HISTORICAL AND COMPARATIVE PERSPECTIVES ON TRADE UNION REGULATION WITH SPECIFIC EMPHASIS ON THE ACCOUNTABILITY OF TRADE UNIONS TO THEIR MEMBERS

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DECLARATION

By submitting this dissertation electronically, I declare that the entirety of the work contained therein is my own, original work, that I am the authorship owner thereof (unless to the extent explicitly otherwise stated) and that I have not previously in its entirety or in part submitted it for obtaining any qualification.

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SUMMARY

How do members hold their own trade unions accountable in South Africa? What legal mechanisms, if any, are available to assist union members in receiving adequate representation and service from their unions? This study approaches these questions through a comparative and historical examination of the regulation of the union-member relationship in the UK, USA and the RSA. The study commences with an examination of what unions do, how they function and what benefits potentially accrue to their members, while the role played by unions in utilising collectivisation to offset the bargaining power of employers is demonstrated. The need for organised labour, by society in general, but South Africa specifically, is brought into sharp relief. This is, however, offset by the examination of 25 constitutions of broadly representative South African trade unions, where the lack of proper regulation of the union-member relationship is brought to the fore. This already means the common law and current judicial approach that is so reliant on the interpretation and implementation of trade union constitutions to address union-member disputes is unsuitable, certainly in those instances where the constitution is either silent or ambiguous, or where the nature of the relationship between the union and its member(s) mimics that of the constantly present imbalance of power and influence between employers and employees.

The comparative examination of union accountability is undertaken against the backdrop of the common historical phases of proscription, acknowledgement/ assimilation, and readjustment of and towards trade unions. The historical and contemporary regulation of the union-member relationship in South Africa is examined in the same way. The study demonstrates that purely statutory regulation of the union-member relationship by means of punitive provisions and inter-union self-regulation measures are not feasible. A series of possible legal mechanisms – that draw from the comparative examination – are suggested, even though they are to be utilised in a collective (rather than individual) way. Even these suggestions, however, are subject to the challenges of cost-effectiveness, accessibility and efficiency of enforcement by (the) average union member(s).

Three proposals are made to foster improved union-member accountability: Firstly, the use of section 103A of the LRA by the Registrar so as to place unions that meet the appropriate criteria under administration, in order to restore accountable functioning and elevate the interests of the member(s) over that of the officials of the

union; secondly, the introduction of a duty of fair representation – to be administered by the CCMA – to hold both union and employer accountable to members, and; thirdly, in conjunction with the first two proposals, the use of a package of further measures (and an associated information campaign), such as bolstering the financial/institutional capacity of the Registrar's office, compelling the inclusion of accountability clauses within union constitutions, and minor amendments to the LRA with regard to balloting, reporting/transparency (and the enforcement thereof). If implemented, the expected outcomes are improved labour relations, increased accountability and professionalisation of trade union administration, a realignment of the employer-union divide and elevating the awareness of union member rights and concomitant obligations on trade unions – all of which are of critical importance in South Africa's post-Marikana society.

OPSOMMING

Hoe hou lede hul eie vakbonde verantwoordbaar in Suid-Afrika? Watter regsmeganismes, indien enige, is beskikbaar om vakbondlede te help om voldoende verteenwoordiging en diens van hul vakbonde te ontvang? Die studie spreek hierdie vrae aan deur middel van 'n vergelykende en historiese ondersoek na die regulering van die verhouding tussen vakbondlede in die VK, die VSA en die RSA. Die studie bestudeer die funksie van vakbonde en watter voordele die vakbond vir hul lede inhou. Daarmee saam word die rol wat vakbonde speel in die benutting/handhawing van kollektiwiteit om die bedingingsvermoë van werkgewers teen te staan, aangedui. Die algemene behoefte aan georganiseerde arbeid, in die besonder in Suid-Afrika, word veral op die voorgrond geplaas. Dit word egter opgeweeg deur die ondersoek van 25 grondwette van verskeie en verteenwoordigende Suid-Afrikaanse vakbonde, waar die gebrek aan behoorlike regulering van die verhouding tussen vakbonde en hul lede na vore kom. Dit beteken reeds dat die gemenereg en die huidige juridiese benadering wat afhanklik is van die interpretasie en implementering van vakbondgrondwette, om geskille tussen vakbondlede aan te spreek, onvoldoende is. Dit kom veral in gevalle voor waar die grondwet geen verwysing daarna het nie of onduidelik is, of waar die aard van die verhouding tussen die vakbond en hul lede juis die voortdurende wanbalans van mag en invloed tussen werkgewers en werknemers namaak.

Die vergelykende ondersoek na vakbond verantwoordbaarheid vind plaas teen die agtergrond van die algemene historiese fases van vervolging, erkenning/assimilasie en heraanpassing van en teenoor vakbonde. Die historiese en kontemporêre regulering van die vakbond-lede verhouding in Suid-Afrika word op dieselfde wyse ondersoek. Die studie illustreer dat suiwer statutêre regulering van die vakbond-lede verhouding deur middel van strafbepalings en selfreguleringsmaatreëls tussen vakbonde, onuitvoerbaar is. 'n Reeks moontlike regsmeganismes word uit die vergelykende ondersoek voorgestel, alhoewel dit op 'n kollektiewe (eerder as individuele) wyse gebruik moet word. Selfs hierdie voorstelle is egter onderhewig aan die uitdagings van koste-effektiwiteit, toeganklikheid en doeltreffendheid van die gemiddelde vakbondlid(lede) se toepassing daarvan.

Drie voorstelle word gemaak om die verantwoordbaarheid van vakbondlede te bevorder: Eerstens, deur die Registrateur se gebruik van artikel 103A van die WAV sodat vakbonde wat aan die toepaslike kriteria voldoen, bestuur kan word – ten einde

verantwoordbare funksionering te herstel en die belange van die lede bo dié van die amptenare van die vakbond te plaas. Tweedens, die instelling van 'n plig tot billike verteenwoordiging – wat deur die KVBA geadministreer moet word – om vakbonde sowel as werkgewers teenoor lede aanspreeklik te hou. Derdens, in samewerking met die eerste twee voorstelle, die gebruik van 'n pakket met verdere maatreëls (en 'n gepaardgaande inligtingsveldtog) insluit, soos die versterking van die finansiële/institusionele kapasiteit van die Registrateur se kantoor, die insluiting van aanspreeklikheidsklousules in vakbondgrondwette af te dwing, en geringe wysigings aan die WAV ten opsigte van stemming, verslaggewing/deursigtigheid (en die toepassing daarvan). Indien hierdie voorstelle geïmplementeer word, is die verwagte uitkomste verbeterde arbeidsverhoudinge, verhoogde aanspreeklikheid en professionalisering van vakbondadministrasie, 'n herbepaling van die werkgewer-vakbondverdeling en 'n verhoogde bewustheid van die vakbondlede se regte en gepaardgaande verpligtinge van vakbonde – wat van kritieke belang is in Suid-Afrika se post-Marikana samelewing.

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I dedicate this dissertation to you.

TABLE OF ABBREVIATIONS

ACAS	Advisory, Conciliation and Arbitration Service
ACLU	American Civil Liberties Union
ADRA	Administrative Dispute Resolution Acts
AFL	American Federation of Labor
AFT	American Federation of Teachers
ALJ	Administrative law judges
AMCU	Association of Mineworkers and Construction Union
ANC	African National Congress
ARU	American Railway Union
AWE	Average Weekly Earnings
BEC	Branch Executive Committee
BER	Bureau for Economic Research
BIFAWU	Banking, Insurance, Finance & Assurance Workers Union
BIS	Business Innovation and Skills
BWU	Building Workers Union
CAA	Civil Aviation Authority
CAC	Central Arbitration Committee
CBAs	Collective bargaining agreements
CCMA	Commission for Conciliation, Mediation and Arbitration
CEC	Central Executive Committee
CEPPWAWU	Chemical, Energy, Paper, Printing, Wood & Allied Workers' Union
CIO	Congress of Industrial Organizations
CNETU	Council for Non-European Trade Unions
CO	Certification Officer
CONSAWU	Confederation of South African Workers' Unions
COSATU	Congress of South African Trade Unions
CPAUIA	Commissioner for Protection against Unlawful Industrial Action
CROTUM	Commissioner for the Rights of Trade Union Members
CSA	Commission Staff Association
CTW	Change-to-Win
CWU	Communication Workers Union
DFR	Duty of fair representation

DOL	Department of Labor
DPRU	Development Policy Research Unit
EA	Employment Act (various)
EAMWUSA	Electronic, Allied & Metal Workers Union of South Africa
EAP	Economically active population
EAT	Employment Appeal Tribunal
EFCA	Employee Free Choice Act
EPA	Environmental Protection Agency
EPA 1975	Employment Protection Act of 1975
ERA	Employment Relations Act (various)
ERDRA	Employment Rights (Dispute Resolution) Act of 1998
ERISA	Employee Retirement and Income Security Act
ERRA	Enterprise and Regulatory Reform Act
ET	Employment Tribunal
F&M	Freeman & Medoff
FAWU	Food and Allied Workers' Union
FEDUSA	Federation of Trade Unions of South Africa
FLRA	Federal Labor Relations Authority
FLRA	Federal Labor Relations Authority
FLSA	Fair Labor Standards Act
FMCS	Federal Mediation and Conciliation Service
IBEW	International Brotherhood of Electrical Workers
ICA 1924	Industrial Conciliation Act 11 of 1924
ICA 1937	Industrial Conciliation Act 36 of 1937
ICA 1956	Industrial Conciliation Act 28 of 1956
ICFTU	International Confederation of Free Trade Unions
ICU	Industrial and Commercial Workers' Union
ILO	International Labour Organization
IMATU	Independent Municipal & Allied Trade Union
IPMS	Institute of Professional Managers and Specialists
IRA 1971	Industrial Relations Act of 1971
ITS	International Trade Secretariats
LDA	Labour Disputes Act of 1932
LFS	Labour Force Survey

LMRA	Labor Management Relations Act of 1947
LMRDA	Labor-Management Reporting and Disclosure Act of 1959
LMSB	Labour Market Statistical Bulletin
LRA 1956	Labour Relations Act 28 of 1956
LRA	Labour Relations Act 55 of 1996
LSSC	Local Shop Stewards Council
MISA	Motor Industry Staff Association
MWU	Mineworkers' Union
NACTU	National Council of Trade Unions
NALEDI	National Labour and Economic Development Institute
NASWU	National Security Workers Union
NC	National Congress
NEC	National Executive Committee
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Education Health & Allied Workers Union
NIRA	National Industrial Recovery Act
NIRC	National Industrial Relations Court
NLB	National Labor Board
NLRA	National Labor Relations Act of 1935
NLRB	National Labor Relations Board
NTM	National Transport Movement
NTUA 1886	National Trade Union Act of 1886
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
NUS	National Union of Seamen
NWLB	National War Labor Board
OATUU	Organisation of African Trade Union Unity
OECD	Organisation for Economic Co-Operation and Development
OHS	October Household Survey
OLMS	Office of Labor-Management Standards
ONS	Office for National Statistics
PAWUSA	Public and Allied Workers Union of South Africa
PEC	Principal Executive Committee
POBC	Provincial Office-Bearers Committee

POPCRU	Police & Prisons Civil Rights Union
PRB	Public Review Board
PSA	Public Servants Association of South Africa
PSCBC	Public Service Co-ordinating Bargaining Council
RC	Regional Congress
RICO	Racketeer Influenced and Corrupt Organizations
RLA	Railway Labor Act of 1926
RMT	National Union of Rail, Maritime and Transport Workers Union
SACCAWU	South African Commercial, Catering & Allied Workers Union
SADTU	South African Democratic Teachers Union
SAFTU	South African Federation of Trade Unions
SAIRR	South African Institute of Race Relations
SAMA	South African Medical Association
SAMWU	South African Municipal Workers Union
SATAWU	South African Transport & Allied Workers Union
SEIU	Service Employees' International Union
StatsSA	Statistics South Africa
TGWU	Transport & General Workers Union
TLA 2014	Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act
TUA	Trade Union Act
TUC	Trades Union Congress
TULRA 1974	Trade Union and Labour Relations Act of 1974
TULRCA	Trade Union and Labour Relations (Consolidation) Act
TURERA	Trade Union Reform and Employment Rights Act
UAW	United Automobile Workers
UK	United Kingdom
ULPs	Unfair labour practices
UMF	Union Modernisation Fund
UMWA	United Mine Workers of America
USA	United States of America
U.S.C.	United States Code
VCA	Voluntary compliance agreements

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CHAPTER 1: AN INTRODUCTION TO THE HISTORICAL AND COMPARATIVE STUDY OF THE REGULATION OF TRADE UNIONS, WITH SPECIFIC EMPHASIS ON THE ACCOUNTABILITY OF TRADE UNIONS TO THEIR MEMBERS

1 1 Introduction

The origins of trade unionism can be traced back to the industrial revolution when abuse of employees was commonplace simply because the concept of worker rights was unknown.[1] Trade unions became the custodian of these rights – a position hard-fought for in the labour market and broader society over the years.[2] As trade unions came to be accepted and assimilated in society, primarily through institutionalisation and promotion of the process of collective bargaining, the important role they continue to fulfil has crystallised. The primary reason for the existence of trade unions continues to be a representation of their often-vulnerable member-employees as a countervailing force against the inherent power of and potential exploitation by employers. At the same time, the fact that many employees still belong to trade unions simply means that those employees depend on their trade unions to process their aspirations in the workplace and to protect their job security. As such, any undue alienation between the interests of the membership of a trade union and the union itself may have stark consequences for (often vulnerable) employees. History also shows that trade unions, both through the exercise of their primary collective bargaining weapon (industrial action) and through other means of influence, have an external, broader societal impact and have assumed a broader public role. This potential impact of a trade union's activities on its membership and broader society already provides a compelling motivation for any study in search of the appropriate regulation of trade unions and their accountability.

As far as its membership is concerned, a trade union's role might range from representation (during collective bargaining,[3] internal workplace processes such as

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[1] Thompson "Introduction: International Labor, 1800-2000" in N Schlager (ed) *St. James Encyclopaedia of Labor History Worldwide: Major Events in Labor History and Their Impact* I i ix.

[2] Macun & Wood *Comprehending Union Growth and Decline: The Case of the South African Independent Unions* (2002) 2; PS Nel (ed) *South African Employment Relations: Theory and Practice* 4 ed (2002) 115; R Hyman *Understanding European Trade Unionism: Between Market, Class and Society* (2001) 74.

[3] Du Toit "Collective Bargaining and Worker Participation" (2000) *ILJ* 1544 1544 states in this regard:

> "Collective bargaining is widely accepted as the primary means of determining terms and conditions of employment. In South Africa its importance has been underlined by the legacy of deep

pre-dismissal procedures, or in external dispute resolution proceedings – conciliation, arbitration or in court), advice (where members approach the union for advice), instruction (where a trade union orders members, for example, to participate in a strike under threat of expulsion) to acting as a custodian (in respect of the subscriptions paid by members and making decisions about the use of those monies). It is easy to see how and why things can go wrong for the individual employee. To name some examples: the union may be downright incompetent in its role as representative or advisor (which, for example, in case of an unprotected strike called by a union may lead to loss of employment); the democratic principle of majoritarianism which informs so much of what trade unions do means that trade unions often have to compromise between the different interests of its members, sometimes to the detriment of those in the minority; and, as unions assume a more public role there may well be general alienation between members' interests and that of the union leadership.

In a world where the primary focus of trade unionism remains the protection of especially the most vulnerable (and consequently, the most dependent) employees it is thus easy to see that the consequences of trade union conduct may be dire for its membership. Put differently, although the idea of unionism may well be reduced to the maxim of "strength in unity" – with a combined workforce exerting pressure through a single mouthpiece[4] – this apparent strength also contains the potential for injustice. With service provision and improvement of workplace conditions constituting the primary goal of trade unions and with a vulnerable constituency, any abuse or potential

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adversarialism between organized labour and employers, the recent struggles of the trade union movement to achieve recognition and continued wariness on the part of unions against real or perceived attempts by employers to undermine their hard-won status. The right to bargain collectively has been written into the Constitution, by means of s 23(5), and is guarded jealously in the workplace."

[4] E Webster & G Adler "Introduction: Consolidating Democracy in a Liberalizing World – Trade Unions and Democratization in South Africa" in Adler & Webster (eds) *Trade Unions and Democratization in South Africa, 1985-1997* 1 2. T Aidt & Z Tzannatos *Unions and Collective Bargaining: Economic Effects in a Global Environment* (2002) 26 state: "Unions facilitate worker-participation and worker-manager cooperation in the workplace. This can have efficiency-enhancing effects that jointly benefit workers and management." See further C Crouch *Trade Unions: The Logic of Collective Action* (1982) 45 who states:

"Combination [of labour] appears as a rational strategy for workers because it offers the chance of reducing, though never overcoming, this inequality. By standing together instead of alone they can threaten that, unless their conditions improve in various ways, they will ensure that no work goes on in the plant; they can develop an organization to look after their interests, which might…rival the organization the employer has to take care of his …".

abuse at the expense of members deserves the full consideration of the law.

This need for regulation – as would be the case in any common law country such as South Africa – was initially determined with reference to the principles of the common law. In the South African context, the initial (common law) solution was to view trade unions as voluntary associations premised on the principle that union members *are* the union and that, by implication, the union cannot harm its members.[5] A necessary consequence of this approach was that, subject to a measure of judicial oversight over a trade union's compliance with its own constitution,[6] trade unions were left largely to their own devices,[7] and, in case of serious breach of a trade union's obligations, members had to explore possible reliance on contract and delict to hold the union liable.[8] This associational and essentially non-interventionist approach of the common law is, at least to some extent, echoed by current legislation – the Labour Relations Act 66 of 1995 ("LRA") defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers …".[9]

However, given the inadequacies of the common law and the presence of other (perceived) policy dictates (such as prevalent trade union corruption or the abuse of industrial action to the undue detriment of trade union members, the economy and broader society), the question as to the appropriate legislative regulation of trade unions increasingly confronted lawmakers across jurisdictions. One aspect of such regulation concerns the extent to which the law regulates (or should regulate) the internal functioning of trade unions to ensure an alignment between the wishes and interests of trade union members and the conduct of the trade union through its representatives – to the advantage not only of trade union members, but also broader society.

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[5] See § 11 5 1 below.

[6] See § 11 4 4 and § 11 4 5 below.

[7] J Piron & PAK le Roux "South Africa" in R Blanpain (ed) *International Encyclopedia for Labour Law and Industrial Relations* XII 46 state: "Common law principles regarding voluntary associations will regulate the relationship between a union… and its members". See further GJ Pienaar "Associations" in JA Faris (ed) *Law of South Africa* 1 3 ed (2014) para 619 where the following is stated:

> "An association is founded on a basis of mutual agreement. This entails that it will come into being if the individuals who propose forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the universitas or unincorporated association. The latter aspect is usually manifested by the approval and adoption of a constitution".

[8] See § 11 4 5 4 2, § 11 5 1 and § 11 5 2 below.

[9] Section 213 of the Labour Relations Act 66 of 1995.

At the same time, while there are countless publications on collective labour law (that is, the institutionalised role of trade unions), most simply accept the trade union as an assimilated entity and only a (relatively-speaking) small minority of these focus on the internal relationship between trade union members and their union. Apart from the easily identifiable potential prejudice inherent in the relationship, strong anecdotal evidence exists that members often are in fact prejudiced through the conduct of trade union office-bearers, officials or representatives, evidence supported by disputes that land up before the courts.[10]

Furthermore, there is a strong link between internal trade union accountability and the appropriateness and responsiveness of the external role trade unions fulfil. For now, the point may be made that a proper and comprehensive analysis of the legal regulation of the relationship between members and their union already should make a contribution at four levels: the appropriate protection of the rights of trade union members (often vulnerable employees) through promotion of certainty about the current legal position; the identification of areas where such regulation is inappropriate and the provision of guidelines for improvement; at a broader level, the development of a trade union movement that, even though assimilated into society, is appropriately responsive to its membership and to broader society; and, ultimately, the study should contribute to bringing about a more stable labour market (through more appropriate regulation of one of its institutional actors).

1 2 The scope of the study

These remarks in mind, the hypothesis informing this study and the main research questions this study seeks to answer are outlined in § 1 3 below. Before this is done, however, it is necessary to address and motivate the five directional choices that underlie this study, most of which also add considerably to the length of the study. Firstly, there is the choice to address the functioning and structure of trade unions in the first part of the study; secondly, the study focuses on the "accountability" of trade unions, a seemingly wide concept made even wider, as will be discussed below, because of the link between the internal and external accountability of trade unions; thirdly, there is the choice to place the discussion in historical context; fourthly, there

[10] See § 3 4 3, and as discussed in more detail within chapters 11 (§ 11 4 5 and § 11 5) and 12 (§ 12 4 3 2 and § 12 4 5 1) below.

is the choice to embark on a comparative study; and, finally, it is important, as point of departure to also make clear what this study is not designed to do.

1 2 1 The functioning, impact and internal organisation of trade unions

This thesis first seeks to examine the functioning, impact and internal organisation of trade unions (with a specific emphasis on South Africa), before considering the regulation of trade unions and their accountability in a historical and comparative context. This choice is informed by a simple reality, namely that any endeavour to regulate a societal institution such as trade unions – as the law invariably does – has to be founded on a proper understanding of the phenomenon one seeks to regulate. This includes an understanding of the reasons why the institution exists, its prevalence, the nature of the institution (the different types and categories that may exist and its internal organisation), the activities of that institution (what it does and seeks to do) and also what the influence, impact or potential impact of that institution is or may be, both positive and negative. As such, an examination of all these aspects of trade unions as a societal institution is called for as the point of departure in any consideration of the appropriate regulation of trade unions and their accountability.

1 2 2 A note on the term “accountability”

As the title of this dissertation makes clear, the primary focus of this study is to investigate the regulation of trade union accountability *to its members*. In this regard, it is important to understand that the term “accountability” is used in this thesis not as a legal concept, but as no more than a conceptual aid to a proper understanding of the relationship between trade unions and their members. Admittedly, use of the term in the title of this dissertation already suggests that there is virtue in accountability (and, as will be discussed below, it certainly is part of the hypothesis of this study). However, the term “accountability” should, in the first instance be seen as a term of convenience to explore how the wishes of the trade union membership may be aligned to that of the union, how such alignment is to the benefit of trade union members and broader society and what the consequences would or could be should there be a breakdown in the relationship between a trade union and its members.

Informally, the term “accountability” may be equated with any number of words, including “answerability”, “blameworthiness”, “account-giving” and even “liability”. In

this regard, two remarks should be made. Firstly, as will be discussed in this study, trade union accountability is not the same as trade union democracy. While there is a large measure of overlap, trade union accountability is here used in the sense of a specific subset of the notion of democracy. For purposes of this study, the notion of accountability essentially includes the need to properly account for activities, the need to accept responsibility for obligations created by the relationship between a trade union and its members, the need to disclose necessary information (that is, an obligation to communicate effectively) to that membership and, importantly, the availability of sanctions should these obligations not be complied with and result in hardship for trade union members (last-mentioned could be described as "liability", which then forms part of accountability). In short, accountability is narrower than "democracy", but broader than "liability".

Secondly, it is necessary to make a distinction between what conveniently may be called "internal accountability" and "external accountability". Internal accountability refers to the relationship between, on the one hand, a trade union and its office-bearers, officials and representatives and, on the other hand, the membership of that trade union. External accountability refers to the relationship between the trade union and outside parties – employers, the state, and the public. The focus of this study is on the former – with greater emphasis on the relationship between a trade union and the ordinary member. At the same time, it is important to understand that there is a strong relationship between internal and external accountability of trade unions. While it is typically external accountability that is the driving force behind the regulation of the primary role of trade unions (in other words, collective bargaining), external accountability largely is dependent on internal accountability. Indeed, it may already be said that the South African experience over the last couple of years has sought to re-align the functionality of the collective bargaining process (based on considerations of external accountability) through a strong focus on the internal functioning and accountability of trade unions.[11] Furthermore, to the extent that legislation imposes direct external accountability on trade unions – often through registration and reporting requirements under the oversight of an external administrative institution[12] – it is done for the purpose of, or at least has the effect of, promoting internal accountability. While

[11] See § 12 4 2 3 1 below.

[12] Such as the office of the Registrar of Labour Relations, discussed in chapter 12 (see § 12 4 5 below).

the focus of this study remains the internal accountability of trade unions to their members it seeks to show, where appropriate, the link with external accountability.

1 2 3 A note on registered unions

A further important distinction to be made during the course of this study, is its focus on *registered* trade unions, as opposed to *un*-registered unions or labour associations. In the context of South Africa, the distinction is important in that only registered trade unions enjoy recognition of their corporate status and related protections in terms of the Labour Relations Act.[13] As such, the Act is predominantly concerned with registered unions, who also fulfil the most important representative functions in regard to workers (as members) in South Africa. Nonetheless, to the extent that the discussion needs to address unregistered unions, particularly in the context of the common law, the study will duly consider them.

1 2 4 Placing regulation of trade union accountability in historical context

The choice to place the discussion in historical context (a discussion that takes place across the three jurisdictions chosen for this study discussed in § 1 2 5 below) is borne from a simple reality, namely that regulation of the internal accountability of trade unions is largely based on how trade unions are viewed in a specific society and that that view is largely shaped by historical developments (either as an extension of earlier developments or in the form of a counter-reaction). This insight also means that while the current state of regulation of trade unions is a result of the past (and should be understood in that context), those forces also serve to delimit future possibilities and future adjustment to the law. This should be borne in mind in considering proposals that may result from this study. In short, it is necessary to account for historical forces in the search for the appropriate regulation of trade unions and their accountability to their members.

In this regard, it should also be mentioned that the historical development of the regulation of trade unions and their accountability broadly took place in three distinct phases. The first phase was marked by an initial opposition to trade unions (their prohibition and proscription) and then their legal assimilation (that is, the phase where

[13] Section 97 of the LRA.

trade unions are recognised, and their role institutionalised). The second phase, one of readjustment, built on the legal assimilation of trade unions and included an increased focus on the internal functioning of trade unions. The third phase is simply the current state of regulation and the ongoing refinements we see in the regulation of trade unions and their accountability. While this distinction is not hard and fast and did not happen uniformly across different jurisdictions, the discussion below will largely follow this framework in accounting for the historical development of trade union regulation.

1 2 5 The comparative nature of the study

In all jurisdictions, perhaps more so in South Africa because of our political history, trade unions have been necessary to serve as an institutional barrier between the rights of the employee and potential exploitation by the employer.[14] Trade unions, however, are hardly a South African invention. It is a product of the industrial revolution and, mindful of continental developments at the time, an export of Britain.[15] From Britain, trade unionism was propagated across the globe to many countries, including the USA and South Africa.

This already means that there is, to a certain extent, an umbilical link between trade unionism in Britain, the USA and South Africa and any comparative study of these three countries will be insightful (in the sense of how the same phenomenon developed in different countries from the same origin). On top of this, it may safely be stated that any comparative study already has value: different societies face similar challenges and can learn a lot from each other how best to arrange, organise and regulate the institutional framework of their different societies. This is also true of the organisation of the labour market and the actors – including trade unions – that make up that labour market. Lastly, the choice of Britain, the USA and South Africa as comparators may be justified because all three countries represent so-called “common law” jurisdictions and tell essentially the same story of finding an appropriate mix of (an inadequate) common law and legislation to effectively regulate a societal institution such as trade unions. And even though the discussion will show that the three countries went down different routes (with different degrees of success) and, over the

[14] See § 2 7 and § 2 8 below.
[15] See § 2 2, § 4 2 1 and § 10 2 1 below.

years, different forces played a role in shaping their approach to trade union regulation, there is a lot to be learnt from the experience of other countries that may be of use. Throughout this thesis, there are many examples of this (potential) cross-fertilisation – the fact that the first endeavour to regulate trade unions through legislation in Britain constituted a very unsuccessful and large-scale adoption of legislation from the USA (unsuccessful due to differing circumstances),[16] the role of the Certification Officer in Britain as a possible example for South Africa,[17] the lesson from the USA that the stronger the system of majoritarianism as part of the broader labour relations system, the stronger the argument in favour of increased accountability (through imposition of a duty of fair representation on the representative trade union)[18] and, finally, the lesson that the court system, in general, is poorly placed to provide effective relief to trade union members.[19]

At the same time, countries are different, and it is not possible to always uniformly consider them. The approach followed in this thesis is to deal with each jurisdiction in three chapters along the lines of the three phases of regulation described in § 1 2 4 above – the phase from prohibition to assimilation, the period of readjustment and then a consideration of the current legislative framework. In respect of every country both the common law and legislation are discussed. And, as far as the current state of legislative regulation in the three countries is concerned, this is done in each case under three headings – the regulation of collective bargaining, the regulation of the representative role of trade unions and the direct regulation of the internal functioning of trade unions. Note that the chapters on Britain and the USA also include a discussion of their dispute resolution institutions, which do assist in regulating trade union accountability through application of the common law and legislation. This was not deemed necessary in the South African context where the system is well-known. Further discrepancies between the comparative chapters are due to the fact that some of the countries show certain idiosyncrasies (for example, the strong regulation of trade union activity in the context of strikes in Britain and the aforementioned duty of fair representation in the USA).

[16] See § 5 2 4 below.
[17] See § 6 3 2 7 below.
[18] See § 8 4 2 and § 9 4 below.
[19] See § 11 5 and § 12 4 3 2 below.

1 2 6 Limitations on the scope of the study

It is important to point out that there are certain things this study does not do, nor pretend to be. In this regard, it has to be mentioned up front that this study goes directly to a consideration of the domestic regulation of trade unions across the three jurisdictions chosen. As such, the study considers the role of the common law and domestic legislation against the backdrop of historical developments. The primary focus of the study is not to consider international law, nor constitutional law. At the same time – and this is certainly true of South Africa – developments at these levels have shaped domestic regulation. Here one thinks of influence of the International Labour Organisation ("ILO"), their Conventions and their Fact-Finding Committee on the LRA,[20] an Act which was also drafted against the backdrop of the adoption of the Constitution.[21]

This in mind, the key ILO Convention of relevance to this study – discussed at § 12 2 2 below – is ILO Convention No. 87 of 1948 on "Freedom of Association and Protection of the Right to Organise", ratified by South Africa in 1996. While subsection 3(c) of the LRA recognises to need to comply with the "public international law obligations" of South Africa, subsection 39(1)(b) of the Constitution also requires a court or tribunal, when interpreting the Constitution's Bill of Rights, to consider international law.[22] To the extent that these principles require further consideration, or have seen engagement by the South African courts, they will be highlighted and discussed below.

Similarly, while due acknowledgement is also given to the Constitution and the fundamental role it plays in the entire legal system, this study is not focused on pure constitutional considerations, with the obvious exception where these have been deliberated upon by the South African courts in union-member matters. From a constitutional perspective, there might well be overlap between the broader societal role fulfilled by trade unions who also find themselves within the structure of contemporary labour relations and the potential constitutional duties imposed on trade

[20] See § 12 2 below.

[21] See § 12 2 and § 12 3 below.

[22] See for instance the recent Constitutional Court judgment in *National Union of Metalworkers of South Africa v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) and Others* 2020 6 BCLR 725 (CC) 739E-F, where was said that "the [ILO] conventions and recommendaitons are an important source of international law to be considered in the interpretation of section 23 of the Constitution".

unions by, for example, section 23 of the Constitution.[23] However, what must not be lost sight of is that this study is an examination of the accountability of trade unions to their members, but from the latter's perspective. Any implied constitutional right to fair and competent treatment or representation by a member's trade union, is meaningless to the average union member in the absence of a readily-available (and accessible) subsidiary remedy.

Accordingly, these international and constitutional influences will be discussed where appropriate, but it bears repeating that they do not constitute the focus of this study.

1 3 Hypothesis and specific aims

All of the earlier remarks in mind, it is possible to formulate the central hypothesis informing this study as follows:

Trade unions have been assimilated into the labour market and the importance of their role is found in their representation of often vulnerable workers and in the external effect of their activities. The traditional legal approach to the regulation of trade unions is based on the view that they are voluntary associations and should regulate their own affairs (typically through the trade union constitution). However, given the (potentially negative) internal and external impact of trade union activity, self-regulation (as is generally the case with voluntary associations) is not sufficient to ensure the alignment of trade union activity with the best interests of its membership and with the legitimate interests of external parties. As such, intervention is necessary to ensure the appropriate accountability of trade unions – both internal and external. In common law jurisdictions (such as South Africa, Britain and the USA) intervention to ensure internal accountability takes place through a combination of the common law and legislation based on past experience and societal realities. However, there has been little systematic consideration of the driving forces behind, the limits of and, consequently, the appropriateness of such regulation. Such an evaluation calls for a

[23] Reference can for instance be made to the decisions firstly of *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* 2015 2 BCLR 182 (CC) 190G, where Cameron J states that the "interpretation of the LRA, which gives statutory embodiment to the right to fair labour practices, raises a constitutional issue" and, more recently, in *National Union of Metalworkers of South Africa v Lufil Packaging* 2020 6 BCLR 725 (CC) 734B, where the jurisdiction of the Court was "engaged", since the case concerned "the rights to freedom of association at the workplace, fair labour practices as well as the interpretation of constitutionally mandated legislation".

proper understanding of what trade unions do and how they typically are structured, of the fact that their regulation is a direct function of historical developments and of the current state of regulation. Only then can such regulation be placed on a proper foundation.

This in mind, the overall aim of this study is to provide a historical and comparative perspective on the origins, nature and continued role of trade unions in the workplace and in broader society, their relationship with their members and how best to regulate the relationship between a trade union and its members. Specific research questions that the study will seek to address are the following:

1 3 1 What is it that trade unions actually do in the context of contemporary labour relations and what is their impact?

1 3 2 How do trade unions typically function – how is their internal organisation structured, with specific emphasis on potential trade union accountability as a subset of trade union democracy (focusing, as it does, also on the practical consequences and failures of trade unionism in relation to the membership of trade unions)?

1 3 3 What role does the trade union constitution play in the regulation of the internal affairs of a trade union and what is the state of affairs relating to trade union constitutions in South Africa?

1 3 4 How has the regulation of trade unions and their accountability developed over time in the three jurisdictions chosen for this study?

1 3 5 What were the driving forces behind this development and what were the reasons for (increased) intervention in trade union affairs?

1 3 6 How does this development influence (and perhaps limit) further development of trade union regulation?

1 3 7 What is the current state of regulation of trade unions and their accountability across the three jurisdictions? In particular, what mix of common law and legislation is used to effect such regulation?

1 3 8 As far as the common law is concerned, what is the continued viability of using common law principles enforced through the courts to ensure internal trade union accountability?

1 3 9 To the extent that legislation is used, what mix is used between the regulation of collective bargaining, regulation of the representative role of trade unions and the direct regulation of internal trade union functioning to ensure trade union

accountability?

1 3 10 And, as far as the direct legislative regulation of trade unions are concerned, what processes and institutions are used, and how, to ensure accountability?

1 3 11 Is the current state of regulation of trade union accountability in South Africa appropriate and how can it be improved, if at all (also with reference to the comparative experience)?

1 4 Outline of the study

Against the background of the earlier explanation of the motivation for and the scope of this study, it is possible to provide a brief outline of the chapters to follow.

Chapters 2 and 3 are designed to set the scene for the historical and comparative part of this study through an examination of the prevalence, function, impact and internal organisation of trade unions. As mentioned, these chapters are included and based on the premise that proper understanding of the different aspects of trade unions inform (and should inform) appropriate regulation. Particular topics that will be addressed include (in chapter 2) a brief description of the origin of trade unions, a description of the commonly accepted meaning of “trade union”, the prevalence of trade unions (and of their main weapon in the collective bargaining process – striking), the different categories of trade unions encountered in the labour market, the basic structure of trade unions, the goals and objectives of trade unions, the benefits of membership, how trade unions exercise their influence and the impact of trade unions on employees (and their members) as well as employers. This is followed – in chapter 3 – by an analysis of the internal functioning of trade unions. The chapter starts off by considering the concept of “trade union democracy” (and distinguishing it from “accountability”), examines the functions of trade union office-bearers, officials and representatives and introduces the trade union constitution as the fundamental organising document in the regulation of the internal functioning of trade unions. Brief consideration will already be given to legislative and judicial perspectives on the trade union constitution in chapter 3, but it is a recurring topic throughout this thesis. In addition, the chapter includes a survey and analysis of existing South African trade union constitutions and explores the similarities and divergence between these constitutions.

From chapter 4 onwards, the attention shifts to the regulation of trade unions and their accountability. As mentioned, this study investigates Britain, the USA and South

Africa and also seeks to place the investigation in historical context. Allowing for both historical developments and the comparative nature of the study, each country is dealt with in three chapters – Britain in chapters 4 to 6, the USA in chapters 7 to 9 and South Africa in chapters 10 to 12. In the case of each country, the first chapter is devoted to an examination of the first phase of trade union regulation – the period from proscription/prohibition to the legal assimilation of trade unions. This is followed by a second chapter analysing the period from assimilation to the readjustment towards internal trade union regulation. It should be mentioned that in all three cases, the discussion of the common law regulation of trade union accountability is contained in the second chapter (the readjustment chapter). This is largely determined by the fact that Britain is considered first and in Britain common law developments precipitated legislative readjustment towards internal trade union regulation. For the sake of uniformity, the discussion of the common law in the USA and South Africa is also included in the chapter dealing with legislative readjustment to trade union regulation. Finally, the third chapter relating to each jurisdiction seeks to describe the current legislative regime, with legislation the most important mechanism to regulate trade unions (in contrast to the common law). This is done with specific reference to the three ways in which legislation seeks to regulate internal trade union accountability – indirectly through the promotion of collective bargaining, through regulation of the representative role of trade unions and through direct regulation of the internal affairs and functioning of trade unions. In all of these chapters – and in line with the hypothesis of this study – there is a deliberate endeavour to describe the historical forces influencing the development of trade union regulation over the years up to and including the current state of affairs.

Chapter 13 will draw conclusions from the thesis as a whole and specifically deal with the hypothesis, broad aims and research questions mentioned above. The chapter will also attempt a comprehensive evaluation of these conclusions and how these impact on the regulation of internal trade union accountability. Where appropriate, recommendations will be made for the adjustment of the regulation of internal trade union accountability in South Africa, mindful of both historical constraints and comparative insights.

CHAPTER 2: WHAT UNIONS DO

> "[W]ithout the presence of a free union movement, no society can long remain free. History repeatedly offers graphic proof of this time-tested truth. Wherever the right to unionise is contemptuously violated, the regime is neither civil, nor humane, nor free."[24]

> "[It] deliberately avoids the 'victims-villains' dichotomy, where observers are driven by their advocacy instincts to view trade unions as victims, on the one hand, or villains, on the other. Those who follow either of these positions often find themselves inadvertently playing the role of praise singer of the labour movement and turning a blind eye to its flaws and failings, or union basher and doing everything in their power to demonise unions, while ignoring some of the positive things that unions do."[25]

2 1 Introduction

This chapter examines the origins, nature, prevalence and role of trade unions (with a specific focus on the South African context) in modern labour relations (and broader society). The purpose of this is twofold: Firstly, within the broad context of the dissertation this chapter (along with chapter 3) will provide a baseline conceptual insight into the current role and structure of trade unions in the workplace before the focus shifts (from chapter 4 onwards) to the more detailed, historical and comparative evaluation of the regulation of trade union accountability to trade union members. Secondly, in considering the nature and importance of the role fulfilled by trade unions in the workplace and broader society this chapter will, in turn, highlight the potential impact that organised labour can have (and does have) on the everyday working life of employees and society. By implication, then, the chapter will demonstrate why trade union members are often so dependent upon the particular services offered by unions and why the topic of trade union accountability to their members (the focus of this dissertation) is so important. Put differently, a trade union as an entity is defined by the nature of its constituent parts, since it is this that characterises a union as an organisation that seeks to promote and further the interests of its key stakeholders,

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[24] DL Gregory "The Right to Unionize as a Fundamental Human and Civil Right" (1988) 9 *Miss Coll L Rev* 135–154 137.

[25] S Buhlungu & M Tshoaedi "A Contested Legacy: Organisational & Political Challenges Facing COSATU*"* in S Buhlungu & M Tshoaedi (eds) *COSATU's Contested Legacy* (2012) 1 28, where the authors explain the approach to be taken in its analysis of the 2008 "Taking Democracy Seriously" survey.

namely the union members. Seen from this angle, it becomes apparent that in order to properly address the question of trade union accountability to these members, it is essential to first investigate the nature of the relationship between the members and their trade union. However, to be able to do that, a closer examination of what a union is, and how it functions, is required.

This chapter will commence with a brief, global overview of the origins of trade unionism, before exploring the definition of a "trade union". This will be followed by an examination of trade union/labour statistics, which will consider both the South African context and provide international perspectives. Thereafter, trade union categorisation as well as their structure and objectives will be considered, before unpacking the benefits of union membership. Implicit in this discussion is the underlying reasons why workers join trade unions in the first place, what members' possible expectations are, and the internal procedures underlying union structures. The chapter will conclude with a consideration of *how* unions exert their influence and the economic impact of unionism on employers (internationally and in South Africa) and workers in South Africa. At the outset, it should be noted that, given the nature of this study, various comparative sources will be referred to, where relevant, in outlining the fundamental characteristics of trade unions. The underlying focus remains that of the trade union in the context of South Africa – and as such, South African sources will primarily be referred to in properly situating the discussion.[26]

2 2 Early trade unionism

It was in Europe that the interests of employers and employees, particularly during the industrial revolution, began diverging in an ever-increasing fashion. This polarity resulted in a greater need for worker protection against the dominance of employers and the transformation of the artisan coalitions of the past into the trade unions of the modern-day industry.[27] The development and history of the labour movement corresponded with the growth of capitalism, specifically in the form of the factory industry – the latter being central to the new industrial concept of mass production-line

[26] In this regard, the following works have been extensively referred to in the discussion to follow: R Venter (ed) *Labour Relations in South Africa* (2003); S Bendix *Industrial Relations In South Africa* 5 ed (2010) and M Finnemore *Introduction to Labour Relations in South Africa* 11 ed (2013).

[27] W Thompson "Introduction: International Labor, 1800-2000" in N Schlager (ed) *St. James Encyclopedia of Labor History Worldwide: Major Events in Labor History and their Impact* (2004) ix.

manufacturing.[28] These methods of production not only heralded the beginning of the industrial age (mid-eighteenth century), but also the dawn of a new collective identity for the countless workers required to drive the burgeoning public and private enterprises that were thrusting Europe, and the rest of the world, into a new age of technology, exploration, and exploitation.[29]

Thompson[30] suggests that the tenuous relationship between master and servant – employer and employee – was one of the major reasons for the proliferation of worker organisations aimed at defending their members' interests.[31] The industrial revolution brought about a sudden influx of migrating workers into newly developing industry and factory towns, which resulted in "wages and conditions of industrial work [being] vulnerable".[32] In short, a surplus of potential workers failed to translate into a surplus of benefits for the employee.[33] Elias et al argue that trade unionism was conceived in

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[28] See Bendix *Industrial Relations* 8, who explains the impact of the industrial revolution upon modern society as follows:

> "[T]he removal of economic activity from the individual's personal and social life; the depersonalisation of work and, consequently, of the employment relationship; the polarisation between the mass of employed on the one hand and the owners or managers on the other, resulting in the rise of a working-class consciousness and providing the necessary impetus for the growth of trade unionism; … the central role now played by economic activity, causing it to become the main aspect of a man's life and one which impacts greatly on his personal, social and political life; the predominance of capitalism, being the ownership by one person of the 'tools' of production; [and finally,] the consequential concept of 'selling labour', leading to the disempowerment of the producers of such labour".

[29] Thompson "Introduction" in *Labor History* ix. See G Friedman *State-Making and Labor Movements: France and the United States, 1876-1914* (1999) 23. See further R Benedictus & B Bercusson *Labour Law: Cases and Materials* (1987) 405 who state:

> "The Industrial Revolution, by bringing together in one workplace unprecedentedly large numbers of workers, paradoxically both increased the degree of exploitation and also produced the conditions in which workers could most effectively challenge the employers' superiority."

[30] Thompson "Introduction" in *Labor History* ix.

[31] See further C Crouch *Trade Unions: The Logic of Collective Action* (1982) 46. Selig Perlman's [*A Theory of the Labor Movement* (1928)] argument regarding the establishment of trade unions, as quoted in PS Nel (ed) *South African Employment Relations: Theory and Practice* 4 ed (2002) 115, is that rather than the inspiration for union development originating from "intellectual outsiders", the true source was very much internal, commencing with employees who were increasingly becoming aware of job scarcity, and the associated "distress, dissatisfaction, needs, interests and aspirations" of such workers.

[32] B Napier, P Elias & P Wallington *Labour Law: Cases and Materials* (1980) 1.

[33] Thompson "Introduction" in *Labor History* ix states that workers were also "subject at unpredictable intervals to a total loss of income, whenever economic depression or an overstocked labor market produced long-term unemployment".

"an economically and politically hostile atmosphere",[34] where "few understood and fewer sympathised with the implications of a combination of labour",[35] and in addition, that organised labour enjoyed virtually no political voice with which to effect any changes to working conditions.[36] In view of this, it was inevitable that organisations aimed at collectively expressing the concerns of labour would materialise. As a result, capitalist market role players became increasingly aware of the potential threat posed by the concept of combined labour and their associations. Furthermore, the social, economic, and political changes enveloping Europe (circa 1790) contributed to growing anxiety among the new owners in the industrial revolution and the established wealthy classes as well as the various governments.[37] In this regard, Thompson explains that organised labour was feared because of their immediate objectives as well as the mere possibility that they could be "infected by the democratic virus of the French Revolution, which, although defeated, continued to inspire many at the bottom of the social pyramid".[38] As such, the emergence of groups of permanent workers' organisations, according to Elias et al, "did not merely involve a threat to established economic interests [of the propertied classes]; in addition it created a fear of revolutionary political upheaval",[39] a factor taken seriously by the governments of the day.[40]

The advent of the Industrial Revolution (1750-1850), which saw an increased demand for additional resources and cheaper labour,[41] coincided with advances in

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[34] Elias et al *Cases & Materials* 1.

[35] 1.

[36] 1.

[37] See for instance R Bendix "The Lower Classes and the 'Democratic Revolution'" (1961) 1 *Ind Rel J Econ Soc* 91 106-113 for a succinct discussion of the interplay between the newly-industrialised State, worker associations and working conditions, and the awakening of political democratisation and enfranchisement within the lower social classes of England.

[38] Thompson "Introduction" in *Labor History* ix. See further S Honeyball & J Bowers *Textbook on Labour Law* 8 ed (2004) 1.

[39] Elias et al *Cases & Materials* 2.

[40] See further P Elias & K Ewing *Trade Union Democracy, Members' Rights and the Law* (1987) 11; Friedman *State-Making and Labor Movements: France and the United States, 1876-1914* 25.

[41] A gradual transformation of the system of social ranking, as epitomised during the period preceding the Industrial age, arose at this point. The huge wealth amassed by the new merchant class of factory owners and manufacturers meant that social status was no longer determined solely by virtue of family heritage and birth right, but in addition, by business acumen. This development marked the beginning of the decline of the rigid class structure that had so ruthlessly protected the privileges of the aristocratic few. See further R Hyman *Understanding European Trade Unionism: Between Market, Class and Society* (2001) 74-75.

navigation, shipbuilding and the resultant systematised utilisation of the world's oceans as avenues of mass industrial transport and trade. The shipping lanes of the world were, therefore, opened to the raw materials and slave plantations of the new European Colonies, at an industrialised scale. This, coupled with the dramatic increase in the acquisition of foreign territories through the process of colonisation, introduced the potential wealth of the New World to that of the Old. More importantly, this movement of trade and persons brought about the spread of organised labour and associated trade union conceptions that had begun its slow and painful birth in the industrial cities and factories of Europe.[42]

But, as will be evidenced from the chapters to follow, organised labour and their associations were not welcomed with open arms – far from it – and be it through legislation or court-driven, the steps from the origins of trade unions to their assimilation (and regulation), were (mostly) hard-fought and costly. The eminent German-born, British labour law academic Kahn-Freund, in writing of the period that signified the eventual acceptance of unions into British "mainstream society", said:

> "Nothing can be more obvious to the historian than the sequence of suppression, abstention, recognition, and attempted control in the attitude of the law towards the autonomous organisations of the working class. We can observe that sequence in all industrial countries. Abroad, in France, in Germany, in the United States, the transitions from one stage to another are more clearly marked than in this [the UK] country. Legislative enactments are the milestones on the road which draw our attention to the end of one stretch of our journey and the beginning of a new one. In this country, where enacted law has been less important than elsewhere in the relationship between the State and the trade unions, the more indistinct and inarticulate fluctuations of judge-made law have sometimes performed a similar function. The dramatic struggles between the legislature and the Courts about the external activities of the trade unions are well known."[43]

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[42] M van der Linden *Transnational Labour History: Explorations* (2003) 13. See further Friedman *State-Making and Labor Movements: France and the United States, 1876-1914* 23. S Parfitt "A Nexus Between Labour Movement and Labour Movement: The Knights of Labor and the Financial Side of Global Labour History" (2016) 58 *Lab Hist* 288 provides an interesting analysis of the background to the formation of the American "Knights of Labor", and their links to the British "Knights", along with a historical discussion of the interrelatedness of the early labour union movements across the various "new" world countries. Similarly, RV Clements "Trade Unions and Emigration, 1840-80" (1955) 9 *Pop Stud* 167 provides a useful overview of the movement of members between industrial unions on either side of the Atlantic during the mid-to-late nineteenth century, and says, by example, on this point:

> "As the primitive land hunger died amongst the urbanised masses, the expansive industrial economy of the United States became the Mecca of many unemployed trade unionists."

[43] O Kahn-Freund "The Illegality of a Trade Union" (1944) 7 *MLR* 192 204.

The origin of trade unions – and unionism/organised labour in general – has been the topic of a multitude of books and articles over the years. It is noteworthy how many of these sources are also comparative in nature and serve to trace the development and spread of union concepts through a variety of interrelated jurisdictions. In this regard, South Africa's trade union history and origins, explored in detail in chapter 10 below, is no exception.[44] For present purposes, however, it should be noted that the trade union movement has developed to the point where it has been assimilated in many jurisdictions – also the three jurisdictions chosen for this study, namely the United Kingdom ("UK"), United States of America ("USA") and South Africa. However, as the discussion in subsequent chapters will show, each jurisdiction – in its search for the optimal institutionalisation of trade unions – has seen developments unique to their own circumstances and internal influences.

2 3 Trade union definition

Focusing on the legal (or other) definitions of trade unions, in all their various guises, is a useful point of departure in unpacking the trade union concept.[45] Nevertheless, defining a "trade union" must be seen in light of the fact that there are many different classifications of labour associations, given their diverse functioning across different industrial fields.[46] However, certain key definitions do provide some assistance. Amongst these, labour associations have been described as "[a]ny organization whose membership consists of employees, which seeks to organize and represent their interests both in the workplace and society, and, in particular, seeks to regulate their employment relationship through the direct process of collective bargaining with

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[44] In this regard, Hepple (in B Hepple "Is South African Labour Law Fit for the Global Economy?" (2012) *Acta Jur* 10) states:

> "Historically, the repression of workers' movements and restrictions on freedom of association, either directly or in more subtle guises, accompanied the early stages of industrialisation in all European countries, and it was a characteristic of colonial labour regimes and South African apartheid. Those regimes relied on penal laws to enforce one-sided master and servant regimes, and tolerated forms of slavery, forced and bonded labour, and child labour. They suppressed or marginalised trade unions and workers' movements".

[45] At the outset, as explained in chapter 1 (see § 1 2 3 above), this study is focusing purely on *registered* trade unions, that are in compliance with the requirements contained in ss 95-97 of the Labour Relations Act 66 of 1995 ("LRA").

[46] Nel *Theory and Practice* 112, for instance, makes the point of the divergent views that exist between management and the unions in defining their possible roles within the applicable labour relations system.

management".[47] Somewhat simpler is to state that a union is "a voluntary organisation of workers",[48] or that it is "first and foremost, an agency and a medium of power, seeking to redress the imbalance of power in the workplace".[49] In stating that labour associations are "social phenomena and entities"[50] and therefore seldom confined to one particular organisation, Nel cites the International Confederation of Free Trade Unions ("ICFTU"), who maintain that a "[t]rade union is a continuing permanent organisation created by the workers to protect themselves at their workplace, to improve the conditions of their work through collective bargaining, to seek to better the conditions of their lives, and to provide a means of expression for the workers' views on matters of society".[51] Van Jaarsveld continues with the theme of unions focusing on collective bargaining about employment conditions, before adding "the provision of benefits, legal defence and the promotion of their members' interests by bringing pressure to bear on governments and parliaments and, in certain cases, by political action."[52] Lynk, in his discussion of the impact Denning LJ had on the interaction between the British courts and trade unions,[53] provides three characteristics of Canadian trade unions, two of which are equally apposite: Firstly, that "unions are primarily economic associations designed to concentrate power in order to win better working conditions and living standards for employees – 'fighting organizations,' in Kahn-Freund's oft-cited description";[54] and secondly, that "they are essentially private

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[47] Venter *Labour Relations in South Africa* 67, quoting Salamon [Industrial Relations Theory and Practice 3 ed (1998) 85].

[48] Nel *Theory and Practice* 111.

[49] G Wood & JK Coetzee *Trade Union Recognition: Cornerstone of the New South African Employment Relations* (1998) 7, quoting Hyman (as quoted in Salamon [Industrial Relations Theory and Practice (1987) 75]).

[50] Nel *Theory and Practice* 111.

[51] 111.

[52] SR Van Jaarsveld et al "Labour Law*"* in JA Faris (ed) *Law of South Africa* 2 ed (2014) paras 1 and 300.

[53] M Lynk "Denning's Revenge: Judicial Formalism and the Application of Procedural Fairness to Internal Union Hearings" (1997) 23 *QU LJ* 115.

[54] 138 – quoting O Kahn-Freund "Trade Unions, the Law and Society" (1970) 33 *MLR* 241 263. Lynk (1997) *QU LJ* 138-139 quotes further from M Dubofsky "Legal Theory and Workers' Rights" (1981) 4 *Ind Rel LJ* 496 500, who states:

> "[U]nions have to be understood as peculiarly contradictory institutions. They are ... simultaneously town meetings and military formations. In one guise, unions are marked by rank and file participation where policy decisions are reached only after open democratic debate. In other guise, they are fighting machines struggling for survival or victory through discipline, absolute loyalty to command and unbroken solidarity. To stress workers' individual rights and to romanticize the heroic rank and

organizations, albeit with a significant public role".[55]

With regard to the statutory position in South Africa, LRA defines a trade union as meaning "an association of employees whose principal purpose is to regulate relations between employees and employers …".[56] The LRA's 1956 predecessor,[57] in turn, stated that "any number of workers in a particular enterprise, industry, trade or profession who are united for the purpose, either alone or with other objectives, of organising relations between them or some of them and their employers or some of their employers in that enterprise, industry, trade or profession", would qualify as a trade union.[58]

When considering these definitions, it becomes clear that one common theme or truism permeates all these definitions: unions exist because of their members. It would not be possible to speak of labour associations was it not for the existence of workers as members. But before addressing this point in more detail, what must first be considered is how prevalent unions are, in terms of the South African workforce as a whole, and how unions are positioned within the contemporary labour relations system in terms of their potential classification and structure. It is to these issues that the focus will now shift.

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file compared to autocratic union leaders is to threaten the survival of trade unionism".

[55] Lynk (1997) *QU LJ* 140. Expanding further on this point, and the importance of protecting trade union independence, Lynk at 141 states that "union autonomy stands as a counterweight to the economic and political ascendancy of corporations and private power, thus encouraging an ethos of social equity" – and (in quoting Hartley) – "it is precisely because unions are among the important 'competing units of social and economic aggregation' that their independence from state control is so vital'" [RC Hartley "The Framework of Democracy in Union Government" (1982) 32 *Cath U L Rev* 13 96-97].

[56] Section 213 of the LRA. J Grogan *Workplace Law* 12 ed (2017) 346 after similarly citing s 213 LRA in defining the trade union, states:

> "The primary role of trade unions is to engage in collective bargaining with a members' employers, and to represent their members in grievance and disciplinary matters. Trade unions also appoint members or officials to bodies which ensure employers' compliance with the statutory obligations."

[57] Labour Relations Act 28 of 1956, as amended ("1956 LRA").

[58] Section 1 of the 1956 LRA, as discussed in more detail below. Regarding the earliest statutory definition at national level, the Industrial Conciliation Act 11 of 1924, by means of s 24, defined a trade union as follows:

> "[A]ny number of persons associated together either temporarily or permanently for the purpose of regulating relations between themselves and their employers or for protecting or furthering the interests of employees in any particular undertaking, industry, trade or occupation in relation to their employers."

2 4 Trade union and labour statistics

2 4 1 Trade union surveys

In order to properly examine the role that unions play in the South African labour market, and to determine the extent to which (if at all) workers are reliant upon the services and protection offered by unions, certain specific areas of the union relationship and the individual characteristics of the unionised workforce, within the broader spectrum of the labour market, would need to be examined. Unfortunately, and somewhat understandably, certain of these criteria are seldom if at all contained in or addressed by a specific survey that is of a sufficiently representative nature so as to serve as direct evidence or support for some of the positions adopted in this study.[59] For now, this section will do no more than to briefly highlight, as a general

[59] As indicated in chapter 1, an exhaustive appraisal of the internal affairs of unions in South Africa – with a view to exploring the particular aspects as highlighted during the course of this research – falls outside the specific ambit of this study. One of the key reasons for this (apart from this study's focus on union accountability to members from a legal perspective), is that surveys and studies conducted in the field of the South African labour market are understandably general in nature. They accordingly focus mostly on broader aspects of organised labour – or alternatively, are focused within a specific union or union federation, and as such – with the exception of the surveys discussed below – very little statistical data is available that specifically addresses the underlying themes of this study. But in spite of this, a wealth of statistical information pertaining to major themes relating to South Africa's organised labour is available, as a result of the long-running longitudinal study of unions affiliated with COSATU, as conducted initially under the auspices of the Society, Work & Development Institute/Sociology of Work Unit (SWOP) at the University of the Witwatersrand, Johannesburg. The "Taking Democracy Seriously" survey has been conducted approximately every four years, starting in 1994 (1998, 2004, 2008 and 2014 saw a similar survey initiated) and targeting COSATU-affiliate unions' shop stewards and members. Furthermore, the 2014 survey expanded beyond COSATU, to also include FEDUSA, NACTU and other independents – see C Bischoff, N Nthejane, J Cherry, NP Jikeka, BJ Malope, J Maree, S Nomvete, A Sitas & B Tame "Research in a Highly Charged Environment: Taking Democracy Seriously, 2014" in A Bezuidenhout & M Tshoaedi (eds) *Labour Beyond COSATU: Mapping the Rupture in South Africa's Labour Landscape* (2017) 18 31).The aforementioned surveys also resulted in the publication of several books, analysing the data so collected, with the most recent being A Bezuidenhout & M Tshoaedi (eds) *Labour Beyond COSATU: Mapping the Rupture in South Africa's Labour Landscape* (2017). However, whilst the surveys examined the various perceptions that members have of their own unions across a broad spectrum of topics, which in turn have produced data points that overlap to an extent with union-member accountability – these are not necessarily broadly representative of South African unions and their membership in general. By way of simple example, when compared against the total union membership within South Africa (as discussed at § 2 4 below), the number of interviews conducted in each of the surveys, from 1994 through to 2014 – namely 643, 655, 630 and 708 interviews respectively – whilst not insignificant – nonetheless represent a very small sample relative to the broader cohort of organised workers in South Africa. This is not to decry in any manner the importance of the studies conducted – particularly as a valuable yardstick in measuring changes within South Africa's largest union Federation (and its associated unions) in light of the numerous political and socio-

overview, key information pertaining to organised labour numbers and related data points (where relevant), within the South African context.

2 4 2 Registered unions and membership totals in South Africa

Various official institutions or non-governmental organisations, including the Department of Labour, Statistics South Africa ("StatsSA") and the South African Institute of Race Relations ("SAIRR"), provide quarterly and/or annual updates on trade union data. However, as noted by Finnemore, an important point to keep in mind is that "[r]eporting on trade union membership does not appear to be that reliable in South Africa" and, accordingly, "[r]eported union membership [numbers] should thus be treated with caution in many instances" – not to mention that "[i]t is also not known

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economic developments over the period in question – but merely serves as explanation as to why, whilst duly acknowledged, the surveys so mentioned remain of limited assistance for the purposes of this study. Nonetheless, further examples of organised labour-focused surveys, would be those conducted by the National Labour and Economic Development Institute ("NALEDI"), but since these are initiated at the request of specific unions or Federations (who also provide the funding for the research), the surveys are intended to address specific scenarios applicable to those specific unions and/or Federations. Two examples hereof, published in 2006 and 2012 respectively, are the so-called "Workers' survey", or "Household survey": National Labour & Economic Development Institute (NALEDI) The Workers' Survey for COSATU (2006) 1, formerly available online at <http://www.nalediorg.za//pubs/2006/Naledi_workers_survey_2006.pdf> (digital copy on file with the author) and the 2012 National Labour & Economic Development Institute (NALEDI) "Findings of the COSATU Workers' Survey, 2012" (2013) *COSATU* 1 <http://www.cosatu.org.za/docs/reports/2012/final%20workers%20surveys%20results%20August%202012.pdf> (accessed 01-05-2017). See further D Budlender & L Orr (eds) *The COSATU Worker Surveys of 2006 and 2012: What Do They Tell Us?* (2015) 5, for a general overview of the two surveys – which confirms that 2863 workers were interviewed for the 2006 survey (of which 951 were union members), and 3046 workers were interviewed for 2012 survey (of which 2 293 were union members). Another example of a NALEDI survey is the National Labour & Economic Development Institute (NALEDI) "The State of COSATU: Phase One Report" (2006) *NALEDI* 1, formerly available online at <http://www.nalediorg.za/pubs/2006/The_state_of_COSATU_Report.pdf> (digital copy on file with the author) which targeted key trends within COSATU and its affiliated trade unions through an analysis of COSATU's political influence. Lastly, the National Labour & Economic Development Institute (NALEDI) [S Denga] Building Effective Union Service Delivery (2003) 1 survey serves as another good example of a regional study, and thus not sufficiently representative on a national basis. It was conducted by NALEDI from February to June 2003, reported in September 2003 (a digital copy of which is on file with the author), and focused on four affiliates of COSATU (namely (then affiliate) NUMSA, SACCAWU, SADTU and POPCRU) as based on interviews conducted in 3 cities in the northern provinces of South Africa (566 interviews were conducted between Johannesburg, Tshwane and Ekurhuleni – see National Labour & Economic Development Institute (NALEDI) Union Service (2003) 3). To conclude, therefore, to the extent that it and the abovementioned studies are relevant to the purposes of this study, further reference will be made thereto below.

how many unregistered unions there are in South Africa or how many members they have."[60] With this in mind, and firstly focusing on the number of registered trade unions in South Africa, the reported figure as at 2014–2015 is placed at 187,[61] a decline from 213 in 1994, and its peak in 2002 of 504 registered trade unions.[62] The total trade union membership as at the first quarter of 2016 was placed at 3 794 055,[63] which

[60] Finnemore *Introduction* 123 explains that the "lack of transparency in releasing figures by some federations, and their websites, where available, are not regularly updated", compounds the issue. Furthermore, in their note "b" to the table on trade unions and membership figures between 1994 and 2016, the South African Institute of Race Relations [R Phungo & T Dimant] *2017 South African Survey – Industrial Relations* (2017) 307 310 states that whereas union membership data between 1994 and 1996 does include membership numbers of unregistered unions, from 1997 onwards, unregistered union figures are not included, given that the Department of Labour is, in terms of the LRA, "no longer required to keep records of unregistered trade unions". In this regard, s 99 of the LRA requires that a registered trade union must keep a list of its members, and in terms of subs 100(a) a registered trade union is obliged annually to provide a certified membership statement of the previous year to the Registrar by 31 March of each present year – and as such, no obligation is placed on unregistered unions to provide any membership information.

[61] As per the Annual Labour Market Bulletin Report 2015/2016, Table 11. South African Institute of Race Relations *Industrial Relations* (2017) 310 reports the number at 186, citing email communication received on 22 June 2016 from the Department of Labour. South African Institute of Race Relations *Industrial Relations* (2017) 312 list the primary trade union groupings (or Federations) as including the following four: The Confederation of South African Workers' Unions ("CONSAWU"); the Congress of South African Trade Unions ("COSATU"); the Federation of Trade Unions of South Africa ("FEDUSA"); and the National Council of Trade Unions ("NACTU") – with 12, 19, 20 and 18 affiliates respectively. For a complete breakdown of the affiliates associated with the aforementioned Federations, see South African Institute of Race Relations *Industrial Relations* (2017) 312-315.

[62] See South African Institute of Race Relations *Industrial Relations* (2017) 310, available at <http://irr.org.za/reports-and-publications/south-africa-survey/south-africa-survey-2017/downloads/industrial-relations.pdf> (accessed 30-08-2017). Regarding the notable decline in the number of registered unions, Finnemore *Introduction* 123 states:

> "Part of this decline of trade union membership has arisen from the fact that the Minister of Labour has deregistered large numbers of trade unions, as they did not meet the requirements of the LRA. This may account for part of the sharp downturn in recorded membership in registered unions."

[63] As per the "Annual Labour Market Bulletin Report 2015/2016" (2016) *Department of Labour* <http://www.labour.gov.za/DOL/downloads/documents/annual-reports/labour-market-bulletin-report/2016/almb2016.pdf> (accessed 30-08-2017), Table 12, issued by the Department of Labour. The Report presents the membership numbers by industry [Agriculture, Mining, Manufacturing, Utilities, Construction, Trade, Transport, Finance, Community, Private Households] and province, with the "Community" industry (described as "Community, social and personal services", and includes employment within Government) category reporting 1 664 630 members, followed by "Manufacturing" (474 814), "Trade" (427 916) and "Mining" (376 748). The least represented industry category is the "Private Households" category, with 9007 reported members. As is to be expected, Gauteng reports the most registered members at 1 062 466, followed by the Western Cape (559 314) and KwaZulu-Natal (524 110), with the Northern Cape reporting the least, at 81 331 members. In slight contrast, the South African Institute of Race Relations *Industrial Relations* (2017) 310, citing the Department of Labour as at 22 June 2016, report this figure at 3 716 000.

represents approximately 23% as a proportion of total employment.[64] When placed in historical context, the approximately 3.7 million members of 2016 sees an increase from that of 1994 – which was reported at 2 980 481 – but a decline from its peak in 2002 at 4 069 000.[65]

2 4 3 Strike action and industrial disputes

For purposes of the further discussion, it is also useful to consider statistics relating to industrial action: as the further discussion will show (especially as far as South Africa is concerned) trade union members potentially are at their most exposed when embarking on industrial action at the request or instruction of a trade union. This is especially true where the industrial action is unlawful (or, to use the terminology of the LRA, unprotected).

In briefly considering figures pertaining to strike action and industrial disputes, and given that the sector with the highest unionisation rate (as at 2016) was that of mining (at 82.4%[66]), it is not surprising that the South African trade union with the "biggest share of strike action in 2015" was the National Union of Mineworkers (at 38.4%). The mining sector also is the sector to have lost the most days to strikes (245 760 in

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[64] As per the Annual Labour Market Bulletin Report 2015/2016 (2016) *Department of Labour*, commentary to Table 11. It must be noted that the 23% stated above is derived from the Department of Labour, Collective Bargaining Report, for the period April 2015-March 2016, and is calculated on a slightly lower membership total of 3,5 million workers. The South African Institute of Race Relations *Industrial Relations* (2017) 310 places this number at 23.9%, and at 17.5% as a proportion of the total economically active population ("EAP"). Regarding the latter, StatsSA defined the term "economically active population", for the purposes of the 1996 Census, as follows:

> "The economically active population consists of both those who are employed and those who are unemployed. The terms supply of labour and the labour force are used as synonyms for the economically active population."

See StatsSA "Census in Brief: Introduction" (undated) *StatsSA* <https://apps.statssa.gov.za/census01/Census96/HTML/CIB/Introduction.htm> (accessed 30-08-2017). For the purposes of the 2011 Census, StatsSA defined it as follows: "A person of working age who is available for work, and is either employed, or is unemployed but has taken active steps to find work in the reference period." See StatsSA "Census 2011 Metadata report" (2012) <http://www.statssa.gov.za/census/census_2011/census_products/Census_2011_Metadata.pdf> (accessed 30-08-2017).

[65] South African Institute of Race Relations *Industrial Relations* (2017) 310. 1994 and 2002 saw the total employment and the "as a proportion of the EAP" percentages reported as 31% and 24.8%, and 36% and 25% respectively.

[66] Compared to 72.1% in 2011 – see South African Institute of Race Relations *Industrial Relations* (2017) 311.

2015).[67] The total number of days lost due to strike action in 2015 was 640 000, with the highest number of days lost in a single strike (also in 2015) reported at 210 000.[68] When compared to historical figures commencing with 1979 at 100 000 days lost, the 2015 figure is the lowest since 2000 (500 000 days lost) – but due note must be made of the particularly high figures in various years over the last decade, most notably: 2007 (12 900 000 – major public service strike); 2010 (14 600 000 – major public sector strike in September 2010); and 2014 (11 800 000 – major mining sector strike).[69] Finally, 2015 saw 55% of strikes being reported as unprotected.[70] Historically, a perusal of the various annual reports made available by the Department of Labour,[71] indicates that the Department measured the ratio between protected and unprotected strikes from 2012 onwards, with the percentages being recorded as follows: 2012 (45%); 2013 (52%); and 2014 (48%).

2 4 4 International comparison

Whereas the statistics mentioned above arguably does not provide enough of a basis to draw any firm conclusions on possible trends, past or future, it is noteworthy that the annual percentages of industrial action inside and outside the ambit of the LRA track one another so closely, this in spite of South Africa seeing relatively high unionisation rates compared to much of the world.[72] As mentioned, and as will be

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[67] See South African Institute of Race Relations *Industrial Relations* (2017) 307.

[68] 307.

[69] These figures and contextual explanations are provided by the South African Institute of Race Relations *Industrial Relations* (2017) 325, that furthermore make specific reference to 2012, where a "mere" 3 500 000 days were lost to industrial action, yet state further that "this figure does not reflect the true impact in terms of the nature of strikes", given that 2012 was "dominated by the wave of violent unrest in the mining sector set off by events at Marikana (North West) in August 2012."

[70] South African Institute of Race Relations *Industrial Relations* (2017) 307.

[71] See in general the Department of Labour website, for a list of the Annual Industrial Action Reports that can be downloaded, from 2003 onwards, available at <http://www.labour.gov.za/DOL/documents/annual-reports/> (accessed 04-09-2017).

[72] As was alluded to at § 2 4 2 above, trade union statistics should be referred to cautiously. By way of example, the International Labour Organization ("ILO") provides union density levels and their related percentages for 95 countries, including South Africa, spanning the period from 2001 to 2012 – available at <http://www.ilo.org/ilostat/faces/oracle/webcenter/portalapp/pagehierarchy/Page27.jspx?subject=IR&indicator=ILR_TUMT_NOC_RT&datasetCode=A&collectionCode=IR> (accessed 04-09-2017). The union density rate listed under South Africa, differs markedly from the statistics recorded by the Department of Labour, with the ILO reporting the figure in 2001 to be at 44.9%, compared to the 35.2% provided by the Department. Similarly, 2012 sees the ILO figure placed at 29.6%, compared to the

discussed in chapters 11 and 12 below,[73] the persistently high percentage of unprotected strikes in South Africa is significant, as it serves as one of the areas where the legal regulation of trade union accountability has come into sharp focus.

South Africa certainly does not rank as one of the most union-dense countries, and is nowhere near the levels of Iceland (mid-80%), the Scandinavian countries (mid-to-high 60%), or even Italy (mid-35%). Nonetheless, a unionisation rate between the mid-to-high twenties certainly suggests a not-insignificant role for unions within the South African labour relations system.[74]

Department's 23.8% – with analogous differentials throughout the period in question, albeit with both demonstrating a consistent downward curve. In comparing the ILO figures to that of the Organisation for Economic Co-Operation and Development ("OECD"), and its union-density figures for the 35 OECD member-countries in the period 1999-2013 [available at <https://stats.oecd.org/Index.aspx?DataSetCode=UN_DEN> (accessed 04-09-2017)], minor percentage points aside, the figures align. Working with what is available, when comparing the union-density numbers of South Africa, as provided by the ILO [as above – 29.3%, being the average of 29% (2011) and 29.6% (2012)], to that of the other 94 countries listed by the ILO, sees a mere 14 countries with higher densities than South Africa in 2011/2012: [Country: 2011 TU Density %, 2012 TU Density %] Iceland: 83.6%, 82.6%; Finland: 68.4%, 68.6%; Sweden: 67.5%, 67.5%; Denmark: 66.4%, 67.2%; Belgium: 55.1%, 55%; Norway: 53.5%, 53.3%; Malta: 52.4%, 52.9%; Cyprus: 45.9%, 43.6%; Kazakhstan: 39.2%, 49.2%; Armenia: 36.6%, 35.2%; Italy: 35.7%, 36.3%; Luxembourg: 33.9%, 32.8%; Ireland: 32.6%, 31.2%; and finally, Croatia: 31.2%, 30.9%. Taking the same dataset, but instead using the average of the Department of Labour's trade union density rate between 2011 and 2012, being 23.35% [average of 22.9% (2011) and 23.8% (2012)], sees this number climb slightly to 19 [3 countries, namely Bosnia & Herzegovina; Montenegro and the Occupied Palestinian Territory were disregarded, with them only having data available for the year 2012]. Finally, in comparing the ILO and Department of Labour trade union density figures for South Africa, again for the periods 2011/2012 against that of the 35 member-states of the OECD, sees a mere 9 countries place above South Africa at the ILO figure of 29.3% for South Africa [9 of the 14 Countries that ranked higher on the ILO list, rank again above South Africa on the OECD list, namely Belgium, Denmark, Finland, Iceland, Ireland, Italy, Luxembourg, Norway and Sweden]. In comparing the lower Department of Labour figure of 23.35%, Canada (26.9%, 27.2%) and the United Kingdom (25.8%, 26%) get added to the list for 2011-2012, with Israel also being slightly more union-dense in 2011 (24.2%), bringing the total to 12. As is evident from the above figures – with due acknowledgement to them being slightly outdated, they remain all that are available – union density numbers are very high in certain European/Scandinavian countries, but the average union-density rate in the OECD countries for the period 2011/2012 is at 27% and 26.6% respectively. Similarly, the average union-density rate amongst the 95 ILO countries for the same period is at 25.1% and 24.6% respectively.

[73] See for instance § 11 5 1 and § 12 4 3 2 below.

[74] See however the research of H Bhorat, K Naidoo & D Yu "Trade Unions in South Africa*"* in C Monga & JY Lin (eds) *The Oxford Handbook of Africa and Economics: Policies & Practices* (2015) 641 641-662, who – in analysing the effect of trade unions within the context of South Africa's economy and overall labour market – reach the conclusion that, relative to international markets (and despite long-held perceptions), the impact of organised labour is significantly below that which might be expected. Specifically, the average percentage of strikers' workdays lost per year and relative average strikers' workdays lost (from 1999-2008), demonstrate that "strike action in South Africa is not remarkably

2 5 Trade union categories

2 5 1 Traditional union categorisation

While the internal structures of labour associations or trade unions (to be discussed at § 2 6 below) are relatively similar, the same cannot be said of the categorisation of trade unions. Union classification is used to describe, for lack of a better word, the different "types" of labour associations or trade unions that can be found in the contemporary labour relations system – and as such, is useful in providing a macro-level overview of unionism within South Africa. Each variant has its own focus on a specific field of industry and class of worker. A union's objectives and manner of operation are adapted accordingly.

Different authors have categorised unions according to different criteria with different results. The following major categories can be distinguished:[75] (i) craft

different from similar activity in other similar emerging economies" – see Bhorat et al "Trade Unions" in *Africa & Economics* 655. By way of example, in the aforementioned dataset, South Africa ranks below that of Brazil and India, in regards to average proportion of strikers' workdays lost per year – with Nigeria and Turkey seeing respectively three and five times the South African estimate (Bhorat et al "Trade Unions" in *Africa & Economics* 655). In addition, in considering the strike intensity (that is, "the proportion of formal-sector workers involved in strike actions" – Bhorat et al "Trade Unions" in *Africa & Economics* 654) of South Africa for the period 1998-2008 compared to international figures, Bhorat et al state: "On average, only 2.8 per cent of South Africa workers were involved in strike action over the period, a similar intensity to countries such as Australia, Denmark and Iceland" – Bhorat et al "Trade Unions" in *Africa & Economics* 654. Granted, the foregoing speaks to statistical information covering a period ending ten years ago, and much of this picture might be different, were the dataset to be updated. However, the above does go towards placing into context the perceptions held of unions, and their impact in the context of industrial action, when viewed against statistical evidence. The above also speaks to an earlier point raised by the authors, namely that "a highly protective labour legislation and constitution" focuses on "the *right to unionize*, and not necessarily that South Africa's workforce is overly unionized to give labour unions disproportionate power in the arena of employment relations" – Bhorat et al "Trade Unions" in *Africa & Economics* 650, [their emphasis]. In other words, vocal unions combined with intense media coverage of industrial action – interpreted together with statutory provisions that appear to be organised-labour friendly – might be significant contributing factors towards how unions are perceived. In this regard, see the more detailed discussion about the impact of trade unionism at § 2 9 and § 2 10 below.

[75] Bendix *Industrial Relations* 164-166 differentiates between three broad categories of union, namely: (i) occupational unions (where membership is derived from employees who practice a specific occupation), and includes craft unions, promotion unions (as variation of the craft union, where on-the-job training, as opposed to apprenticeship, applies), unskilled/semi-skilled worker representation and white-collar unions; (ii) general unions (where membership is drawn across levels and industries); and (iii) industrial unions (where membership is drawn across levels, but in a specific industry field).

unions;[76] (ii) industrial unions;[77] (iii) general unions;[78] and lastly, (iv) white-collar unions.[79] However, with contemporary unions operating across industries, occupations, and across jobs, the risk of generalisation regarding the nature of trade unions must be guarded against. This is particularly true in the context of a South African society that is seeing rapid socio-economic, political, and industrial or technological change.

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[76] According to Venter *Labour Relations in South Africa* 68, a craft union is the term used to describe labour associations where the union was formed by "workers who either have specific skills or perform defined types of work". Such workers, whilst sharing a common skill-related interest, are generally active across numerous geographical or industrial areas and, consequently, so are the unions. Historically, craft unions were trade-specific, only accepting members from within specific professions and are the oldest of the union categories, moulded along similar lines to that of the pre-industrial craft guilds. Nel *Theory and Practice* 112 explains that traditional categories of workers who were members of the craft unions included carpenters, plumbers, bricklayers and painters. Bendix *Industrial Relations* 164 states further: "Craft unions find their power in the skill of their members and in their ability to restrict entrance to the occupation which they represent. Their strength lies not in numbers, but in the fact that their members occupy strategic positions in an undertaking and are not easily replaceable. The dilution of skills by the introduction of technology has had the result that very few pure craft unions still exist."

[77] Industrial unions (or industry-based trade unions according to Nel *Theory and Practice* 112) are characterised by their membership originating from within a defined industry, irrespective of the particular jobs that the individual members perform within that industry. See Venter *Labour Relations in South Africa* 69. Examples include the National Union of Mineworkers of South Africa ("NUMSA"), and the Food and Allied Workers' Union ("FAWU"). However, according to Nel *Theory and Practice* 112, an industrial union might be classified as a multi-industry trade union, which, for example, would mean that a union would accept all the various employees of a specific industry as members, irrespective of their jobs (such as production workers and the administrative personnel employed in that particular industry). However, this need not necessarily be the case, with an industrial union occasionally only accepting membership from a specific job category within the particular industry. Bendix *Industrial Relations* 166 likewise divides industrial unions into monopoly unions (similar to the multi-industry unions discussed above) and single-industry unions.

[78] General unions are focused on recruiting members from all possible sectors, regardless of the criteria that craft (occupational) and industrial unions focus on. To general unions, the type of industry, geographical area and the occupation held by the potential worker are of no consequence, provided that the members can agree on specific, common interests, and will attempt to use the union as the vehicle with which to achieve such objectives. See Venter *Labour Relations in South Africa* 69. It is submitted that a good example of a general union within the South African context is Solidarity/MWU [Solidariteit/MWU], whose constitution states at clause 5.1 that "[e]mployees who accept the principles, policies, tenets and programmes of the Trade Union, and who abide by the constitution of the Trade Union, shall be accepted as members". The union, therefore, does not limit membership according to which industry or field a potential member might work in.

[79] White-collar unions (as the name suggests), focus specifically on non-manual, professional workers, typically persons employed as "academics, banking staff and teachers". Middle to lower-level management personnel, following the continued encroachment by information technology systems and/or the increasing focus on service industries, are increasingly seeking protection through unionisation as well. See Venter *Labour Relations in South Africa* 70; Bendix *Industrial Relations* 165.

2 5 2 Contemporary union categorisation

A more recent attempt at categorisation is provided by Bezuidenhout[80] who speaks of the concepts of "economic, political and social movement unionism", to which can be added "entrepreneurial unionism". "Economic" unionism relates to labour associations that "confine their activities to the workplace (and are market focussed)", with their "sole interest [being] the improvement of the working conditions of their members".[81] "Political" unionism sees an organised labour association that is primarily focused on the "state-political struggle", and is "often closely allied or tied (and often subordinate) to a political party".[82] "Social movement" unionism is a far less readily defined concept, with it essentially entailing a focus on "progressive social change in the interests of the broader working class".[83]

The final category, that of "entrepreneurial unionism", is arguably more controversial – and takes as its point of departure the following quote from the 2015 Organisational Report to the Congress of South African Trade Union's ("COSATU") National Congress:

> "The South African labour market remains highly fragmented with 180 registered trade unions. There are also 23 registered trade union federations in the country … The question that must be posed is,

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[80] A Bezuidenhout "Labour Beyond COSATU, Other Federations and Independent Unions" in A Bezuidenhout & M Tshoaedi (eds) *Labour Beyond COSATU: Mapping the Rupture in South Africa's Labour Landscape* (2017) 217 218–221, in turn, is working from the formulation of D Pillay "Between Social Movement and Political Unionism: Cosatu and Democratic Politics in South Africa" (2013) 2 *Reth Dev Ineq* 10 13–15.

[81] Pillay (2013) *Reth Dev Ineq* 13, quoted in Bezuidenhout "Other Federations" in *Beyond COSATU* 219. Pillay cites as example an airline pilots' union, which may "use their monopoly power to defend their own narrow interests, whether or not they transgress the interests of other members of the working class" (Pillay (2013) *Reth Dev Ineq* 13).

[82] Pillay (2013) *Reth Dev Ineq* 14, as quoted in Bezuidenhout "Other Federations" in *Beyond COSATU* 219. Pillay explains further that political unionism speaks to associations that are "often hierarchically organised, with an oligarchic form of representative democracy (ie. while regular elections are held for office-bearers, elected leaders operate with a high degree of autonomy from the membership". Furthermore, such unions "offer strong support for their [political] parties during elections, usually provide party funding, and sometimes have block votes in party congresses" (Pillay (2013) *Reth Dev Ineq* 14).

[83] Pillay (2013) *Reth Dev Ineq* 15, quoted in Bezuidenhout "Other Federations" in *Beyond COSATU* 220. Explaining this concept further, Pillay (2013) *Reth Dev Ineq* 15 states that these unions "can be divided into two sub-types, the more reformist 'social justice' unions, typically found in the USA, and the more explicitly anti-capitalist, or anti-systemic, type" – with the latter being more prevalent "during the phases of struggles for democracy".

> 'why are there so many trade unions in the country yet only 27% of the workforce is unionised?' A possible answer to this question is that the majority of these unions are mere fly-by-night enterprises. They are not there to genuinely represent the interests of their members, but the financial interests of their leaders. It is a crude form of business unionism."[84]

Bezuidenhout's argues that the "business unionism" referred to above should not be conflated with (yet) another form of union categorisation[85] – rather, he uses the term "entrepreneurial unionism" as a means to move "the focus from members to the interests of [union] officials".[86] By way of example, Bezuidenhout sketches a labour association that "[a]t times may look like a social movement union and may be characterised by leaders who make special appeals to notions of social justice or even socialism, but the internal practices of these unions do not conform to basic standards of democratic representation and their finances are not open to outside scrutiny or review by members".[87] To conclude his point, he states:

> "Such unions may be run by Weberian charismatic leaders who mobilise around issues and, in setting up unions, accumulate personal wealth and benefit in terms of status and national attention. Like the cults that form around such Weberian charismatic leaders, these unions tend to be unstable and may decline rapidly once their leaders are discredited or move on to other entrepreneurial activities. Such unions may also be controlled by low-profile operators who move under the radar of public scrutiny – the 'fly-by-night' unions Cosatu refers to."[88]

The extent to which "business unionism" accurately reflects the totality of the

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[84] The Congress of South African Trade Unions (COSATU) *Organisational Report to the 12th National Congress 23 to 26 November 2015* (2015) 1 5.

[85] In this regard, Bendix *Industrial Relations* 175 differentiates between five broad categories of union approaches, or "styles", and has as her first, "business unionism" – which involves a focus on the improvement of wages and working conditions at the plant or industry level, a de-emphasis on "any significant sociopolitical involvement", and being "'workerist', as opposed to 'populist' in their approach". The remaining four categories put forward by Bendix *Industrial Relations* 175, briefly stated, are: (i) Community unionism (focusing on the improvement of conditions within a particular community that the union's membership is drawn from); (ii) Welfare unionism (providing member benefits that focus on "pension and sick funds, funeral benefits and even educational assistance"); (iii) Economically responsible' unionism (represented by unions who have as their role promoting and protecting "general economic welfare, be this at industry or national level"); and finally, (iv) Political unionism (where the union is primarily focused on the "promotion of a particular [political] party or on general sociopolitical change").

[86] Bezuidenhout "Other Federations" in *Beyond COSATU* 220-221.

[87] 221.

[88] 221.

organised labour system in South Africa is open to debate.[89] It does nonetheless provide an interesting counterpoint to what is to be explored in greater detail below.

Through identification of the different views of trade union categories (traditional vs contemporary), many overlapping concepts are distinguishable. These views differ primarily depending on whether the union is being considered from the perspective of *whom* the union represents (that is, where that worker is situated, in what industry – the "traditional approach" of categorisation), as opposed to whether the union is being considered from the perspective of *how* the union represents (the more "contemporary approach" to categorisation). While not definitive, union categories also provide a useful background to a further understanding of the nature and role of trade unions.

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[89] With this being said, it is certainly not a concept far removed from the minds of the legislature, given the wording (now) found in item 18 of the "Guidelines issued in terms of section 95(8) of the Labour Relations Act, No. 66 of 1995" [GN R1395 in *GG* 42121 of 19-12-2018], issued by the Minister of Labour (mention can be made that the wording is identical to that which was originally found within item 18 of the "Guidelines for the registration of trade unions and employers' organisations" [GN R 1446 in *GG* 25515 of 10-10-2003]). Item 1 describes the purpose of the Guidelines as to be "applied by the Registrar… in determining whether an applicant for registration in terms of the [LRA] is a genuine trade union". Item 18 is entitled "Association not for gain", and confirms that – in terms of subs 95(5)(a) of the LRA – a trade union constitution must state that the union is an "association not for gain", before reading as follows: "The purpose of this requirement is to prevent trade unions from being used as vehicles for enriching individuals or as a cover for profit-making businesses". The remainder of item 18 lists four examples [item 18(a)(d)] as factors "that may indicate that a trade union is operating in fact for the gain of certain individuals", with these including, *inter alia*: (i) That "[u]nrealistically high salaries and allowances are paid to officials, office-bearers of employees of the union" [item 18(a)]; (ii) That [i]nterest-free or low interest loans are made to officials, office-bearers or employees, and those loans are not repaid" [item 18(b)]; and finally, (iii) That "[i]ncome earned by the trade union is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or employees" [item 18(d)]. Furthermore, in terms of item 21, the Guidelines regulate the extent to which members are expected to contribute for costs accrued where the union represents their interests in litigation, with the clause reading as follows:

> "The financial arrangements made with members of a trade union on behalf of whom litigation, particularly dismissal disputes, is instituted, is an indication of whether the trade union may not be a genuine trade union or may be operating as an association for gain. Where a trade union charges its purported members a substantial proportion of the settlement reached in disputes, this may be an indication that the trade union is not a genuine trade union … However, the fact that a member is required to pay a substantial percentage of the settlement to the union, would be a strong indication that the organisation is not a genuine trade union."

The impact of the above Guidelines concerning the registration of unions is considered in more detail below in chapter 12 (see § 12 4 5 3 below). But suffice it to say at this point, that the introduction of the Guidelines in 2003, duly re-issued in 2018, following as it did the 2002 amendment of the LRA [in terms of the Labour Relations Amendment Act 12 of 2002], was a statutory response to an increase in the formation of non-*genuine* trade unions – in other words, "entrepreneurial unionism".

2 6 Trade union structure

Since trade unions first made their appearance as organisations separate from and unique to the old craft associations of the past, unions have been characterised as entities where the power of the union remains vested in the members.[90] In this regard, and certainly at the shop-floor level, unions have been described as being "usually imbued with a heightened sense of democratic values",[91] with membership control normally being exercised "through the election of shop stewards at each plant".[92] In modern-day labour relations, the shop steward, therefore, forms the crucial link between the democratic voice of the members and the union organisation.[93] Essentially, the members of a trade union within a particular plant or business concern have their collective wishes, needs or requests conveyed to the union by means of the shop steward, with the latter being the person who interacts with the officials from the regional or district branches of the trade union. From this follows the characterisation of trade unions as democratically-run organisations, with the various chain-of-command functionaries within the union organisation conveying the wishes of the membership from the factory-floor level, through the various organisational levels until, theoretically at least, these wishes reach the appropriate management structures.

The management of a trade union is the responsibility of the various administrators at the branch, regional and national levels, often elected. As such, the maxim "the members are the union" appears to hold true, with the latter indirectly controlling the organisation.[94] The structure of a trade union has been described as being hierarchical, with the shop stewards being positioned at the base of the hierarchy, above that of the ordinary members.[95] The shop stewards collectively form part of

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[90] There are exceptions to this general characterisation, most clearly highlighted through the periods of adjustment made to the "traditional approach", as discussed in the unionism history sections of the various comparative chapters that follow below. Simply put, the outward justification for the adjustment was precisely due to the perceived corruption of the union leadership/officialdom structures, with the alleged result of a shift in power from that of the membership, to the officials. The adjustments, and their underlying reasons, were ostensibly initiated in their various forms to "restore the balance", as it were, and bring democratic control back to the membership.

[91] Venter *Labour Relations in South Africa* 73.

[92] 73.

[93] For a detailed examination of the role of the shop steward, see Nel *Theory and Practice* 120-124; Wood & Coetzee *Cornerstone* 108-117; Finnemore *Introduction* 112-114.

[94] Bendix *Industrial Relations* 162.

[95] Venter *Labour Relations in South Africa* 73; Bendix *Industrial Relations* 176. For further commentary on additional aspects of the typical union's structure, see Nel *Theory and Practice* 119-120.

either the plant- or area-based shop steward committees, depending on how many have been elected within a specific enterprise or district.[96] The next level sees local[97] and regional branch committees,[98] followed by the National Branch Committee, and eventually, the National Executive Council ("NEC"),[99] at the apex of the structure.[100] The National Congress,[101] which serves as the highest authority regarding union affairs, is an annual meeting where various delegates, as elected by their union branches, attend in order to decide on future policy decisions and resolutions.[102]

Whereas the structures of modern labour unions are by and large aligned with the expected structural organogram of any entity focused on the representation of a membership base, the size and (local, regional or provincial/national) reach of a trade union is understandably directly linked to its inherent complexity.[103] In practice,

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[96] Finnemore *Introduction* 115; Bendix *Industrial Relations* 179.

[97] Venter *Labour Relations in South Africa* 76 explains that where a specific union has successfully organised numerous companies within a specific geographical area, a local branch committee can be established. This structure will provide general support to the various union structures within that area, such as secretarial and financial management services. See further Finnemore *Introduction* 115.

[98] Venter *Labour Relations in South Africa* 76 states that should several local branch committees exist within a defined area, it often proves beneficial to establish a regional branch committee. This committee will then comprise of both officers from the local branches and full-time officials. Bendix *Industrial Relations* 176 states that the local branch coordinates trade union activity, recruits new members and "acts as a transmitter of general union policy to local members, or, conversely, ensures that suggestions, complaints and requests from local members reach the higher levels of the organisation". The regional branch consequently serves to coordinate the activities of the local branches and liaises between the latter and the national structures.

[99] Venter *Labour Relations in South Africa* 76 mentions that this body usually consists of a president, vice-president, treasurer, general secretary and various delegates from each of the lower branches. The general secretary is normally in the full employment of the union and included within his scope of responsibilities is the administration and management of the central head office and other regional offices. In addition, the monthly deduction of membership dues finances the costs associated with the running of this office and the general activities of the union. Finnemore *Introduction* 115 explains that meetings of the NEC may be held as regularly as every three months and states that the NEC's function is "to ensure that the policies of the union are implemented, to negotiate with employers on larger or industry-wide issues when necessary, to supervise branch and head office officials, to organise union meetings, attend to correspondence and control the finances of the union".

[100] Venter *Labour Relations in South Africa* 73. Bendix *Industrial Relations* 177-178 explains that the manner in which the officials within these top structures are elected will be regulated by union constitution.

[101] Finnemore *Introduction* 115-116.

[102] Venter *Labour Relations in South Africa* 76. According to Bendix *Industrial Relations* 177, the theory behind the General Congress is that the highest decision-making authority remains in the control of the members, with the executive functionaries merely being required to implement the policies and decisions made by the National Congress.

[103] In this regard, one need only page through the various constitutions of some of the larger unions or

however, the aforementioned structures broadly seem to hold true regardless of the size and shape of South African trade unions. Simply put, the membership base interacts with its union by means of elected shop stewards and the local, regional officials, who in turn interact with other, more centrally and higher-based officials and office bearers. This chain of command and its concomitant election procedures are the very essence of the worker-controlled trade union. Of course, a closer examination of the role of the officials, representatives, and office bearers within these structures is required, which is done in more detail at § 3 3 below.

2 7 Trade union objectives and purpose

2 7 1 Why unions exist

There can be no doubt, both internationally and locally, that organised labour and unionism, in general, are under threat, off the back of years of pressure from a multitude of sources.[104] However, the focus of this study is not directed at the current

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union federations, and take note of the extensive range of acronyms used to describe all the various officials and committees, and the rankings of such – by example: BEC [Branch Executive Committee]; PEC [Provincial Executive Committee]; NEC [National Executive Committee]; CEC [Central Executive Committee]; BDC [Branch Disciplinary Committees]; PDC [Provincial Disciplinary Committees]; NDC [National Disciplinary Committees]; LSSC [Local Shop Stewards Council]; SSC [Shop Stewards Committee]; RSSC [Regional Shop Stewards Committee]; GS [General Secretary]; DGS [Deputy General Secretary]; RS [Regional Secretary]; DRS [Regional Deputy Secretary]; NOB [National Office Bearers]; REC [Regional Executive Committee]; RC [Regional Congress]; ROB [Regional Office Bearers]; LOB [Local Office Bearers]; and finally, POB [Provincial Office Bearers].

[104] See, in general, a proverbial "shopping list" of but some of the sources that have commented, in one form or other, on the decline of organised labour, across all the comparative jurisdictions of this study: D MacShane "Politics: Adieu to Trade Unions?" (1999) 41 *Crit Qrtly* 165 165-173; P O'Higgins "The End of Labour Law as We Have Known It?*"* in C Barnard et al (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) 289 289-301; E Webster & S Buhlungu "Between Marginalisation & Revitalisation? The State Of Trade Unionism in South Africa" (2004) 31 *Rev Afr Pol Econ* 229 229-245; RJ Flanagan "Has Management Strangled U.S. Unions?" (2005) 26 *J Lab Res* 33 33-63; A Pollert "The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights" (2005) 34 *ILJ* 217 217-233; M Rigby et al "The Changing Impact & Strength of the Labour Movement in Advanced Societies*"* in G Wood & M Harcourt (eds) *Trade Unions and Democracy: Strategies and Perspectives* (2006) 132 132-156; P Fairbrother et al "Unions Facing the Future: Questions and Possibilities" (2007) 31 *Lab Stud J* 31 31-53; KV Holdt & E Webster "Organising on the Periphery: New Sources of Power in the South African Workplace" (2008) 30 *Emp Rel* 333 333-354; Frimpong FS '*Unions are for Older People': A Case Study of Young People in the South African Commercial, Catering and Allied Workers Union (SACCAWU)* M A thesis University of the Witwatersrand (2009); R Hickey et al "No Panacea for Success: Member Activism, Organizing and Union Renewal" (2010) 48 *BJIR* 53 53-83; WR Corbett "The More Things Change: Reflections on the Stasis of Labor Law in the United States" (2011) 56 *Vill L Rev* 227 227-249; VG Devinatz "US Trade Unionism under Globalization: The Death of

health of trade unionism in general, or in South Africa, in particular, nor is it to provide insight into the apparent decline of organised labour. Rather, through an examination of the objectives, purpose and benefits of unions, this study accepts as a point of departure that both now, and for the foreseeable future, a proportion of labour is and will remain organised. Trade unions exist. Trade union members exist. As such, the preceding discussion has highlighted that trade unions exist as organisations of like-minded employees who are seeking to achieve certain objectives within the workplace by virtue of using the union entity as the vehicle through which to attain such goals. Membership numbers and overall representation, while having declined slightly over the past decade, remain relatively stable – as such, unions still play a prominent role in the South African labour relations system.[105] But as indicated above, an analysis of organised labour statistics, categorisation and structures remains largely meaningless in the absence of properly understanding why workers need unions in the first place – and this can only be properly understood if the underlying purposes and reasons for the existence of modern trade unions are considered. What follows is a brief examination into what it is that trade unions aim to do – in other words, what their

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Voluntarism and the Turn to Politics" (2011) 62 *Lab LJ* 16 16-29; P Dibben et al "Is Social Movement Unionism Still Relevant? The Case of the South African Federation COSATU" (2012) 43 *IRJ* 494 494-510; AL Gitlow "Ebb and Flow in America's Trade Unions: The Present Prospect" (2012) 63 *Lab LJ* 123 123-136; J Kelly "The Decline of British Trade Unionism: Markets, Actors and Institutions" (2012) 43 *IRJ* 348 348-358; G Gall "Unions in Britain: Merely on the Margins or on the Cusp of a Comeback?" (2012) 23 *Manag Revue* 323 323-340; M Brassey "Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" (2013) 34 *ILJ* 823 823-835; VG Devinatz "The Crisis of US Trade Unionism and What Needs to be Done" (2013) 64 *Lab LJ* 5 5-19; C Ross "New Unions in the UK: The Vanguard or the Rearguard of the Union Movement?" (2013) 44 *IRJ* 78 78-94; R Milkman "Back to the Future? US Labour in the New Gilded Age" (2013) 51 *BJIR* 645 645-665; RW Hurd & TL Lee "Public Sector Unions Under Siege: Solidarity in the Fight Back" (2014) 39 *Lab Stud J* 9 9-24; VG Devinatz "Right-to-Work Laws, the Southernization of US Labor Relations and the US Trade Union Movement's Decline" (2015) 40 *Lab Stud J* 297 297-318; RL Hogler *The End of American Labor Unions: The Right-to-Work Movement and the Erosion of Collective Bargaining* (2015) 1; A Abrahms "Could Employee Choice End Labor Unions' Influence?" (2017) 43 *ERLJ* 33 33-37; M Ginsburg "Nothing New under the Sun: 'The New Labor Law' Must Still Grapple with the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations" (2017) 126 *Yale LJF* 488 488-502; and, finally, N Marrian "Adapt or Die" *Financial Mail* (3-9 October 2019) 24.

[105] J Barnard & MM Botha "Trade Unions as Suppliers of Goods and Service" (2018) 30 *SA Merc LJ* 216 217 state as follows in this regard:

> "The role of trade unions, not only in the labour domain, but also in society, cannot be overstated. In addition to defending and vindicating the rights of their members, trade unions also play an important role in the economic life, social consciences, and development of workers."

purpose is and what their objectives are.

2 7 2 The employer-employee relationship

It is commonly acknowledged that while employees provide their services to employers in return for a wage, the reality underlying this relationship is one of economic dependency. There is an imbalance of power favouring the employer with the employee constantly exposed to the potential of exploitative practices by the employer.[106] Kilpatrick states as follows:

> "In traditional labour law discourse, alongside collective labour law, individual employment rights have been the most significant legislative expression of a mission to redistribute wealth and power between capital and labour. No one has expressed this mission better than Kahn-Freund:
>
> 'But the relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. In its inception it is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by that indispensable figment of the legal mind known as the 'contract of employment'. The main object of labour law has been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'".[107]

One of the most effective ways to avoid or address this imbalance is to introduce a measure of equilibrium into the employment relationship by harnessing the collective power of combined labour through the mechanism of trade unions[108] and by applying this power by means of collective bargaining.[109] Put slightly differently, unions attempt

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[106] Venter *Labour Relations in South Africa* 67.

[107] C Kilpatrick "Has New Labour Reconfigured Employment Legislation?" (2003) 32 *ILJ* 135 137, quoting Kahn-Freund Labour and the Law [Hamlyn Lectures (1972) 7]. See further in this regard P Benjamin "Labour Law Beyond Employment" (2012) *Acta Juridica* 21 22, who describes it as being the "most widely repeated statement regarding the purpose of labour law", and points to the Constitutional Court's description of it (in *Sidumo v Rustenburg Platinum Mines Ltd* 2007 (28) ILJ 2405 (CC)) as being a "famous dictum"

[108] Venter *Labour Relations in South Africa* 67.

[109] K Ewing, H Collins & A McColgan *Labour Law: Text and Materials* 2 ed (2005) 649 state as follows: "Trade unions perform a crucial role in advancing rights of citizenship. Through membership of a trade union, the citizen as a worker is provided with an opportunity to participate in making the rules by which he or she will be governed while at work. These rules may be made by collective bargaining to which the trade union is a party, or by legislation … for which the trade union has lobbied and applied political pressure. But apart from providing an opportunity for participation in rule-making institutions, the trade union advances rights of citizenship by raising standards and widening

to enhance the material employment conditions of their workers, by seeking to establish "a joint rule making system to protect their members from arbitrary managerial actions, and allow them to participate in the organisation for which they work",[110] and thereby to express the aspirations and political ideologies of their members.[111]

2 7 3 The diversity of needs

It has also been suggested that the general purpose of trade unions supersedes the objectives outlined in any union's constitution[112] and that this purpose "must be to protect and promote the interests of their members and of the working class in general".[113] Consequently, the worker's enthusiasm in joining a trade union is commensurate to his (or her) degree of belief in the union to "alleviate frustration and anxiety, improve opportunities, and lead to the achievement of a better standard of living".[114]

While the straightforward objectives of trade unions amount to representing the

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horizons. The social rights of trade union members are likely to be more fully advanced than the social rights of other workers, and the concerns of the citizen as worker are likely to be more fully addressed where there is a trade union pressing for equality of opportunity and the protection of human rights at work, as well as for better pay and shorter working hours."

[110] Wood & Coetzee *Cornerstone* 7, quoting Salamon [M Salamon *Industrial Relations Theory and Practice* (1987) 75].

[111] Benedictus & Bercusson *Labour Law* 411, in quoting Flanders [A Flanders "What Are Trade Unions For?" in WEJ MacCarthy *Trade Unions* (1972) 17], states the following on the position in Britain:

"[O]ne of the principal purposes of trade unions in collective bargaining is regulation or control. They are interested in regulating wages as well as in raising them; and, of course, in regulating a wide range of other issues appertaining to their members' jobs and working life … Unions and their members are interested in the effect of the rules made by collective bargaining, which is to limit the power and authority of employers and to lessen the dependence of employees on market fluctuations and the arbitrary will of management. Stated in the simplest possible terms these rules provide protection, a shield, for their members. And they protect not only their material standards of living, but equally their security, status and self-respect – in short, their dignity as human beings."

[112] See in this regard Collins et al *Labour Law* (2012) 492 who state the following before listing various functions of British trade unions: "Although wide ranging, trade union objects clauses [as contained in their rule-books/constitutions] nevertheless tend to conceal the fact that trade unions have a number of functions ... The weight and importance attached to these different functions will vary from time to time, and according to circumstances". The authors list these functions as including "a service function"; "workplace representation function"; "regulatory function"; "political representation function"; and finally, a "public administration function".

[113] Nel *Theory and Practice* 116.

[114] 116.

interests of their members, this is complicated by the fact that the needs of the members are as diverse as the members themselves. Consequently, the purpose of unions can become both "multiple and complex".[115] However, such difficulties cannot conceal the fact that trade unions are, primarily, *membership* organisations. In this regard, Nel makes the following points:

> "Trade unions … exist because of their members, are made up by members, they serve their members' interests, and are governed by the members themselves. Trade unions are founded on the social-cultural value of collectivism: together we are who we are – we are because of those around us. By standing together, workers increase their power base and improve their chances of promoting greater organisational and social justice. They help to ensure greater distributive, procedural and interpersonal justice in organisations as the employing entity, as well as in society at large. Trade unions serve and protect the interests of their worker members through bargaining with the employer representatives, challenging seemingly unfair managerial decisions by means of various processes, and through generally representing workers in interactive processes about employment relations and broader socio-political and economic and other matters."[116]

The diverse nature of members and their expectations means that the challenge facing any trade union is to formulate its goals in such a manner as to satisfy, at the very least, the majority of its constituents.[117] In order to achieve goals that remain meaningful for their members, two key problems face unions. Firstly, according to Finnemore, as institutions such as trade unions gradually expand in strength and status, they begin to "outgrow [their] formal purpose".[118] Unions develop their own individual needs and ambitions and have to address their own dilemmas. This might result in a divergence of interests between the union and its members, with the former no longer addressing the concerns of the latter.[119] Secondly, in describing the challenges that members present to unions, Finnemore continues by stating the

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[115] Bendix *Industrial Relations* 168.

[116] Nel *Theory and Practice* 111.

[117] Finnemore *Introduction* 96.

[118] Finnemore at 96 quoting Ross (as quoted by Hyman [Hyman R Industrial Relations: A Marxist Introduction (1975) MacMillan Press Ltd, London)].

[119] See for instance the research conducted by P Hirschsohn "The 'Hollowing-Out' of Trade Union Democracy in COSATU? Members, Shop Stewards and the South African Communist Party" (2011) 15 *Law Dem Dev* 279, regarding the challenges being faced by COSATU in maintaining member/worker/shopfloor involvement and participation within the Federation's structures through the vehicle of union democracy. Regarding the latter (union democracy) concept, see the discussion at § 3 2 below.

following:

> "[U]nions also receive contradictory signals from their own members. Workers are divided and contradictory. They are collectively oriented, yet individual and instrumental in expectations to their own standards of living."[120]

Consequently, many union members, particularly those who fall within the low-income bracket, have unrealistic expectations regarding what union representatives have to offer, making it all the more important for a trade union to carefully tailor its objectives.[121]

2 7 4 The purpose of unions

Thus, the proper delineation of union goals remains of paramount importance. It is only through a careful assessment of such goals in conjunction with the needs of their members that trade unions are capable of properly judging their performance and future direction. In this regard, Venter states that "[t]rade unions ultimately exist to protect both the work and non-work-related interests of their members, whether these be economic, social, political, or environmental".[122] While varying external situations might see unions emphasising different factors at different times,[123] their primary focal point has been variously described as alternating between (i) economic objectives;[124]

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[120] Finnemore *Introduction* 96 quoting Torres [L Torres "South African Workers Speak" (1995) Common Security Forum Studies FAFO, Oslo].

[121] Finnemore *Introduction* 96. Herein lies part of the problem facing modern unions, with regards to the matter of union democracy. By this is meant, if members interact with their union from a point of departure that is based upon expectations that are not necessarily realistic, then it can become difficult (and often problematic) for unions to properly comply with the members' requests. See § 3 2 below for a more detailed discussion of the particular factors surrounding the union democracy issue.

[122] Venter *Labour Relations in South Africa* 70.

[123] 70, in speaking of the underlying reasons for the existence of trade unions, states that "[c]ertain interests [of unions] may take precedence over others at any one time depending on the prevailing norms within a society".

[124] Bendix *Industrial Relations* 168. Venter *Labour Relations in South Africa* 70 argues that a key service offered by the union remains the renegotiation of wage levels by means of collective bargaining, and any other additional benefits such as medical aid and improved working conditions. Finnemore *Introduction* 97-110 includes herein the category of equitable wages and benefits, particularly the promotion of a living wage, reducing the wage gap, supporting gender equality, promoting parental rights, accessing pension and provident funds and providing and restructuring medical aids.

(ii) employment conditions;[125] (iii) socio-political goals;[126] (iv) employment security;[127] (v) individual worker development;[128] (vi) freedom from unfair discrimination;[129] and finally, (vii) political influence.[130]

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[125] Venter *Labour Relations in South Africa* 72 explains that employment conditions include the improvement of safety and health issues and the provision of additional benefits, such as in-factory crèche and day-care facilities.

[126] Venter *Labour Relations in South Africa* 72. As is to be demonstrated in chapter 11 (regarding the labour relations history of South Africa) the former black labour associations were seldom far removed from the political struggle prior to the new dispensation. Much of the fundamental change that occurred within the political sphere leading up to, and post 1994, was thanks in no small part to the role of labour associations and their vital unification of the working classes. Unions, by means of actively challenging the apartheid regime and campaigning for the rights of the disenfranchised – have demonstrated the powerful influence that labour can exert, and today this role (albeit focused in different areas) remains (arguably) as important. For further background to the politicisation of trade unions in South Africa's past, see in general R Lambert "SACTU and the Industrial Conciliation Act" (1983) 8 *SALB* 25 25-44; WJ Vose "Wiehahn and Riekert Revisited: A Review of Prevailing Black Labour Conditions in South Africa" (1985) 124 *ILR* 447 447-464; L Heinecken & L Du Plessis "Trade Unions in Politics: South African Trends" (1994) 14 *IRJ* 19 19-37; G Wood & M Harcourt "The Rise of South African Trade Unions" (1998) 23 *Lab Stud J* 74 74-92; S Buhlungu "The Building of the Democratic Tradition in South Africa's Trade Unions after 1973" (2004) 11 *Democ* 133 133-158; M Budeli "Workers' Right to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective" (2009) 15 *Fundamina* 57 57-74 – to be discussed in greater detail at § 11 3 below.

[127] Modern union attempts at providing their members with security of employment, which in many cases is as important, if not more so, than the various economic objectives that unions strive to offer their members, are discussed by the following authors: Venter *Labour Relations in South Africa* 71-72; Finnemore *Introduction* 104-105; Bendix *Industrial Relations* 169.

[128] Venter *Labour Relations in South Africa* 72 reasons that contemporary unions are increasingly focusing their efforts on the upliftment of their individual members through the provision of skills training exercises, education programmes, and the positive benefits of socialising within the confines of the union with like-minded, fellow workers. See further Bendix *Industrial Relations* 170.

[129] Finnemore *Introduction* 104-105.

[130] The nature of the particular tripartite relationship between the ruling African National Congress ("ANC") party, the South African Communist Party ("SACP") and organised labour through South Africa's largest trade federation such as COSATU, is well documented – especially with regards to the possibility of political influence. See for instance E Webster "The Alliance under Stress: Governing in a Globalizing World" (2001) 8 *Democ* 255 265, 267, where is said: "Of course this does not mean that labour will no longer mobilize. But what it does suggest is that mobilization against a government that has been democratically elected with which labour is in alliance takes on a very different meaning than a 'clash with the illegitimate apartheid state'… [Webster (2001) *Democ* 267] Union leaders are therefore likely to continue to want to co-operate with the government in the hope of influencing it, rather than opting for the political wilderness." For further background to the labour pact involving the tripartite alliance, see in general PG Eidelberg "The Tripartite Alliance on the Eve of a New Millennium: The Congress of South African Trade Unions, The African National Congress And The South African Communist Party" (1997) unpublished paper presented at a seminar hosted by the Institute for Advanced Social Research at University of Witwatersrand, 3-03-1997 1 1-23; G Wood "The Politics of Trade Unions in Transition: The Case of the Congress of South African Trade Unions" (2002) 8 *Contemp Pol* 129 129-143; M Harcourt & G Wood "Is There a Future for a Labour Accord in South

Similarly, Ewing – in tracing the role of trade unions in the context of their historical development – speaks of five core functions, namely a service; representation; regulatory; government(al); and public administration function.[131] He reasons that each of these is in turn coupled to the different stages of development of a union.[132] By way of example, the "service function", which involves (understandably) "the provision of services and benefits to members",[133] is most likely the activity of "a fledgling and immature organisation",[134] whereas the "public administration function", would feature as a function of a well-established and mature union or federation. The "representation function" self-evidently refers to the role that the union fulfils in representing the member directly in employment matters (such as disciplinary procedures),[135] or more indirectly – in the context of, for example, negotiations preceding a possible transfer of undertaking, or in instances of retrenchment negotiations. The "regulatory" and "governmental" function would include participation

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Africa?" (2003) 27 *Cap Class* 81 81-106; S Buhlungu et al "Trade Unions and Democracy in South Africa: Union Organizational Challenges and Solidarities in a Time of Transformation" (2008) 46 *BJIR* 439 439-468; S Buhlungu & S Ellis "The Trade Union Movement & the Tripartite Alliance: A Tangled History*"* in S Buhlungu & M Tshoaedi (eds) *COSATU's Contested Legacy* (2012) 259 259-282; M Anstey "Marikana – and the Push for a New South African Pact: Forum Section" (2013) 37 *SAJLR* 133 133-145; and T Masiya "Social Movement Trade Unionism: Case of the Congress of South African Trade Unions" (2014) 41 *Politikon* 443 443-460. However, more recent developments within South Africa, post-Marikana and in the context of a tripartite alliance under the then ANC presidency of Jacob Zuma, has seen a rift within the alliance, demonstrated most clearly following the explusion from COSATU of NUMSA, one of its biggest unions in November 2014, and the breakaway by its former General Secretary Zwelinzima Vavi, resulting in the eventual formation of the new trade union federation in 2017 (the South African Federation of Trade Unions ("SAFTU")). See in this regard L Gentle "What About the Workers? The Demise of COSATU and the Emergence of a New Movement" (2015) 42 *Rev Afr Pol Econ* 666 666-677; P Dibben et al "The Ending of Southern Africa's Tripartite Dream: The Cases of South Africa, Namibia and Mozambique" (2015) 57 *Buss Hist* 461 461-483; and Bezuidenhout "Other Federations" in *Beyond COSATU* 217 228-230. Regarding the interplay between politics and organised labour in the context of the United States (discussed in more detail in the chapters to follow), see in general MF Masters & JT Delaney "Organized Labor's Political Scorecard" (2005) 26 *J Lab Res* 365 365-392. Compare this with the discussion of G Patmore & D Coates "Labour Parties and the State in Australia and the UK" (2005) *Lab Hist* 121 121-141 regarding the situation in the UK and Australia.

[131] KD Ewing "The Function of Trade Unions" (2005) 34 *ILJ* 1 3.

[132] Ewing (2005) *ILJ* 3.

[133] Included herein, are services ranging from discounted health care and unemployment benefits – on the one hand – to "professional services, notably legal advice and representation to help with problems at work, accidents on the way to work, or problems unrelated to work", on the other [Ewing (2005) *ILJ* 3].

[134] 3.

[135] 3-4.

in a statutory scheme (where, for instance, Bargaining Councils require input from organised labour at sectoral levels), or possibly through the shaping of national or provincial policy by participating in governmental or parliamentarian/statutory processes (such as, in the context of South Africa, organised labour's role in the National Economic Development and Labour Council ("NEDLAC").[136]

Regardless of which jurisdiction or country is being considered, trade unions ultimately share many commonalities regarding their purposes and objectives. The attempts at categorisation of these goals discussed above serve as a vehicle through which to observe their true nature and reveal to some extent organised labour's role and function within the broader labour relations system. What is also clear from this discussion is that one of (if not the) primary goal of trade unions is to aid the union member in the course of, and by association with, their employment.

2 8 The benefits of union membership

2 8 1 The social factor and the power of the employer

The discussion so far has focused on the early history of unions, the prevalence of organised labour and industrial action in South Africa, and the general structure, objectives and purpose of trade unions. What remains to be addressed – albeit briefly – is what motivates workers to join together as members of trade unions? In other words, whereas the apparent material benefits for members in their working environment understandably provides a reason why a worker might consider joining a trade union, the question is whether there are additional factors that might be at play?

One such factor may be found in the underlying "collectivism" inherent in the concept of organised labour,[137] that is, that of striving (in contrast to "individualism") to achieve goals and objectives *collectively*.[138] In this regard, Gregory argues that

[136] Discussed in more detail at § 12 3 below. See further Ewing (2005) *ILJ* 4-5.

[137] Regarding the term "collectivism", see firstly E Cummings "A Collectivist Philosophy of Trade Unionism" (1899) 13 *Q J Econ* 151, and then A Bogg "'Individualism' and 'Collectivism' in Collective Labour Law" (2017) 46 72, for an overview that runs the full gamut of its development.

[138] Says M Metochi "The Influence of Leadership and Member Attitudes in Understanding the Nature of Union Participation" (2002) 40 *BJIR* 87 89 in this regard: "It is argued, therefore, that attitudes are formulated on the basis of identifications with groups that become salient within a trade union setting, such as the union, management, and more immediate social units such as one's workgroup/departmental group. Therefore, union loyalty and union instrumentality emerge from identification with the union; 'them and us' attitudes through a process of out-group stereotyping. Finally, what is termed 'workplace collectivism' stems from identification with one's work-group/departmental

unionisation is "the social and political manifestation by workers of a most indispensable human right".[139] He maintains that "individuals yearn to join in community"[140] and when they unionise they move from their personal, private position within the broad scope of humanity out "into the participatory political life" of society.[141] Therefore, he reasons that the right to combine (by means of a trade union) becomes both a fundamental human *and* civil right.[142] This prospect of socialisation and self-fulfilment within the context of the union is of importance, particularly in respect of those workers who might feel marginalised within the work environment. The social aspect of forging relationships with fellow workers, both within and outside of work hours, by means of the union is clearly an added benefit. In this regard, Nel makes the point that Maslow's theory of motivation "supports the claim that a vast range of unfulfilled needs may induce or influence workers' decisions to join or support a trade union, including basic economic and security related needs, as well as social and self-fulfilment needs".[143] Furthermore, Nel states that the workplace is often perceived as being "dehumanised" and reasons that "workers may want to be and to feel part of a group … thereby experiencing comradeship".[144]

But this *esprit de corps* still has the employment contract, and the associated individual work-relationship, as its point of departure. Given the position of relative vulnerability between employer and employee,[145] employees are forced to resort to alternative measures with which to bring about a re-balancing of the negotiating process. In their analysis of "union [member] participation" (given the new role being fulfilled by COSATU during the mid-1990s), Short and Mastrantonis state the following:

> "The basis of this framework is the psychological contract that exists between the employee and the employer, in which an employee's labour is exchanged for goods and power is placed in the hands

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group. The motivational effect of group identification, translates into members' willingness to participate in trade union activities, with [union] leadership behaviour as a major influence in reinforcing group identifications and attitudes."

[139] Gregory (1988) *Miss Coll L Rev* 137.

[140] 137.

[141] 137.

[142] 137-138.

[143] Nel *Theory and Practice* 112.

[144] 114. See further Finnemore *Introduction* 95.

[145] See in this regard the earlier discussion at § 2 7 2 above, and the quote of Kilpatrick (2003) *ILJ* 137, quoting Kahn-Freund Labour and the Law [Hamlyn Lectures (1972) 7].

> of the employer to dictate the terms of that particular exchange. When the employee considers the employer to be trustworthy, the unequal distribution of power can be tolerated and may be considered by the respective parties to be completely irrelevant to the existing relationship. On the other hand, when a low level of trust exists, dissatisfaction with the outcomes of the exchange will prevail, as the employer's decisions cannot be trusted to be in the employee's interest. It is at this point that collective behaviour may be perceived to be the only channel of redress in order to ensure a fair exchange. Using this perspective, it can be argued that the individual's decision to unionize is a response to a lack of power. Thus an employee's reason for joining a trade union is primarily based on the expectations that collective bargaining will be instrumental in redistributing the power between the relevant parties, thereby increasing workers' chances of obtaining valued outcomes."[146]

Therefore, a second factor is to be found in the member's need to match the relative power of the employer in the context of the employment relationship. Put differently, "important causes of unionization are distrust and powerlessness".[147]

2 8 2 Union commitment and participation

Short and Mastrantonis also emphasise the fact that for an organisation to thrive, it has to meet the needs and requirements of its membership – and it does the latter by means of "fostering member commitment and participation".[148] "Union commitment" relates to the loyalty of members towards their union, along with the "willingness to perform [union-related] services voluntarily".[149] "Union participation", in turn, points to what members *do* within their union[150] – and, not surprisingly, "the extent of union participation is a manifestation of how committed union members are".[151] In this

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[146] G Short & H Mastrantonis "Trade Union Commitment and Participation: A Theoretical Review" (1994) 14 *IRJ* 4 11.

[147] Short & Mastrantonis (1994) *IRJ* 11.

[148] 4. They furthermore make explicit the connection between union democracy and participation: "Union democracy may be defined as the extent of rank-and-file participation in union activities, and is brought about by maintaining structures which are accessible to all members, and by encouraging a certain level of commitment" – Short & Mastrantonis (1994) *IRJ* 5.

[149] Short & Mastrantonis (1994) *IRJ* 4 – citing ME Gordon, JW Philpot, RE Burt, CA Thompson & WE Spiller "Commitment to the Union: Development of a Measure and an Examination of Its Correlates" (1980) 90 *J App Psych* 479 480-482.

[150] This would be the difference between a member who actively engages in union activities (attending meetings, assisting with arrangements etc.), as opposed to those members who "merely pay their dues and do nothing more" (Short & Mastrantonis (1994) *IRJ* 12).

[151] Short & Mastrantonis (1994) *IRJ* 12. In their South African study on expectations held by members and officials, as owing towards their union (that is, *member obligations*) – B Linde & H Henderson "Expectations and Obligations Governing the Member-union Relationship: A Psychological Contract Perspective" (2010) 34 *SAJLR* 68 74 (Table 2) ranked by prevalence the different themes raised as important "duties" owing to the union by the members/officials. Most prominent of these, was the "union

regard, and when one considers international studies from the 1980s that sought to "apply psychological models to commitment-related phenomena (e.g. trade union membership, willingness to participate and member attachment)",[152] a key insight comes to light: a worker's perception of "whether or not a union is instrumental in addressing their needs"[153] remains one of the central considerations in a decision to join.

Therefore, whereas the nexus between union participation and instrumentality lies at the heart of that worker's commitment to their union,[154] the question of "what can the union do for me", remains central to understanding the motivation behind becoming a member.[155]

2 8 3 Yielding utility

Simply put, any person will be more likely to join an organisation if such membership "yields utility".[156] In other words, membership becomes worthwhile because of added benefits that may be received.[157] In exploring this notion further, Nel points to

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member conduct" theme, with 79% of members citing this, which included the sub-themes of "Support", "Loyalty" and "Promotion" [of the union]. Following closely behind, with 73%, 68% and 64% respectively, was the "Participation" theme (including "Attendance/involvement in union activities"), the "Contractual Agreement" theme (including the sole sub-theme of "Pay membership fee"), and the "Communication" theme (including the sub-theme of staying informed of union activities, and reporting problems to the union". Of interest regarding the "Participation" theme – which, as mentioned – was the second most prevalent member obligation (at 73%), where the sub-theme of attendance/involvement in union activities saw 100% of respondents have this response, only 10% of the respondents spoke to "adherence of advice provided by union".

[152] Regarding the paucity of this type of research in the South African context, Linde & Henderson (2010) *SAJLR* 70 state: "[N]o known studies have focused on the member-union relationship from the context of the psychological contract theory."

[153] Short & Mastrantonis (1994) *IRJ* 6.

[154] 6.

[155] In this regard, Short & Mastrantonis [in quoting SA Youngblood, AS DeNisi, JL Molleston & WH Mobley "The Impact of Work Environment, Instrumentality Beliefs, Perceived Labor Image, and Subjective Norms on Union Voting Intentions" (1984) 27 *Acad Manag J* 576 577] state that there exists "a consistent pattern of the relationships between pro union attitudes and behaviour and attitudes towards the job, attitudes towards unions, and beliefs that unions can be instrumental in obtaining desired outcomes" – see Short & Mastrantonis (1994) *IRJ* 8.

[156] Nel *Theory and Practice* 113.

[157] Says G Chaison & B Bigelow *Unions and Legitimacy* (2002) 95 in this regard, in considering the role of American trade unions:

> "What unions do is not 'right' in some abstract sense: unionization and representation in bargaining are not commonly seen as the inherent, inviolable civil right of workers. Rather, unions assume the practical role of agents that balance the power of employers at the workplace, that encode workers'

research[158] where it was found that workers are drawn towards support for unionisation because of the existence of a gap between their expectations and what they are able to achieve in their work environment.[159] As a result, prospective members conduct a cost/benefit analysis and weigh up what they potentially stand to gain from membership as opposed to what they might possibly lose were they not to join.[160]

To summarise, three key factors have so far been identified influencing the decision of workers to join trade unions, namely the social/collectivism factor, to need to restore the imbalance in power relations, and lastly for reasons of "instrumentality"[161] or "utility". However, in considering this final factor, it should be borne in mind that it includes a broad range of components related to what the objectives of unions are: unions strive to provide or achieve outcomes and objectives that are advantageous to their members since if they do, workers will want to join. At the same time, workers want to join because unions provide or achieve outcomes and objectives that are to their advantage and benefit. Therefore, a utility/instrumentality factor that serves to explain why members want to join a labour association by its very nature incorporates a host of additional factors that can be grouped within it,[162] all related to the benefits associated with unionism.

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rights in legally binding contracts, and that use the possibility of conflict to negotiate over a limited range of issues. In other words, the unions' constituencies, ranging from nonmembers to employers, have been conditioned by sixty years or more of labor relations practice to think in terms of conferring pragmatic legitimacy".

[158] Nel *Theory and Practice* 112 – in reference to JA McClendon et al "The Individual Decision to Unionize" (1998) 23 *Lab Stud J* 34.

[159] McClendon et al (1998) *Lab Stud J* 37-38.

[160] See for instance Chaison & Bigelow *Legitimacy* 91, who in their use of the "organization theory" of legitimacy as a means to examine trade unions in the United States, state the following regarding the expectations of union members: "The legitimacy conferred on unions, where it existed, was usually pragmatic, resting on the self-interested calculations of the unions' constituencies. They were asking: Do unions provide me with a benefit or service that is, on the whole, valuable? Do I gain more than I lose by being or becoming a union member, by being covered by a collective agreement, by working with the union in a coalition, by negotiating with the union, or by having a union represent me at my company?"

[161] Short & Mastrantonis (1994) *IRJ* 15 explains instrumentality as being indicative of a "union's effectiveness in achieving desired goals".

[162] Nel, in quoting McClendon states the following regarding a worker's decision to unionise: "[It] may involve a combination of predispositional attitudes, situational conditions, intense emotional affect, as well as a calculative cost/benefit analysis of the pros and cons of union representation" – Nel *Theory and Practice* 113, quoting McClendon et al (1998) *Lab Stud J* 50.

2 8 4 Additional factors as benefits

In unpacking these additional factors referred to above, Finnemore provides a useful point of entry in their identification: economic needs, job security and regulation, political reasons, social needs and self-fulfilment.[163] Each one of these is briefly considered below.

2 8 4 1 The economic dimension

The economic needs of a prospective trade union member will see him/ her turning to organised labour given that the union will bargain for improved wages and working conditions.[164] The economic dimension is clearly a fundamental aspect of the utility/instrumentality factor, particularly in South Africa with its highly-problematic discrepancies in the distribution of wealth and capital.[165] As such, improving the financial situation of its members through continuing negotiations with employers[166] – and ensuring that wages and/or salaries (at a minimum) "meet the current cost of living" – remains one of the core functions of a union and one of the core benefits of union membership.[167]

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[163] Finnemore *Introduction* 92-96. See further R Venter et al (eds) *Labour Relations in South Africa* 3 ed (2009) 81-82 and Nel *Theory and Practice* 112-114. As will be evident in the discussion below (regarding the powers used by unions to achieve their objectives), here too are examples of significant overlap between different sources on what drives workers to join unions. Regarding where they differ, Venter et al *Labour Relations* 81-82 speak of protection from exploitation, and Nel *Theory and Practice* 112-113 adds that the lack of respect of employee's on the part of the employer/manager, worker anger towards their employer, and "[f]avourable attitudes about trade unions in general" (in citing the research done by McClendon et al (1998) *Lab Stud J* 34-35) serve as further reasons to join.

[164] "Unions actively see to influence their members' working conditions. Issues surrounding safety, health and welfare will be specifically targeted, and unions will lobby the government to implement legislation regulating these issues" – with the classic example being the BCEA – Venter et al *Labour Relations* 82.

[165] Nel *Theory and Practice* 113.

[166] States Finnemore *Introduction* 97 in this regard: "[S]alary negotiations are usually the most stridently pursued as they are generally the most pressing 'bread and butter' concerns of members." Venter et al *Labour Relations* 81 point to the fact that apart from matters pertaining to wages, additional benefits (or improvements to existing benefits) along the lines of "medical aid, pension funds, and the like" might be negotiated for.

[167] Venter et al *Labour Relations* 81.

2 8 4 2 Job security

Regarding job security,[168] job regulation[169] or the protection of a particular trade,[170] workers join unions in the hope of achieving greater employment security, since unions actively assist in disputes such as alleged unfair dismissals. Closely related is the infrastructural support offered by a well-organised union, which would be able to represent its members in disciplinary hearings or, at the very least, be able to offer advice pertaining to any queries or problems that members might have within the work environment.[171] It is in this context that the simple yet undeniably relevant axiom of "the union being the voice of the worker" comes to bear, with it not being difficult to understand why an employee would find it easier to complain to his or her trade union (which in turn would convey the grievance), than to his or her employer.[172] A final point

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[168] See Venter et al *Labour Relations* 82; Bendix *Industrial Relations* 169.

[169] By way of example, trade unions can – apart from acting as a potential scrutineer in regards to workplace safety (in terms of, for instance, the Occupational Health and Safety Act 85 of 1993) – also see their representatives (shop stewards) serving on the various emergency committees within a workplace, with their concomitant responsibilities of ensuring worker well-being. See T Cohen et al *Trade Unions and the Law in South Africa* (2009) 22. Furthermore, joint agreement can be reached between a union and employer on regulatory matters pertaining to "working hours, overtime, work on public holidays, vacation leave, sick leave and notice periods", or "dispute settlement procedures, dismissal procedures, grievance handling, retrenchment, technological innovation and health and safety matters" – see Bendix *Industrial Relations* 170. On a broader scale, Bendix *Industrial Relations* 170 makes the point that whereas certain regulatory matters might be controlled by the State, unions can bring about industry regulation by means of "lobbying with or placing political pressure on government." Lastly, mention must be made of the possible regulatory role that can be fulfilled by a union within a workplace regarding matters pertaining to employment equity (in terms of the Employment Equity Act 55 of 1998) – see in this regard Cohen et al *Trade Unions* 22-23.

[170] The desire to protect their particular trade is reason enough for numerous workers to decide to unionise. Craft associations were specifically established with this in mind, namely the protection of their members who "have specific skills or perform defined types of work", by means of preventing "the employment of less-skilled workers at lower rates of pay [which would] compete with them for jobs" – see Venter et al *Labour Relations* 78. With this being said, Venter et al *Labour Relations* 78 make the point that craft unions – and their membership base – have been increasingly encroached upon by technological advancements, and not nearly as prevalent as they once were. See further Bendix *Industrial Relations* 164.

[171] This would therefore amount to the workplace representation function, as discussed by Ewing (2005) *ILJ* 3-4 at § 2 7 4 above.

[172] In their South African study on expectations held towards a union by members and officials, in other words – what the members/officials perceive as the obligations of their unions – Linde & Henderson (2010) *SAJLR* 72-73 ranked by prevalence, a series of themes. Foremost of these, followed by "Communication" (at 79% of responses) and then "Union Conduct" (at 50% of response), was "Legislative Obligations", with *all* respondents identifying it as an important union duty. Included under the legislative obligations theme, were the following sub-themes [duly-ranked, along with the percentage point that each made up of the overall theme]: Negotiations (91%), Workplace

to make about job security is that apart from *internal* workplace assistance, unions obviously also assist when matters are adjudicated externally, at bodies such as bargaining councils,[173] the Commission for Conciliation, Mediation and Arbitration ("CCMA") or the labour courts.

2 8 4 3 Social needs and self-fulfilment

Aspects of social needs and self-fulfilment in the context of the social benefits potentially associated with collectivism were already touched on above. Added to this are the broader societal benefits associated with the training and education programmes that certain unions offer,[174] as well as pension and investment scheme benefits (discussed in greater detail at § 2 9 1 below).

2 8 4 4 Political reasons

The final point made by Finnemore[175] is that of political reasons that might contribute to a worker deciding to join a trade union. Despite the major changes that have been brought about in organised labour and politics in South Africa – particularly with regard to the tripartite alliance (discussed at § 2 7 4 above) – political reasons are still prevalent in generating union interest amongst workers. As will be evident from the discussion regarding South African unionism history in chapter 10 below, unions

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representation (48%), Protect members' legal and human rights (46%), Mediation (41%), Advise members (38%), Individual representation (38%), Voluntary/democratic industrial action (9%), and finally, Promote union power (9%). The remaining two themes, "Training and development", at 38%, and "Supplementary services", at 29%, were furthermore identified. As is clear from the aforementioned, the union's role in negotiating with the employer, easily ranks as the most crucial expectation of duty that members have of their union.

[173] Also discussed in more detail at § 2 11 3 and § 12 4 2 2 below.

[174] By means of example, 1998 saw the UK Government implement the Union Learning Fund, which was to see funding allocated in partnership with independent trade unions, in order to faciliate various schemes aimed at upskilling and training of union members in Great Britain. See in this regard K Forrester "'The Quiet Revolution'? Trade Union Learning and Renewal Strategies" (2004) 18 *W Emp Soc* 413 and P Findlay & C Warhurst "Union Learning Funds and Trade Union Revitalization: A New Tool in the Toolkit" (2011) 49 *BJIR* s115, and the discussion at § 6 2 1 below. In the context of South Africa, whereas structured in-service training does not appear to be on offer by any notable labour association, examples of education-focused benefits are to be found. *Solidariteit / Solidarity* for instance offers study-funding and bursaries for members and their dependents, and has branched out into distance-education and occupational training institutions – as per the union's Benefits page, at <https://solidariteit.co.za/en/union-benefits/> (accessed 01-11-2017). See further Nel *Theory and Practice* 118.

[175] Finnemore *Introduction* 94-95.

were heavily involved in the struggle against the former apartheid regime. The current LRA bears testimony to the significance of this role by allowing for socio-economic protests (called "protest action").[176] Continuing this trend, major unions still play an active role in voicing their members' concerns regarding socio-economic issues and, as such, act as a vehicle through which potential members are reminded of the important role that many of the unions played in the history of our country.[177]

Therefore, despite there not necessarily being a clear-cut and singular reason that underlies ongoing unionisation, the discussion above highlighted the niche that trade unions strive to fill – and how this factors into a decision to join.[178] One fact remains undeniable – union fortunes are inextricably linked to how they are perceived by their current members[179] and by potential members alike. Below, the attention will shift to the different ways in which trade unions may assist employees in their everyday working lives.

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[176] Section 77 of the LRA, as discussed at § 12 4 2 3 below.

[177] Nel *Theory and Practice* 114 in quoting J Baskin "Labour in South Africa's Transition to Democracy: Concertation in a Third World Setting" in G Adler & E Webster (eds) *Trade Unions and Democratization in South Africa, 1985-1997* (2000) Macmillan, London 43-44 states the following on the political role that certain unions played in South Africa's history:

> "[I]t is now widely accepted that South Africa's union movement played a key role in the struggle against apartheid and class oppression. During the 1970s and 1980s working people built their unions into a powerful fighting force. Unions succeeded in improving the material conditions of their members, while simultaneously taking on the apartheid state. The democratic unions also contributed leaders and members of the mass democratic movement… Importantly, the style of the labour movement helped shape the country's political landscape… In short, the union played a key role before and during the transition period".

[178] Says Nel *Theory and Practice* 113 in this regard, in their efforts to provide an overview for the reasons' why workers unionise:

> "There are, however, numerous other explanations that may underlie the decision to join a trade union. These fall beyond the scope of this chapter, but relate to aspects such as the attitudes, values and ideologies of people. Some people are simply in favour of unions in general, while others disapprove of them. Some believe that being an active union member is a good thing, while others regard it as being 'wrong' for them to join a trade union. These personal values often link up with societal values. The cultural value of collectivism is especially relevant in this regard."

By way of further example, Short & Mastrantonis (1994) *IRJ* 7 explores the findings of JF Hartley: "Joining a Trade Union" in JF Hartley & GM Stephenson (eds) *Employment Relations* (1992) 163, who points to personal charateristics "independent of the job, such as age, marital status, gender, race and employment scope" – and how these all potentially impact on a worker's likelihood of joining. Apart from "demographic/personal charateristics", "job-related attitudes" and "instrumental beliefs" all serve as further contributory factors that are taken into account by Short and Mastrantonis (1994) *IRJ* 7-12.

[179] See in this regard Linde & Henderson (2010) *SAJLR* 78-79, who reiterates this sentiment in light of their research on members and officials' expectations of their union.

2 9 How trade unions influence

2 9 1 Resources utilised by unions

In his article on "responsible unionism", Botha states as follows:

> "The role of trade unions is confined not only to the political arena but extends into the economic and social spheres. Labour, through trade unions, plays an important and active role in decision-making that 'vitally concerns its interests' as important elements of social life. Trade unions have a duty not only to collaborate with other social institutions, which include representatives of management and capital, but they also have responsibilities when it comes to the production of wealth. Their duties are not limited to the distribution of wealth, but extended to the production thereof. Therefore, it is important for society as a whole, and not simply for corporations and their shareholders, that wealth creation takes place in a continuous and sustainable manner. Sustainable development and participatory democracy are inextricably connected and trade unions play a key role in the democratic process."[180]

The quotation speaks to the broader duties fulfilled by organised labour in South Africa. However, in order for unions to comply with this broad mandate, they need mechanisms through which they can influence the labour market and compel the various role players to concede to their demands. Unions need to "harness the power resources available and use them effectively",[181] and are required to make use of various tactics and procedures allowed in terms of legislation, the common law and the union's own discretionary customs. These resources can be listed as follows: (i) collective bargaining;[182] (ii) industrial action;[183] (iii) consumer boycott power;[184] (iv) affiliation;[185] (v) lobbying of the government and other relevant groups;[186] (vi) use of the media;[187] (vii) benefit funds/schemes and investment power;[188] and finally, (viii)

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[180] MM Botha "Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?" (2015) 48 *De Jure* 328 334-335 – [footnotes omitted].

[181] Finnemore *Introduction* 110.

[182] Venter et al *Labour Relations* 83; Bendix *Industrial Relations* 172; Nel *Theory and Practice* 118.

[183] Finnemore *Introduction* 111; Bendix *Industrial Relations* 172; Venter et al *Labour Relations* 83; Nel *Theory and Practice* 119.

[184] Finnemore *Introduction* 111.

[185] Bendix *Industrial Relations* 173; Finnemore *Introduction* 111; Venter et al *Labour Relations* 83; Nel *Theory and Practice* 116.

[186] Venter et al *Labour Relations* 83; Bendix *Industrial Relations* 173.

[187] Finnemore *Introduction* 111.

[188] Venter et al *Labour Relations* 83; Finnemore *Introduction* 111; Bendix *Industrial Relations* 174; Nel *Theory and Practice* 118.

political power.[189]

2 9 2 Collective bargaining

Collective bargaining (at both plant and industry levels), is naturally aimed at improving wages, employment conditions and any other issues related to employment, that might have to be addressed at the instance of the union's members. This would include what Nel calls "due process", which is described as the union's participation in internal company mechanisms, such as internal disciplinary procedures and grievance systems, and the creation of "channels for fair settlement of matters of mutual interest".[190]

2 9 3 Industrial action

Industrial action, such as the threat or actual implementation of a strike is of fundamental importance where collective bargaining has broken down and management might need to be coerced in a specific direction to achieve the union's objectives.[191]

2 9 4 Consumer boycott power

Consumer boycott power, where the union (and its affiliates) requests its members to shun particular products produced by a particular company/employer, applies a measure of economic pressure on target-employers, the intention of which is to achieve similar results as those sought by means of industrial action.[192]

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[189] Venter et al *Labour Relations* 83; Finnemore *Introduction* 111; Bendix *Industrial Relations* 174. As is clear from the aforementioned list, there is again – understandably – significant overlap in how various authors classify the powers that unions can avail themselves of, in order to achieve their objectives.

[190] Nel *Theory and Practice* 119. In addition hereto, the threat of legal action or alternative dispute resolution procedures, especially in those circumstances involving a particularly active trade union, is often of considerable influence in bringing about a favoured result for both union and employee. See further Finnemore *Introduction* 111.

[191] Finnemore *Introduction* 111 refers to this aspect as the "power to stop, retard or obstruct work" and is "wielded by employees through collective action at the workplace in the form of strikes, stoppages, go-slows, overtime bans, work-to-rule decisions and various other forms of action which involves the withdrawal of labour".

[192] Finnemore *Introduction* 111.

2 9 5 Affiliation

Affiliation is a characteristic of the South African labour market, and arises where a union becomes an affiliate member with a larger trade union federation or where a trade union/federation aligns itself with a particular political party, as demonstrated by the alliance between the ruling party, the African National Congress ("ANC") and COSATU.[193] Unions might also align themselves with international bodies that subscribe to similar views, interests and policies.[194] International support of like-minded unions overseas could bring pressure to bear on certain employers, particularly if the latter exports its commodities and would not want to face an international union boycott.[195]

2 9 6 Lobbying

Lobbying of the government by more powerful unions and federations might result in more favourable conditions for workers should the trade unions/ federation successfully advocate for required changes at the macro-economic level. One potential result of petitioning is pro-labour legislation, a good example being some of the perceived labour-friendly rights provided for in the LRA.[196]

2 9 7 The media

Use of the media, be it by means of advertising campaigns or other uses of radio or television channels, the printed media or the internet, serves as a mechanism through which union mobilisation can be initiated and promoted.[197] Bad press and

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[193] A further example of this, from the international perspective, is offered by the traditional affiliation between labour and the Labour Party in Britain, as discussed in chapter 4.

[194] Examples of these vary from the Organisation of African Trade Union Unity ("OATUU"), the International Trade Secretariats ("ITS") and the International Confederation of Free Trade Unions ("ICFTU"). See Nel *Theory and Practice* 116-117, and Finnemore *Introduction* 111.

[195] Finnemore *Introduction* 111.

[196] The role played by organised labour in the context of the formation of South Africa's labour legislation, is discussed in greater detail in chapter 12 below. See further Finnemore *Introduction* 110, who states:

> "[M]ost unions in the established democracies seek influence through close linkages with political parties or lobbying so as to ensure that their members' needs are met. Political influence is a major source of power to trade unions in achieving a more beneficial legal and economic environment that is supportive of trade unionism".

[197] An excellent example of how the media can be put to good use by trade unions, was the positive feedback generated by SATAWU's decision not to allow its workers to off-load the cargo of the Chinese

publicity has the potential to seriously harm companies financially and will very often form a powerful tool of negotiation.[198] However, negative press can also have a harmful impact on organised labour itself. In this regard, the understandable reams of media coverage dedicated to the tragic events at Marikana in August 2012, are but one example.[199]

2 9 8 Benefit schemes

Benefit schemes, as offered by numerous contemporary trade unions and federations, play a prominent, albeit indirect, part in assisting unions to further their aim of improving conditions for their members. These schemes, offered individually by trade unions capable to do so in light of their financial abilities and the particular needs of their membership base, are designed to facilitate member upliftment by means of social benefit programmes. Included herein are, *inter alia*, membership insurance policies, education and bursary programmes and financial assistance.[200] These

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freighter "An Yue Jiang", or transport such cargo by road, from the Durban harbour Container Terminal. It was reported that the ship in question was transporting ammunition and weaponry, with its alleged destination being Zimbabwe, during a critical phase of the elections held in that country during April of 2008. See in this regard Anonymous "Union refuses to touch Zim arms" (17-04-2008) *News24* <https://www.news24.com/SouthAfrica/News/Union-refuses-to-touch-Zim-arms-20080417> (accessed 2-08-2017).

[198] Finnemore *Introduction* 111.

[199] See in this regard, for a selection of media examples: S Hlongwane "Has Cosatu Drifted Away rom Its Orginal Mission?" (29-08-2012) *Daily Maverick* <https://www.dailymaverick.co.za/article/2012-08-29-has-cosatu-drifted-away-from-its-original-mission/> (accessed 2-10-2017); E Mckaiser "Marikana: A Story About Unresponsive Leadership" (20-09-2012) *News24* <https://www.news24.com/Columnists/EusebiusMcKaiser/Marikana-a-story-about-unresponsive-leadership-20120920> (accessed 2-10-2017); H Swart "Labour Action: A Breakdown in Collective Bargaining" (28-09-2012) *Mail & Guardian* <https://mg.co.za/article/2012-09-28-00-labour-action-a-breakdown-in-collective-bargaining> (accessed 2-10-2017); K Patel "Analysis: NUM - Rich History, Unforgiving Present" (05-09-2012) *Daily Maverick* <https://www.dailymaverick.co.za/article/2012-09-05-analysis-num-rich-history-unforgiving-present/> (accessed 2-10-2017); D Faku "NUM, AMCU rivalry goes beyond Marikana graves" (27-08-2017) *IOL/Business Report* <https://www.iol.co.za/business-report/num-amcu-rivalry-goes-beyond-marikana-graves-10955731> (accessed 2-10-2017). See further P Alexander "Marikana, Turning Point in South African History" (2013) 40 *Rev Afr Pol Econ* 605 605-619; Anstey (2013) *SAJLR* 133 133-145; M Bolt & D Rajak "Introduction: Labour, Insecurity and Violence in South Africa" (2016) 42 *J SA Stud* 797 797-813 and L Sinwell "'AMCU by Day, Workers' Committee by Night': Insurgent Trade Unionism at Anglo Platinum (Amplats) Mine, 2012–2014" (2016) 42 *Rev Afr Pol Econ* 591 591-605.

[200] Venter et al *Labour Relations* 83; Nel *Theory and Practice* 118. For a succinct and recent overview of the types of services and "benefit schemes" being offered by South African unions, see Barnard & Botha (2018) *SA Merc LJ* 228-231. The authors list, *inter alia*, the following services [228-229]: Funeral

schemes make joining a union all the more attractive for potential members, who receive a direct return on their membership dues. Along with pension and provident funds,[201] investment power can be harnessed by means of the sizeable funds and assets controlled by contemporary unions. This capital, for example, may be used to acquire a share in the company (or companies) operating within a particular industry, leading to a measure of economic control.[202] The funds being potentially held with such union investment companies, are sizeable. Finnemore, citing Tangri and Southall,[203] placed it at approximately R2 billion as far back as 2008.[204]

2 9 9 Political power

The final "power resource" to achieve union objectives, is that of political power – which has been referred to at different stages in the earlier discussion.[205] Suffice it to say that organised labour, as potential influencers of member ideologies, are potentially in the situation where favourable concessions can be extracted in exchange for direct or indirect support of political parties in the lead up to local, provincial or national elections. Conversely, were organised labour to garner membership support in opposition to certain state policies, this too could yield desired concessions.[206]

The importance of power and how it is wielded in the context of an adversarial labour relations system cannot be over-emphasised. Achieving and maintaining power is essential and allows the trade union to accomplish further objectives. The strength of the union and its acquisition of influence is dependent upon the solidarity of its members and the latter's determination, together with the union, to participate in

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cover; disability policies; indemnity insurance; retirement planning; loan schemes; debt-relief services; and medical services.

[201] See Finnemore *Introduction* 99-100 for a succinct discussion about historical developments in this regard.

[202] Finnemore *Introduction* 100-101, 111.

[203] Finnemore at 101 citing R Tangri & R Southall "The Politics of Black Economic Empowerment in South Africa" (2008) 34 699 701.

[204] As explained by Finnemore *Introduction* 100-101, the management of these funds, have not been without significant issues. For succinct details on the nature of corruption, and the hundreds of millions of Rands ostensibly lost within certain union investment bodies/pension fund schemes, see G Heald *Why is Collective Bargaining Failing in South Africa?: A Reflection on How to Restore Social Dialogue in South Africa* (2016) 58-62, and his discussion about incidences at COSATU's *Kopana Ke Matla* investment arm, SACTWU's *Canyon Spring Investments*, SACCAWU's *Litigate* and SAMWU's provident/pension fund.

[205] See § 2 7 4 above regarding the discussion of the tripartite alliance.

[206] Finnemore *Introduction* 111.

collective bargaining.[207] In turn, member involvement is to a large extent determined by effective leadership through a union structure that functions properly and efficiently.[208]

2 10 Impact of trade unionism on employers

The focus thus far has been on two role players in the working environment, namely employees and their trade unions. Furthermore, the discussion has tried to unpack the relationship between trade unions and its members (or potential members). In the remaining two sections (and for the sake of completeness) attention will be paid to the actual impact of trade unionism on employers and the evidence of the actual impact of trade unionism on employees.

2 10 1 What do unions do?

Bhorat et al state:

> "Given South Africa's persistent high unemployment levels, sclerotic competitiveness, and the perceived political power of the union movement, the impact that trade unions may have on raising average wage levels has long dominated the debates around trade union power and job creation."[209]

In this regard, a pertinent question can be asked: Are trade union members the only beneficiaries from organised labour? And at what cost to the economy – if at all – do such benefits arise? These are the key considerations to be explored in this section.

One seemingly contradictory point of departure that arose in the 1980s, which also gave rise to academic debate that lasted well into the 2000s, is that employers also find economic benefit from the existence and functioning of trade unions. This view of the interplay between organised labour and employers in the context of modern labour relations, stems in no small part from the research of Freeman and Medoff, in

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[207] Bendix *Industrial Relations* 172. See further F Barker *The South African Labour Market: Theory & Practice* 5 ed (2008) 88, who explains the following points as factors influencing a union's "strength and impact": (i) Union density; (ii) Capacity to mobilise; (iii) Labour institutionalisation (this being the extent to which worker and union rights have been incorporated into the labour relations' system); and finally, (iv) Union structures (the extent to which that union has the capacity/infrastructure to manage complex/contested labour issues).

[208] Bendix *Industrial Relations* 172.

[209] Bhorat et al "Trade Unions" in *Africa & Economics* 649-650.

particular, their seminal work "What Do Unions Do?"[210] published in 1984.[211] By way of brief summary, Wrigley states as follows:

> "The role of trade unions in Western industrialised societies became a highly controversial issue in the last two decades of the twentieth century. In an age of widespread renewed belief in the efficacy of free-market economies, many economists and politicians saw them as blocks on the working of the free market. In contrast, many people who desired protection in 'the flexible labour market' saw more their 'sword of justice' role. In 1984, Freeman and Medoff, two Harvard economists, observed that unions had two faces, 'a monopoly face' and 'a voice/response face', and concluded: 'If one looks at the monopoly face, most of what trade unions do is socially harmful. If one looks at only the voice/response face, most of what unions do is socially beneficial.'"[212]

2 10 2 Monopoly and collective voice

The "two faces" theory of Freeman and Medoff, speaks of the "undesirable monopoly face – which enables unions to raise wages above the competitive levels which results in a loss of economic efficiency"[213] – and is juxtaposed against the "more desirable face" of the collective voice, "which enables unions to channel worker

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[210] Freeman RB & JL Medoff What Do Unions Do? (1984) Basic Books, New York. The initial basis of the research was initially outlined in Freeman RB & JL Medoff "The Two Faces of Unionism" (1979) 57 *Public Interest* 69.

[211] DG Blanchflower & A Bryson "What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?" (2003) 25 *J Lab Res* 383 383, in speaking of the "enormous impact" of the book, reason it to be "the most famous book in labor economics and industrial relations". See further BE Kaufman "What Do Unions Do? – Evaluation and Commentary" (2005) 26 *J Lab Res* 555 588 who posits:

> "Most books in the social sciences quietly slip into oblivion soon after publication. Very few remain frequently cited 20 years later and only a handful merit a retrospective symposium. One of these books is Freeman and Medoff's What Do Unions Do? When it was published, a reviewer labeled the book 'a landmark in social science research' Two decades later this verdict still rings true" [references omitted].

[212] C Wrigley *British Trade Unions Since 1933* (2002) 81, quoting Freeman & Medoff Unions 246. Kaufman (2005) *J Lab Res* 589 explains it as follows:

> "The thesis of WDUD ['What Do Unions Do?'] is that unions have both beneficial and harmful effects on the social balance sheet but that the former outweighs the latter. F&M [Freeman & Medoff] first developed a new 'two faces' theory of unions to provide intellectual support for this proposition; they then subjected each facet of union behaviour to empirical scrutiny through detailed statistical analysis of numerous data sets. The theory and empirical evidence spoke with one voice: unions are neither saints nor sinners but on a balance make a positive contribution to our economy and society."

[213] Blanchflower & Bryson (2003) *J Lab Res* 383. The authors explain that the "inefficiency arises because employers adjust to the high union wage by hiring too few workers in the union sector" [Blanchflower & Bryson (2003) *J Lab Res* 383].

discontent into improved workplace conditions and productivity".[214] The positive effect of unions, as put forward by Freeman and Medoff specifically with regard to workplaces (as opposed to broader societal benefits),[215] is to be found in the ability of trade unions to enhance productivity through bargaining for "more rational personnel policies" and "reducing organizational slack".[216] As a result, the employer becomes more efficient and the employee can work more productively as a result of the increase in workplace morale.[217] Subsequent studies have pointed to possible higher productivity benefits through the involvement of organised labour by means of a reduction in worker turnover, how the "shock-effect" of unionisation can lead to managerial focus on efficiency, and increased levels of worker motivation.[218]

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[214] Blanchflower & Bryson (2003) *J Lab Res* 383-384. See further C Mulvey "The Impact of Unions: On Economic Welfare: A Short Survey" (1991) 2 *ELRR* 45 43-50 for a succinct overview of the theory.

[215] See for instance the points by Kaufman (2005) *J Lab Res* 587 on the "social rationale" underlying why trade unions are necessary to serve as a "protective device" and "political counterweight" against "the substantial influence of the wealthy and business class" – which understandably ties in closely with the various aspects discussed above on why members seek to join unions.

[216] Kaufman (2005) *J Lab Res* 563. See further Kaufman (2005) *J Lab Res* 563-567, in assessing the Freeman & Medoff theory in this regard. With this being said, Kaufman's analysis of the positives to be associated with the "collective voice face", by no means amounts to a wholesale agreement – see Kaufman (2005) *J Lab Res* 573-583.

[217] T Aidt & Z Tzannatos *Unions and Collective Bargaining: Economic Effects in a Global Environment* (2002) 26, in paraphrasing from the theories of Freeman and Medoff pertaining to the "organizational view" of unions state as follows:

> "Unions facilitate worker-participation and worker-manager cooperation in the workplace. This can have efficiency-enhancing effects that jointly benefit workers and management. More specifically, the economic benefits, which are referred to as participatory benefits, arise from a number of sources".

The authors discuss the following points regarding the benefits associated with unions, given their presence within the internal dynamic of the workplace, including *inter alia* the following: (i) that the union functions as the collective voice of the workforce, thereby improving bi-directional communication and reducing employee turnover and facilitating on-site training; (ii) facilitating various structural mechanisms within the workplace to "reduce the likelihood of costly disputes"; (iii) increasing the likelihood of the acceptance of agreements between the workers and the employer; and finally, (iv) increasing productivity through improved communication potentially resulting in necessary adjustments to manufacturing processes – Aidt & Tzannatos *Unions & Collective Bargaining* 26-27.

[218] For a succinct summary of these, and related discussion, see BE Kaufman "What Unions Do: Insights From Economic Theory" (2004) 25 *J Lab Res* 351 373-374. Kaufman (2005) *J Lab Res* 560 furthermore points to the argument of Mitchell & Erickson [DJB Mitchell & CL Erickson "De-Unionization and Macro Performance: What Freeman and Medoff Didn't Do" (2005) 26 *J Lab Res* 183 183-208], regarding "macroeconomic stability/growth", and how unions promote efficiency within the market by stabilising "aggregate demand by taking wages out of competition and preventing a deflationary downward spiral of wages and conditions during recessions and depressions". They essentially do this by means of "redistributing income from employers and shareholders with a lower propensity to consume to workers with a higher propensity to consume [that is, spend money on purchasing goods

This argument, however, is not settled.[219] There were critical and contrary arguments against the notion that employer benefits ultimately outweighed the costs of the pro-member focus of organised labour, particularly in the US.[220] Given how influential Freeman and Medoff's research was, the debate was widespread and formed part of a wider international examination of the impact of organised labour on national and local labour markets. Despite recognition of the importance of the "organisational view" theory introduced by Freeman and Medoff[221] (suitably adjusted

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and stimulating the economy]." Therefore, employers (and society as a whole) benefit in this manner from the existence of organised labour, and their ability to redistribute income for the greater good. See further Aidt & Tzannatos *Unions & Collective Bargaining* 26.

[219] JT Bennett & BE Kaufman "What Do Unions Do?: A Twenty-Year Perspective" (2004) 25 *J Lab Res* 339 339 state in this regard, by way of background:

> "Labor unions are at least as old as industrial economies and have been the subject of debate and controversy for just as long. All sides agree that the objective of unions is to advance the interests of their worker members, and towards this end they exert pressure on employers and governments for improved terms and conditions of employment. Controversy quickly flares, however, once the discussion moves beyond this point. Two issues, in particular, occupy center stage. The first is one of fact, and concerns the effects of unions. Central questions include: how do unions affect wages?, firm performance?, labor market efficiency?, workers' welfare?, and the political process? The second issue involves evaluation and judgement: are the methods unions used to achieve the objectives consistent or inconsistent with the widely shared ethical and legal principles? And, would social welfare be advanced by encouraging or discouraging additional unionism? Twenty years ago, this debate was taken to a new level with the publication of *What Do Unions Do*? by Richard Freeman and James Medoff… In the first paragraph of their book, they observe, 'For over 200 years, since the days of Adam Smith, economists and other social scientists, labor unionists, and businessmen and women have debated the social effects of unionism. Despite the long debate, however, no agreed-upon answer has emerged to the question: What do unions do?'" [their emphasis].

[220] See for instance the following: WH Hutt "The Face and Mask of Unionism" (1983) 4 *J Lab Res* 197 197-211; JT Addison "What Do Unions Really Do? A Review Article" (1985) 6 *J Lab Res* 127 127-146; JT Addison & JB Chilton "Can We Identify Union Productivity Effects?" (1993) 32 *Ind Rel J Econ Soc* 124 124-132; P Turnbull "What Do Unions Do Now?" (2003) 24 *J Lab Res* 491 491-527; BT Hirsch "What Do Unions Do for Economic Performance?" (2004) 25 *J Lab Res* 415 415-455 and Mitchell & Erickson (2005) *J Lab Res* 183 183-208. Hutt's 1983 article is particularly scathing of the Freeman & Medoff contribution upon its release, where is said in conclusion:

> "Without doubt, FM's [Freeman & Medoff's] article and the book into which it is to be incorporated will be widely quoted as proof of the beneficence of union activities. Yet, FM merely assert; they do nothing to prove that the inegalitarian and impoverishing consequences of the strike-threat system have been more than countervailed by the occasional positive side of union performance in raising productivity. The logic and evidence still point dramatically and diametrically the other way" Hutt (1983) *J Lab Res* 210].

[221] See in general, for an overview of Freeman & Medoff's theory, the following: RB Freeman & JL Medoff "Trade Unions and Productivity: Some New Evidence on an Old Issue" (1984) 473 *Ann Am Acad Pol Soc Sci* 149 149-164; JF Burton "Editor's Introduction: Review Symposium – What Do Unions Do? By Richard B. Freeman and James L. Medoff" (1984) 38 *ILRR* 244 244-245; PW Miller "Trade

given the changing fortunes of unions over time in the US),[222] the overall retrospective consensus is that in the long-term, organised labour is *mostly* not beneficial to the (average) unionised employer and, furthermore, the apparent benefits of unionism that existed in the 1980s are no longer a definitive counterbalance to the accepted downsides of unionism.[223]

2 10 3 International perspectives

Last-mentioned statement pertaining to Freeman and Medoff's theory in the context of the US is purposefully *not* absolute. The reason for this is simply that it remains a fluid viewpoint – with more contemporary economic-based research calling into question the long-held arguments that countered the two faces theory.[224] It is

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Unions and Job Satisfaction" (1990) 29 *Aus Econ Papers* 226 226-248; Mulvey (1991) *ELRR* 45 45-64; P Miller & C Mulvey "What Do Australian Unions Do?" (1993) 69 *Econ Rec* 315 315-342; Wrigley *British Trade Unions Since 1933* 1 81-86; Blanchflower & Bryson (2003) *J Lab Res* 383 383-414; Bennett & Kaufman (2004) *J Lab Res* 339 339-349 and RB Freeman "What Do Unions Do? – The 2004 M-Brane Stringtwister Edition" (2005) 26 *J Lab Res* 641 641-668. For an overview of the importance of the book, and its impact on labour economics, see FI Williams & RC Hoell "Understanding and Quantifying the Impact of Freeman and Medoff's 'What Unions Do?' a Quarter of a Century Later" (2011) 9 *J Bus Econ Res* 13 13-27.

[222] Williams & Hoell (2011) *J Bus Econ Res* 25 state in this regard:

> "Moreover, in the past 25 years since Freeman and Medoff (1984) published their book, the US economy, in general, and the US labor market, in particular, has undergone substantial structural change. Globalization has emerged as a new and growing trend, bringing with it an increased use of and dependence on information technology. Additionally, the recent recession may change the face of the US and global economy. Dealing with these changes poses the biggest challenge to unions today. Perhaps in the next 25 years we will be able to look back and see how unions met these new challenges. Retrospectively, we may be able to see what innovations workers and their organisations developed in response to these challenges, and hopefully we will continue to be able to conclude that what unions actually do is 'improve the well-being of the free enterprise system, and of us all'" [references omitted].

[223] See in this regard Kaufman (2004) *J Lab Res* 351 351-382; JW Budd "The Effect of Unions on Employee Benefits: Updated Employer Expenditure Results" (2005) 26 *J Lab Res* 669 669-676; Kaufman (2005) *J Lab Res* 555 555-595; and RA Epstein "Labor Unions: Saviors or Scourges" (2013) 41 *Cap U LR* 1 1-33. Furthermore, it remains equally apposite that opinions on the aforementioned would no doubt be heavily influenced depending on which side of the employer-worker/union-member divide one was to be found. See for instance SR Sleigh "What Do Unions Do? – A Unionists Perspective" (2005) 26 *J Lab Res* 623 623-640, compared to K McLennan "What Do Unions Do? – A Management Perspective" (2005) 26 *J Lab Res* 597 597-620. However, a final point to make is that the aforementioned statement applies specifically to the downsides associated with *employers*. Therefore, the broader question of whether or not organised labour also effects a positive influence on society as a whole, spanning considerations of worker protection against exploitation, and the possible socio-economic-political role of unions, is not taken into account in this context.

[224] See in this regard S Deakin "The Contribution of Labour Law to Economic Development and Growth"

impossible to make a definitive statement in a field of study (measuring the costs or benefits of unions) that has seen a multitude of studies, in a multitude of countries and a multitude of industrial sectors, spanning across the ebb and flow of decades of union prevalence – all while subject to a multitude of political and economic variables. Aidt and Tzannatos – in their comprehensive multi-national study under the auspices of the World Bank[225] – state the following regarding the underpinnings of the union cost/benefit query:

> "From a theoretical perspective, the net benefit/cost of unions is ambiguous and dependent on the relative size of three components.[226] These in turn depend on the economic, political, and organizational environment in which collective bargaining takes place. The economic environment affects both the monopoly costs and the participatory benefits. The political environment determines the rent-seeking activities of unions. The organizational environment (bargaining coordination, social partnership, and dispute resolution) affects all three components. Thus, judging the contribution of unions and collective bargaining more generally to the achievement of economic and social outcomes is, at the end of the day, an empirical question".[227]

In turning to this "empirical question", and in concluding their chapters on empirical evidence from micro- and macro-economic studies, Aidt and Tzannatos make the point that local conditions and factors play a deciding part in influencing the observable outcomes and, as such, the data needs to be understood in that light. Specifically, their conclusion regarding evidence from micro-economic studies[228] echoes the above sentiment, in that the effects of unions and collective bargaining are dependent on the specific economic and political environment of that country and industrial sector/relations system. In turn, their conclusion on the evidence from *macro*-

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(2016) 92 *Bull Comp Lab Rel* 19 32-33, and his more recent criticism of the underlying neoliberal stance towards labour regulation (and the associated economic interpretation thereof). His argument postulates that improved statistical techniques, taken over the long-run (as opposed to mere snapshots) again raise the possibility that labour regulation (herein including organised labour/trade unions) sees benefits to the broader market arising from productivity-enhancement, worker motivation and commitment, and "more egalitarian outcomes in wage bargaining and with an increased labour share in the national income" [Deakin (2016) *Bull Comp Lab Rel* 33].

[225] Their research included analysis of more than 1000 primary or secondary studies – see Aidt & Tzannatos *Unions & Collective Bargaining* Appendix 1 & 2.

[226] These being monopoly costs, rent-seeking costs and participatory and dispute resolution benefits – see Aidt & Tzannatos *Unions & Collective Bargaining* 37.

[227] Aidt & Tzannatos *Unions & Collective Bargaining* 37-38.

[228] See Chapter 4 of Aidt & Tzannatos *Unions & Collective Bargaining* 77.

economic studies[229] is that the evidence "in OECD countries is too weak and fragile to warrant generalizations".[230]

Some of the key arguments against the evaluation of the impact of organised labour from a purely economic viewpoint are encapsulated by Turnbull, who almost 20 years after Freeman and Medoff writes:

> "The challenge for economists is to better understand the changing dynamics of union organisation and to more systematically evaluate the outcomes of collective action… Although economists acknowledge that the key question is not so much 'what are unions doing now?' as 'what unions are doing what, and how are employers responding?', their analysis is still wedded to the monopoly model of trade unionism… Another important (limiting) feature of contemporary economic research is that it is predominantly country-based, comparing outcomes between union and non-union workers or workplaces. While the advantage of this approach is to hold fixed the factors that affect the economy in its entirety, it does not necessarily identify or isolate the 'true' structural impact of trade unions."[231]

But in fairness, the above is to be expected when analysing a theory first brought to light at the start of a 1980s America, which was a decidedly different place

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[229] See Chapter 5 of Aidt & Tzannatos *Unions & Collective Bargaining* 120.

[230] Aidt & Tzannatos *Unions & Collective Bargaining* 120. They continue further by stating that:
"[T]he interaction cannot be analyzed in isolation from the general economic and political environment in which bargaining takes place, as industrial relations develop endogenously in response to country-specific economic, legal and political conditions. It is therefore dangerous to extrapolate results derived from average cross-country performance to specific countries" – see Aidt & Tzannatos *Unions & Collective Bargaining* 120.

[231] Turnbull (2003) *J Lab Res* 512-513. Turnbull (2003) *J Lab Res* 491-492 states further on this point:
"Unfortunately, empirically based studies of what unions do… rarely engage in any systematic way with theoretical models of trade unionism, nor do they attempt to distinguish between them. This reflects the underdevelopment of economic theories of union bargaining goals as well as standard models of union behaviour. These models are simply not robust to what most labour economists would regard as reasonable changes in various assumptions about the economic environment, leaving only the theoretical prediction that unions raise wages above the alternative (competitive) wage level… Pencavel [J Pencavel *Labor Markets under Trade Unionism: Employment, Wages, and Hours* (1991)] goes further, arguing that this ignorance of union objectives – why unions do what they do – has been exploited by labour economists precisely 'because it has allowed them to specify very convenient forms for union objectors without having to deal with objections to the effect that these forms conflict with a heavy weight of empirical evidence'" [references omitted].
See also E Magnani & D Prentice "Did Lower Unionization in the United States Result in More Flexible Industries?" (2010) 63 *ILRR* 662, who in studying the potential impact of unionisation on the flexibility (or lack thereof) in productivity in US manufacturing between 1973 and 1996, and the associated costs, concluded that "output flexibility varies enormously across industries", and that their statistical simulations "cannot explain the dynamics of the relationship between unionization and flexibility over time".

economically and socio-politically to today.[232] Therefore, in due acknowledgement of Freeman and Medoff's research (along with numerous others) having been born in a context arguably far removed from the labour relations paradigm of current society – what then of the situation in South Africa?

2 11 Impact of trade unionism on workers in South Africa

2 11 1 Basic concepts, wage inflation and economic models

As is the case with any endeavour to measure the impact of unionism on employers, a definite answer to the positive or negative impact of trade unions on workers is unlikely to be found. Methodologies in approach to datasets change, and the analysis, understandably, is intimately related to what statistical information is available (and the accuracy thereof). Regardless, certain basic points can be distilled from the literature.

Bhorat et al have the following to say regarding the nature of South Africa's labour economy:

> "As an upper middle-income country within Africa and the continent's largest economy, South Africa often attracts specific interest in terms of its economic growth and development dynamics. This is of course also in part a function of the country's unique history, based on the notorious system of apartheid. Often under-appreciated is the extent to which this history of racial segregation and discrimination has generated so many of the outlier features of this economy. From high levels of spatial segregation and a very small informal economy, to extraordinary economic and social inequalities amongst the citizens of the country, and a surprisingly deep-inherited social assistance scheme—South Africa remains a country of unusual and unexpected statistics. Nowhere is this feature more evident than in the labour market of this economy."[233]

This in mind, Venter et al state that "it is easily shown that where wages are

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[232] Kaufman (2005) *J Lab Res* 556 makes the obvious, but necessary, point regarding Freeman & Medoff's treatise:

> "[I]t must be recognised that WDUD ['What Do Unions Do?'] was developed largely in a North American context and from the disciplinary perspective of economics. Although at a broad level both the theory and empirical analysis in WDUD are relevant to other types of industrial relations systems, in main outline the book is about American-style business unions in an institutional framework of Wagner Act legislation [discussed at § 7 3 11 below] and decentralized bargaining. Likewise, both authors are economists, and thus the intellectual orientation of the book, while broadly conceived, is towards economic questions, models, and methodology."

[233] Bhorat et al "Trade Unions" in *Africa & Economics* 641.

determined by collective bargaining, there will be higher levels of pay than if employees had to rely on the natural generosity of spirit that may (or arguably may not) exist among employers".[234] The simple premise is that collective bargaining sees higher wages and since trade unions are intimately related to collective bargaining, organised labour drives wage inflation.

The use of the term "inflation" in the preceding sentence, requires a brief explanation in and of itself. In this regard, Mohr explains that "[t]here is no lack of possible causes for inflation", with it being a "complex, dynamic process which cannot be ascribed to a single fundamental cause and which sooner or later directly or indirectly involves most participants in the economic process".[235] Venter et al, in turn,

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[234] Venter et al *Labour Relations* 115. The authors state further that three primary effects of organised labour on that of wages, have been identified as the: (i) Impact effect; (ii) Ratchet effect; and (iii) Rigidifying effect. Simply put, the first refers to the notion that "the largest increases an employer will ever grant are when it bargains with a union for the first time", and that employer "feels the impact of collective bargaining" (Venter et al *Labour Relations* 115). The second refers in turn to how, when organised labour has brought about an effect on wages through collective bargaining, once the wages have gone up – they remain up – and do not return to prior levels, even when "there may be an oversupply of labour, or the demand in the market for the employer's product, or indeed demand over the entire economy is falling" (Venter et al *Labour Relations* 115). The third and final effect, that of the rigidifying effect, pertains to the occurrence that – following involvement in wage negotiations by unions – "they tend to maintain the existing pattern of wage differentials in the face of relative wage movements" (Venter et al *Labour Relations* 115). In other words, a more natural state of market movements, tracking as it does relative shifts within the economy, is stultified as a result of organised labour involvement. With this being said, in exploring this "rigidifying effect" further, see the contrasting views of Bhorat et al, who in their comparative research (based on the World Bank's "Doing Business Survey" of 2013), state as follows:

> "South Africa, falling into the upper middle-income range, exhibits rankings of the indices for firing costs and non-wage labour costs that are all below the means for its income-level category [as] well as the world means. However, the measures for the difficulty of hiring and firing and rigidity of hours are above the respective means, more remarkably for the difficulty of hiring index. Thus, South Africa's higher than global average measure of aggregate labour market rigidity is primarily driven by the difficulty in hiring. These results suggest that South Africa's labour legislation translates into a labour market that is relatively flexible in terms of hiring and firing costs – that is, not overly regulated. In these respects, the greater legislative requirements regarding the procedures to hire workers, in particular, introduces a degree of inflexibility. The World Economic Forum (2013) also had similar findings with regard to the South African labour market" – see Bhorat et al "Trade Unions" in *Africa & Economics* 648.

The authors conclude the above by stating:

> "This notion of rigidity in hiring procedures has been supported quite widely in the local labor literature… Despite these features, the discourse around South Africa's labor markets often serves to perpetuate the perception of a more broadly overly regulated or rigid market, partly based on seemingly political influential trade unions" – Bhorat et al "Trade Unions" in *Africa & Economics* 649 [references omitted].

[235] See P Mohr "On Inflation" (2008) 76 SAJE 1 4, who also states further:

refer to the two readily accepted variances thereof: Firstly, the so-called "demand-pull" inflation, based on the principle that "excess demand drives up prices"[236] – and secondly, "cost-push" inflation.[237] The latter involves the scenario where increased wages cause an increase in the demand for goods (since persons with more money to spend, purchase more goods), and this, in turn, causes prices for goods to increase (which in effect, is but a manifestation of demand-pull inflation) – which ultimately causes demands for higher wages. Put differently, it amounts to a "wage-price spiral", since "increased wages push up prices, [and] increased prices bring forth [increased] wage demands".[238] It is in this "wage-price spiral" that unions can potentially have the biggest and most direct impact, since organised labour (by means of collective bargaining/industrial action and the like) can compel employers to raise wages above the rate that would be efficient, relative to the market. When this happens, the employer (as manufacturer), passes those extra/increased costs on to the consumer, who now pays more for their products. The consumer, in turn, who more often than not is also a worker/employee, would then expect a wage increase in order to afford the increased costs of the goods. Were these consumer/ employees to turn to organised labour in order to achieve that, one then sees what is termed the "classic two-equation model of cost-push inflation".[239] In other words, the "rate of change of prices is, in part, a function of wage increases, and the rate of change of wages, is, in part, a function of the rate of change in prices"[240] – thereby the spiral or circle of inflation.

However, inflationary data and the extent to which this is influenced by organised labour is but one side of the proverbial coin. In examining the economic effects of organised labour within the broader macro-economic model, Venter et al unpack a selection of the economic models that have been used.[241] Of interest for the purposes

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"Ask any group of people and a host of culprits will be identified, including the government, the central bank, the farmers, big business, trade unions and the oil-producing countries. Invariably the blame will be laid at someone else's door" – Mohr (2008) *SAJE* 4.

[236] Venter et al *Labour Relations* 122. The authors define this in the alternative as being where "too much money [is] chasing too few goods".

[237] 122.

[238] 122.

[239] 122.

[240] 122.

[241] Venter et al *Labour Relations* 119-121 identity and discuss three such models, namely the union behaviour, collective bargaining and strike action models.

of this study, is the so-called "insider-outsider" theory,[242] which has at its core the notion that:

> "Unions represent the 'insiders', who can impose their will through industrial action – the larger the workforce, the more powerful the insider group. The theory postulates that wage rates are determined for the benefit of the insiders, with no concern for the outsiders, who are prevented from wage competition with existing employed members by the inelasticity of substitution [of the workforce that] the union imposes on the employer".[243]

2 11 2 Unionised and non-unionised workers

The discussion above brings to light an important consideration – about who the union represents and, consequently, where the benefits associated with unionism and the impact thereof on the broader economy lie. Barker states the following:

> "Most researchers accept that unions cause an increased wage differential between unionised and non-unionised sectors… If a union bid ups the wages in a unionised sector, it may lead to lower employment in that sector. In turn, this may mean an oversupply of labour in the non-unionised sector, which will lead to lower wages there. Unions may thus cause an increase in the wage differential between unionised and non-unionised sectors."[244]

This quotation highlights that, apart from the fact that unionisation does have an

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[242] Venter et al *Labour Relations* 121 who cite A Lindberg & DJ Snower [(1988) *The Insider-outside Theory of Employment and Unemployment* MIT Press, Cambridge MA].

[243] Venter et al *Labour Relations* 121. The authors postulate further that the abovementioned is "of course consonant with those views that suggest that unions represent a labour elite, and take no cognisance of the impact of their wage bargaining on overall levels of employment" – see Venter et al *Labour Relations* 121.

[244] Barker *Theory & Practice* 95. See the further discussion regarding how this effect plays out, in Barker *Theory & Practice* 95-96, which speaks to the so-called "spillover effect", which refers to "the decline in non-union wages caused by displaced union workers supplying their services in the non-unionised labour market – they will [therefore] 'spill over' to the non-unionised sector" (Barker *Theory & Practice* 96). Further hereto, however, is the point regarding the so-called "threat effect", which sees the opposite effect resulting from an employer who is attempting to *prevent* unionisation by means of increasing the wages within that non-unionised sector, as motivation for its employees to *not* join a union. Compare this with the so-called "superior worker effect", which accepts that whereas initially, higher wages might attract more workers to the unionised sector, it also means that the employer has more choice regarding who is employed – which can result in a "superior" worker (in terms of skills and productivity ability) being employed (relative to the entire job-seeking market). Therefore, over time, whereas the unionised sector sees higher wages being paid, this might simply be as a result of superior workers being employed in that sector, with the employer benefiting from their increased skills and productivity – and therefore, paying more for those services. The fact that the sector is unionised, is therefore less of a determinant and influence on the higher wages than might be expected. See in this regard Barker *Theory & Practice* 96.

impact by virtue of wage increases, the benefit is only applicable to *union members* and not the workforce in general. This means any benefits enjoyed by union members (or employers, as suggested at the commencement of this section above), would need to be offset against the possible negative consequences experienced by *non*-union members. However, a vital consideration in the above is the existence of the formalised bargaining council structure within the South African labour relations system.[245]

2 11 3 Bargaining council wage premium

Whereas bargaining councils – strictly speaking – fall outside the immediate ambit of this study, they do play a crucial role in regards to the question of benefits accruing to union members, versus that of *non*-union members.[246] The reason for this, simply put, lies in the possibility of the extension of bargaining council agreements, to all workers that fall within that specific industrial sector. In other words, organised labour can collectively bargain for improved wages or related employment conditions, but these "improved terms" would then – by virtue of that extension – become applicable to members *and* non-members.[247]

Research into the bargaining council wage premium in South Africa is sparse.[248]

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[245] Discussed in more detail at § 12 4 2 2 below.

[246] In this regard, Bhorat et al state:

"Bargaining councils are the key institutions involved in the statutory system of collective bargaining and wage determination in the South African labour market. Bargaining councils can be established by one or more registered trade unions… for a specific sector and area. Worker interests are therefore represented at bargaining councils by the relevant trade unions" – see H Bhorat et al "Institutional Wage Effects: Revisiting Union and Bargaining Council Wage Premia in South Africa" (2012) 80 *SAJE* 400 402.

[247] Says Bhorat et al (2012) *SAJE* 403: "One of the most contested features of the bargaining council system is the extension of council agreements, including minimum wages, to non-parties". The authors [Bhorat et al (2012) *SAJE* 403 n1] point to s 32 of the LRA as the regulating provision, with the Council in question having to request in writing that such extension be made – however subject to the proviso that "a number of provisions have to be adhered to before the Minister of Labour may approve the extension of the agreement". See further S Godfrey et al *Collective Bargaining in South Africa: Past, Present and Future?* (2010) 123-126. Recent amendments to the LRA, have directly impacted on the aforesaid, with S Godfrey et al "The New Labour Law Bills: An Overview and Analysis" (2018) 39 *ILJ* 2161 2168 stating that "the thrust of the amendments is to make the extension of bargaining council agreements easier". The extent of these changes are discussed in more detail in the appropriate sections in chapter 12.

[248] Bhorat et al (2012) *SAJE* 401 provide analysis of the only paper that had done research in this regard, and state:

Following their analysis (and related revision) of available data, Bhorat et al provide evidence of wage premium percentages, which serves to express the extent to which unions and bargaining councils impact on wages. However, what is also evident is that the method of interpretation of the data brings about a high variance in the final result. For example, the authors fix the bargaining council wage effect at "a fairly high premium of 41%", when simply allowing for "standard controls in the estimation".[249] When incorporating a further control-factor for "job type",[250] this percentage drops down to 28%; when controlling for "job type" and "firm size", a further drop is effected; and when the final controls involving "job type", "firm size" and "non-wage benefits" are included, the union wage premium declines "to just 6%".[251] Therefore, "the union wage gap varies between 41% and 6% depending on the specification utilised."[252] Of further interest is their finding that non-union workers covered by bargaining council agreements see a wage premium of 9.4% over non-union members outside the bargaining council coverage.[253] Union workers within the *public* bargaining council system saw a wage premium benefit of 22%.[254] In effect, therefore, union members outside of the bargaining council system saw a wage premium benefit of approximately 7%,[255] while non-union members nonetheless covered by private and public bargaining councils saw premiums of 8.97% and 10.5% respectively.[256] Therefore, the authors conclude their analysis of wage effects brought about through unions and bargaining councils, by making the following point:

> "There is, however, little consensus on the magnitude of the union wage premium or the best method to correct for the endogeneity of union status, although most of the studies report a premium higher

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> "To our knowledge, the only other paper to have attempted to estimate a bargaining council premium in South Africa was that of Butcher & Rose (2001) [KF Butcher & CE Rouse "Wage Effects of Unions and Industrial Councils in South Africa" (2001) 54 *ILRR* 349 349-374], using 1995 October Household Survey ("OHS") data. As we use Labour Force Survey (LFS) data from 2005 in our study, our contribution is a revised estimate of the bargaining council premium found in Butcher & Rose (2001), using more recent and, arguably, better household survey data."

[249] Bhorat et al (2012) *SAJE* 409.

[250] In other words, controlling for a "permanent", "temporary", "contract", "casual", "seasonal" or "other" type of job type specification – see Bhorat et al (2012) *SAJE* 409.

[251] 409.

[252] 409.

[253] 411.

[254] 411; Bhorat et al "Trade Unions" in *Africa & Economics* 650.

[255] Bhorat et al "Trade Unions" in *Africa & Economics* 650.

[256] 650.

> than 20%. Our study on collective bargaining wage premiums firstly takes cognisance of the fact that wages of workers are dependent on a variety of factors, including individual characteristics, job characteristics, firm characteristics and the type of employment… It appears then that union wage premiums in previous studies may be overestimated because of the exclusion of key controls that capture the nature of the workplaces within which employees work and the types of jobs they find themselves in. This finding highlights both the importance of including firm and work characteristics in the wage equation, as well as the fact that the union wage premium, although significant, is possibly lower than implied in previous studies."[257]

The survey above confirms that, firstly, organised labour *does* have an undeniable direct or indirect (through the bargaining council system) effect on wage inflation, albeit acknowledging the variation in the wage premium percentage, particularly in the context of bargaining councils.[258] Secondly, due consideration must be given to the coverage of, and representation within, the bargaining council system.[259] At the time of their research as above, Bhorat et al stated that "58% of those within the bargaining council system belong to a union", and furthermore that union membership is higher within the public bargaining council system than within the private bargaining council system."[260] Regarding actual figures, by all accounts the number of workers covered by bargaining council agreements in South Africa stands in excess of two million.[261] It

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[257] Bhorat et al (2012) *SAJE* 412-413.

[258] Importantly however, research in this area of labour economics, is frequently based on datasets that are several years old. Case in point would be the work done by Bhorat et al (as above), which was based on calculations gathered from the 2005 Labour Force Survey (see Bhorat et al "Trade Unions" in *Africa & Economics* 650; Bhorat et al (2012) *SAJE* 401). This in turn, was research updating one of the few previous studies done in this regard, namely that by Butcher & Rouse – who based *their* research on the 1995 OHS (see Butcher & Rouse (2001) *ILRR* 350). See further P Armstrong & J Steenkamp (2008) "South African Trade Unions: An Overview for 1995 to 2005" (Working Paper No. 10/08) *Bureau for Economic Research (BER), University of Stellenbosch* 14, who analyse the 1995-1999 OHS, and the biannual Labour Force survey, for the period 2000 to 2005.

[259] See in general, Godfrey et al *Collective Bargaining* 114-123.

[260] Bhorat et al (2012) *SAJE* 405.

[261] Barker *Theory & Practice* 104 states in this regard:

> "There are about 60 councils in South Africa and about one million workers are covered by bargaining council agreements. However, this covers only the private sector, and the bargaining councils in the public sector (central government and local authorities) should also be included. The Public Service Co-ordinating Bargaining Council (PSCBC), for instance, covers another one million workers. There are a further 200 000 workers in the bargaining council covering the local authorities."

Regarding more recent statistics, the Department of Labour's list of registered bargaining councils, as of August 2019, lists 39 national private sector Bargaining Councils, 6 Local Government and Government Bargaining Councils, and 3 Statutory Bargaining Councils – bringing the total to 48. See Department of Labour "Registered Bargaining Councils – August 2019" (2019) < http://www.labour.gov.za/DocumentCenter/Publications/Labour%20Relations/Registered%20Bargaini

must be noted, as pointed out by Maree (writing in 2011), that "collective bargaining is not conducted only in bargaining councils" and that "[a] reasonable estimate of the total coverage of all agreements outside the bargaining council system would therefore be in the vicinity of 350 000 to 400 000 employees".[262] However, when the total employed workforce is considered,[263] then the obvious point to be made is that bargaining council benefits as negotiated by trade unions apply to less than 20% of workers in South Africa.[264]

2 11 4 The impact of organised labour

We have seen that unions do have an impact on member wage levels in South Africa, and that through the mechanisms associated with the bargaining council system, these benefits can also be extended to non-union members. However, the point remains that the percentage of workers impacted hereby, compared to the total workforce in South Africa, is relatively negligible.[265] Thus, union members benefit from

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ng%20Councils%20–%20August%202019.pdf > (accessed 24-09-2019) 1-3. See further South African Institute of Race Relations *Industrial Relations* (2017) 316-318. Lastly, J Maree "Trends in the South African Collective Bargaining System in Comparative Perspective" (2011) 35 *SAJLR* 7 17 (in citing S Godfrey et al (2006) "Conditions of Employment and Small Business: Coverage, Compliance and Exemptions" (Working Paper No. 06/106) *Development Policy Research Unit (DPRU), University of Cape Town* 22-23), points to data available as at 2004, where is stated that 48 bargaining councils saw 2 358 012 of 7 241 951 workers (in the employment grades usually covered by bargaining councils), or 32.6%, being covered. A further 335 420 of 7 241 951 workers (or 4.6%) are covered by means of extensions.

[262] Maree (2011) *SAJLR* 17-18.

[263] As at 2016, this was placed at 15 545 000 – see South African Institute of Race Relations *Industrial Relations* (2017) 307.

[264] Butcher & Rouse (2001) *ILRR* 369, writing in 2001, speak of between ten and sixteen per cent being covered by the Councils. Maree (2011) *SAJLR* 17, citing data from Godfrey et al (2006) *Conditions of Employment* 21, states that "bargaining councils covered only 20.3% of total employment, while the proportion of employees covered by extended agreements came to only 2.9% in 2004". See further Godfrey et al *Collective Bargaining* 114-115. Given the slow decrease in bargaining council numbers, it stands to reason that present numbers (were they available), would not be too dissimilar to what is stated here.

[265] Butcher & Rouse (2001) *ILRR* 369 state in this regard:

> "The labor market in South Africa is criticized for being unduly rigid, placing a great burden on businesses, stifiling growth, and exacerbating unemployment. Unions, charged with having exceedingly high wage premia, and industrial [bargaining] councils, which are said to extend these premia to nonunion workers, are singled out as prime offenders. The heated public policy debate hinges on two questions. First, are union wage premia abnormally high in South Africa? Second, do [bargaining] council agreements extend these premia to nonunion workers? The results in this paper suggest that while the union premia in South Africa are high, they are not nearly as high as previous

a wage premium, but despite the extension of bargaining council agreements, the vast majority of workers still find themselves *outside* of any such benefits by virtue of the (relatively speaking) low levels of bargaining council coverage. All in all, this still represents a state of affairs not out of sync with the rest of the world.[266] According to Godfrey et al, organised labour – while potentially being *one* of the contributory factors to South Africa's unemployment levels – does not appear to play the primary role in this regard that perceptions within broader society suggest.[267]

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estimates suggest… These estimates are roughly similar to estimates using data from other countries such as the United States and the United Kingdom… On the suface at least, the proportion of workers who are affected by [bargaining] council agreements is too small to be the primary reason for unemployment numbers in South Africa."

Regardless of the aforementioned, the authors do make the point that further, direct research into these questions would be necessary and welcomed.

[266] Bhorat et al "Trade Unions" in *Africa & Economics* 659 state in this regard:

"We find that despite a long history in South Africa, trade union membership levels, their impact on average wage levels, and indeed their pursuit of strike action has resulted in a relatively benign economic impact either within-country or when compared with other economies around the world".

[267] Godfrey et al *Collective Bargaining* 25 state as follows:

"Collective bargaining undoubtedly has an important influence on wages and employment. Proponents of market liberalisation often argue that collective bargaining increases wages and, by so doing, reduces employment and raises the rate of unemployment. From here it is only a short step to argue that collective bargaining is a (or even the) major cause of unemployment. This conclusion is, however, questionable, as it is based on hidden assumptions and an over-simplification of a more complex reality. South Africa has a very high rate of unemployment but, contrary to popular perception, high levels of unemployment have plagued the economy for many decades".

See further Godfrey et al *Collective Bargaining* 175-185, who provide an overview of the various research done in this field by economists, and then group these according to those who reason that the bargaining council impact on employment is either "extensive" or "marginal". The economists and their research so considered, are as follows: Moll [P Moll "Compulsory Centralization of Collective Bargaining in South Africa" (1996) 86 *Amer Econ Rev* 326 326, PG Moll "Black South African Unions: Relative Wage Effects in International Perspective" (1993) 46 *ILRR* 245 245-261]; Nattrass [N Nattrass "Inequality, Unemployment and Wage-Setting Institutions in South Africa" (2000) 24 *Journal for Studies in Economics & Econometrics* 129-142, N Nattrass "Wage Strategies and Minimum Wages in Decentralized Regions: The Case of the Clothing Industry in Phuthaditjhaba, South Africa" (2000) 24 873 873-888, N Nattrass "The Debate about Unemployment in the 1990s" (2000) 24 *J Stud Econ & Econ* 73-90]; Schultz & Mwabu [TP Schultz & G Mwabu "Labor Unions and the Distribution of Wages and Employment in South Africa" (1998) 51 *ILRR* 680 680-703]; Butcher & Rouse [Butcher & Rouse (2001) *ILRR* 349-374]; and finally, Bhorat et al [H Bhorat et al (2009) "Analysing Wage Formation in the South African Labour Markets: The Role of Bargaining Councils" (Working Paper No. 09/135) *Development Policy Research Unit (DPRU), University of Cape Town* 1-98]. In summarising these positions, Godfrey et al *Collective Bargaining* 186 again provide an example of how difficult it is to draw incontrovertible conclusions from econometric research in this area. With that being said, due acknowledgement must be paid to the contrasting views being held by different economists (as above) – and that the obvious point to be made is that there certainly is ample support for the negative impact

Whereas the wage premium associated with trade unions *is* something that is quantifiably measurable (with due consideration of the variances demonstrated above), it remains significantly more difficult to measure the possible effects that a visible and active trade union presence could have for all workers within the broader economy. Union members undeniably benefit.[268] Arguably, the general workforce benefit as a result of the greater awareness surrounding employee rights – with unions playing no small part in cultivating this awareness. Whether the latter is enough of a benefit to offset the various negative effects that organised labour ostensibly have on the broader economy, will largely depend on which econometric theory or statistical approach one chooses to subscribe to.[269] This remains a question the answer of which

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of organised labour on the overall economy, and by implication, unemployment levels in South Africa. Nonetheless, in considering their own research, the Godfrey et al assert:

> "[T]he extension of bargaining council agreements have had a minimal impact on unemployment. This is because the proportion of the labour force covered by the extension of bargaining council agreements is very small. By our estimate it was a mere 2.8% in 2004. Assuming that workers covered by bargaining councils had a 20% wage premium, the drop in employment by extending their agreements would be a mere 0.4%. It can therefore be safely concluded that the extension of bargaining council agreements has only made a mininal contribution to unemployment in South Africa" – Godfrey et al *Collective Bargaining* 186-187.

The authors conclude their chapter [entitled "Impact of bargaining councils on wages, benefits and unemployment"] by pointing to the tendencies of economists in commencing their analysis of the effects of collective bargaining from "negative *a priori* assumptions" [their emphasis], rather than focusing on the associated benefits of "higher wages for low-earning workers", the savings on "transaction cost" brought about through the centralised nature of the collective bargaining system, and the reduction in industrial disputes for the duration of the particular council agreement – see Godfrey et al *Collective Bargaining* 187.

[268] Included herein, would be the "inequality-reducing" impact of unions, as highlighted by Armstrong & Steenkamp (2008) *Overview* 35-37 – in that unions potentially see the greatest wage benefit to workers at the lower end of the wage distribution grouping. Put differently, economically "poorer" members, stand to benefit more from organised labour than their "wealthier" union member compatriots, when compared to economically poorer *non-union* workers. See in this regard the discussion at South African Institute of Race Relations [B Sethlatswe] *2013 South African Survey – Industrial Relations* (2013) 456 444, where in considering data from 2011, the difference in monthly wages for the bottom five per cent of earners, the median, and the top 5 per cent for union members – as opposed to non-union members – is respectively as follows: R1,060.00 (member) against R510.00 (non-member) for the bottom 5% grouping; R5,500.00 (member) against R2,400.00 (non-member) for the median grouping; and finally, R20,000.00 (member) against R18,750.00 (non-member) in the top 5% grouping. Therefore, the difference in earnings between union and non-union workers at the top end of the wage spectrum is significantly smaller than the difference at the opposite end of the spectrum. [Note to the reader: the 2016 Industrial Relations component of the South African Survey, referred back to the 2013 Survey (and its 2011 data) as the most recent source in this regard, whilst the 2017 Survey dropped mention of the comparison metric completely.]

[269] Says Deakin (2016) *Bull Comp Lab Rel* 31 in this regard:

> "An improved understanding of the economic effects of labour law reforms is only achievable if data

falls outside the ambit of this study, particularly in light of the fact that all of the available studies, research and analysis referred to in the discussion above are based on datasets that are at least a decade old.

2 12 Conclusion

This chapter sought to provide an overview of some of the dimensions of trade unionism as a basis for the discussion in chapter 4 and further. As a point of departure, the chapter demonstrated the unified and largely homogeneous (global) origins of organised labour, and the communal struggle organised labour experienced in being recognised and accepted across different jurisdictions. The process of assimilation of trade unions (and their regulation) in the UK, the USA and South Africa is considered in detail in the further chapters of this dissertation.

Consequently, and once accepted – as was also the case in South Africa – the chapter sought to provide an overview of the current levels of unionisation in South Africa (relative to international levels), and the impact of trade unions in terms of their resort to industrial action. The variance in available unionisation rates, along with the apparent dearth of accurate statistical and survey data, makes drawing firm conclusions difficult. Regardless, despite contrary views being raised about the actual extent of union strength, as opposed to public/business *perceptions* thereof, union membership encompasses approximately 23% of the employed workforce in South Africa and remains significant. Furthermore, unlawful (unprotected) strike action, which represents one area where consideration of a trade union's accountability to its members is important, remains a persistent feature of the South African labour relations landscape.

The consideration of union categorisation does bring to light how changes in markets, national/international economies and political systems and broader societal views have been reflected in how unions themselves are shaped and moulded within different environments. The so-called business- and entrepreneurial classification of

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are available on the extent to which such laws protect workers' interests, on the one hand, and curtail employer's powers to set terms and conditions of employment and to hire and fire at will, on the other. Generating such data has, however, proved to be a difficult and contentious process… Part of the controversy around these indices arises from the premise underlying them, which is that worker-protective laws necessarily impose a burden on business. No account is taken of possible benefits to be derived from protective labour laws".

unionism is a particularly clear indicator hereof. Related hereto are the changes brought about by the LRA, which grants increased powers to the Registrar of Labour Relations to either cancel the registration or refuse to register in the first place, those entities deemed to be “non-genuine” trade unions. The significance hereof will be discussed in more detail in chapter 12 (in particular) below. These changes were introduced due to real-world examples of associations that had seen the proverbial “gap” in the market, to accrue benefits for themselves at the expense of their members. This is also the first mention of the fact that trade unions do not *always* act in the best interests of those they represent – from there the need to consider trade union accountability. The point remains that whichever way one approaches the categorisation of trade unions, it is a useful exercise to understand the various roles they fulfil in the various sectors of the modern labour relations system.

Similarly, exploring the basic structure of unions lays bare the fundamental principles surrounding the location of the power of trade unions – with the union organogram seemingly designed to allow for the authority of the member, to permeate upwards through the structure. What remains clear, however, is that the likelihood of this actually transpiring, remains deeply rooted in the officialdom and office bearers of the union as discussed in chapter 3 and further below.

The crux of this chapter, however, is to be found in the discussion of the objectives and purposes *of* unions, and the benefits *in* unions. Chief among these objectives of trade unions is to present a mechanism through which the individual worker, bound together with other workers, can utilise their collective power to offset the bargaining power of the employer. It can be accepted that a significant number of countries – including South Africa – are experiencing massive levels of inequality, across all spectrums of their societies and economies. Organised labour, while not a perfect vehicle, serves as one of the best countervailing forces to that inequality. This chapter showed both what mechanisms are used by unions in striving to give effect to that role – and the difficulties in aligning the needs of the collective (as union/membership/workers) with that of the individual (as member/worker). It is this balancing act between individual and collective needs that informs the whole of the dissertation.

Finally, the chapter also considered the economic impact of unions on employers and employees. The discussion serves as an important reminder that – despite what might be commonly held views of the effects of organised labour – analysis often sees

conflicting conclusions. The importance of this lies in it drawing attention to the nuanced approach required in not only unpacking the complexities surrounding organised labour and its place within contemporary industrial relations, but also understanding it as a first step towards possible regulation of trade unions.

CHAPTER 3: AN EXAMINATION OF SOUTH AFRICAN TRADE UNION INTERNAL PROCEDURES

> "As a consequence, the role of the 'union bureaucracy' became even more central to industrial relations than in any other period of British labour history. The implication of such an overview is that the crucial distinction which needs to be drawn is not so much that between the unions and workers, as Friedman emphasises, as the dichotomy within trade unions between the union bureaucracy and the rank-and-file."[270]

3 1 Introduction

Both in conjunction with and in further elaboration of the topics discussed in chapter 2, the purpose of this chapter is to delve deeper into the general understanding of the functioning of trade unions as a precursor to the evaluation of the reception and regulation of trade unions in the three comparative jurisdictions chosen for this study. The introductory quotation above, while referring to 1920s Britain, speaks to perhaps the key aspect of trade unionism to be addressed in this chapter, namely that of the role played by the trade union bureaucracy. Given the overall topic of this study, a proper understanding of the role fulfilled by trade union officialdom *vis-à-vis* their membership is of critical importance. Unions cannot function without officials and representatives, or rather, they cannot function effectively in a modern labour relations system – given its complexities and innumerable laws – without officials and representatives. Of particular importance in this regard, is the trade union constitution. Broadly speaking, any trade union constitution records both the duties owed to the members by the union and the obligations owed to the union by the members. In many instances, it serves as the sole "tangible" document against which the conduct of both union officials and members are to be measured.

In light of these remarks, this chapter will first consider the concept of union democracy, inasmuch as it also encompasses the narrower concept, important for purposes of this study, of trade union accountability. Thereafter, the functioning of union officials, office bearers and trade union representatives within the trade union organisational framework will be explored, in order to gain an improved understanding of the power-dynamics within trade unions. Underlying this discussion are the various

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[270] R Darlington "Strike Waves, Union Growth and the Rank-and-File/Bureaucracy Interplay: Britain 1889–1890, 1910–1913 and 1919–1920" (2014) 55 *Lab Hist* 12, citing Friedman [*Reigniting the Labor Movement: Restoring the Means to Ends in a Democratic Labor Movement* (2008)], [footnotes omitted].

tensions between what must be done in managing a union and the expectations of the broader membership. Furthermore, the complexity and fluidity of power in the context of union administration will also be considered. And, closely related to this, the challenges that result from this complexity of power relationships, as it potentially plays out in the union-member relationship, will be addressed.

After exploring the functioning of the union administration, the focus will shift to the centrality of the trade union constitution. The function and purpose of trade union constitutions will be addressed, after which the development of statutory regulation pertaining to the trade union constitutions in South Africa will be considered. This will be followed by a brief overview of South African case law, at least, for present purposes, the extent to which case law affirms the centrality of the trade union constitution.

In conclusion, the chapter will examine 25 South African trade union constitutions in some detail. In doing so, the discussion will, firstly, identify a series of characteristics common to all of these trade union constitutions, inasmuch as these constitutions regulate aspects of the trade union-member relationship. Thereafter, several aspects unique to specific trade union constitutions will be considered, again to the extent that these are relevant to the union-member relationship. Finally, an overall analysis of these constitutions will be provided. The chapter will conclude with insights important for the remainder of the study.

3 2 Trade union democracy and trade union accountability

> "Within the field of industrial relations, few topics have received such widespread attention from theorists, researchers and policy makers as the democratic government of unions. A substantial body of literature has developed around various normative issues related to union democracy in general and the existence of democracy or oligarchy in particular unions".[271]

Given the focus of this section – namely the internal functioning and procedures of trade unions – these words of Anderson points to the constant need to explore the broader concept of trade union democracy, also as a first step towards understanding the concept of "trade union accountability".[272] Examining what happens inside a trade

[271] JC Anderson "A Comparative Analysis of Local Union Democracy" (1978) 17 *Ind Rel J Econ Soc* 278 278. Regarding what is understood by "oligarchy", see the further discussion at § 3 3 2 below.

[272] Says SM Lipset "The Law and Trade Union Democracy" (1961) 47 *Virg L Rev* 1 in this regard: "Concern with internal government of the trade union is probably as old as the institution itself."

union involves exploring how the union and its representatives interact with its membership and this, in turn, involves exploring the nature of that interaction. However, at the outset, it might be said there is a significant degree of overlap between the democratic internal functioning of unions and the accountability of unions to their members. In order to understand accountability, clarity must first be sought on what is to be understood by "trade union democracy".[273] Flynn explains it as encompassing two key concepts: that of "voice"[274] and "control".[275] The former involves "the influence which the ordinary member has over union policy", whereas the latter speaks to "how ordinary members exert influence over those responsible for implementing policy".[276]

Any reference to union democracy would be incomplete without reference to the works of Prof Clyde Summers[277] – particularly given the significant attention this area of the law has enjoyed in the United States (discussed below).[278] Summers convincingly argues that industrial democracy[279] is wholly dependent on trade union

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[273] Nonetheless, as can be imagined with a concept that has such a lengthy history behind it (as evidenced below), neatly categorising democracy in the context of organised labour is in itself not a simple task. See for instance M Kay "The Settlement of Membership Disputes in Trade Unions" in JR Carby-Hall (ed) *Studies in Labour Law* (1976) 160 163, who sates: "To write about union democracy in the abstract is indeed a vacuous exercise, for the extent and health of the notion is bound to vary from one union to another."

[274] This is not to be associated with more recent research into "worker voice". See in this regard, by way of brief overview, A Bogg et al "Worker Voice in Australia and New Zealand: The Role of the State Reconfigured?" (2013) 34 *Adel L Rev* 1 1-2.

[275] M Flynn et al "Trade Union Democracy: The Dynamics of Different Forms" in G Wood & M Harcourt (eds) *Trade Unions and Democracy: Strategies and Perspectives* (2006) 319 320.

[276] Flynn et al "Different Forms" in *Unions and Democracy* 320.

[277] Says MJ Goldberg "Present at the Creation: Clyde Summers and the Field of Union Democracy Law" (2010) 14 *Emp R & Emp Pol Jnl* 121 121 of his contribution:

> "What Louis Brandeis was to the field of privacy law,' Clyde Summers is to the field of union democracy. Summers, like Brandeis, provided the theoretical foundation for an important new field of law. But unlike Brandeis, Summers also played a central role in building a movement on the ground to put those ideas into practice. He was part of an unlikely coalition of union reformers, political activists, and public intellectuals who banded together to create a movement to bring democratic reform to American unions" [footnotes omitted].

[278] See for instance the sources cited by CW Summers "From Industrial Democracy to Union Democracy" in S Estreicher et al (eds) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 45 50 n28, of the research conducted during the mid-twentieth century in the US.

[279] Regarding what is to be understood under this term, AF Sturmthal "Unions and Industrial Democracy" (1977) 431 *Ann Am Acad Pol Soc Sci* 12 13 states as follows:

> "By far the most attractive attribute of the term industrial democracy is the infinite variety of meanings that can be read into it. The range is indeed bewildering. It reaches from workers' self-management via consultation and codetermination to collective bargaining, and in passing picks up such diverse

democracy. For labour organisations to effect the representation of workers' rights within the workplace (by means of negotiating with the employer), the union as an organisation needs to be democratic to guarantee that the "will of the workers"[280] is properly acted upon in those negotiations.[281] Therefore, in "providing employees an effective voice",[282] unions are the recipients of the "fundamental democratic concept that the power to govern derives its just power from the consent of the governed", and that "the union's power to govern must rest on the consent of the governed as expressed through the democratic process."[283]

This means that any examination of how unions function internally would require consideration of trade union democracy as one of its key points of departure. As mentioned above, any enquiry into trade union democracy is neither new nor singular, with a myriad of authors expressing views on the topic over the years[284] – commencing

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notions as job enrichment and autonomous work groups. It goes back in history to such utopian ideas as eternal social harmony, passes through various forms of industrial engineering designed to make workers accept the social status quo, and reaches to new devices for managing the inevitable conflicts that arise in the context of industrial relations" [footnotes omitted].

[280] See Summers "Industrial Democracy" in *Internal Governance* 46, in citing the Webbs' statement: "Trade Unions are democracies. That is to say their internal constitutions are based on the principle of government of the people, by the people, for the people". See S Webb & B Webb *Industrial Democracy* (1902) v-vi.

[281] Summers "Industrial Democracy" in *Internal Governance* 46-48.

[282] 47.

[283] CW Summers "Public Interest in Union Democracy" (1958) 53 *Nw U L Rev* 610 612.

[284] See in general, in chronological order, the following: W Herberg "Bureaucracy and Democracy in Labor Unions" (1943) 3 *Ant Rev* 405 405-417; P Taft "Democracy in Trade Unions" (1946) 36 *Amer Econ Rev* 359 359-369; AM Oppenheim "Trade-Union Democracy" (1951) 1 *Duke B J* 243 243-248; J Seidman "Democracy in Labor Unions" (1953) 61 *J Pol Econ* 221 221-231; Summers (1958) *Nw U L Rev* 610 610-625; CW Summers "The Usefulness of Law in Achieving Union Democracy" (1958) 48 *Amer Econ Rev* 44 44-52; A Cox "The Role of Law in Preserving Union Democracy" (1959) 72 *Harv L Rev* 609 609-644; CP Magrath "Democracy in Overalls: The Futile Quest for Union Democracy" (1959) 12 *ILRR* 503 503-525; O Kahn-Freund "Trade Union Democracy and the Law" (1961) 22 *O St LJ* 4 4-20; HA Landsberger & CL Hulin "A Problem for Union Democracy: Officers' Attitudes Toward Union Members" (1961) 14 *ILRR* 419 419-431; Lipset (1961) *Virg L Rev* 1 1-50; CW Summers "American Legislation for Union Democracy" (1962) 25 *MLR* 273 278-300; E Stein "The Dilemma of Union Democracy" (1963) 350 *Ann Am Acad Pol Soc Sci* 46 46-54; DJ White "Democracy in Labor Unions – A Review Article" (1964) 22 *Rev Soc Econ* 111 111-129; RW Rideout "Responsible Self-Government in British Trade Unions" (1967) 5 *BJIR* 74 74-86; R Martin "Union Democracy: An Explanatory Framework" (1968) 2 *Soc* 205 205-220; O Kahn-Freund "Trade Unions, the Law and Society" (1970) 33 *MLR* 241 241-267; Sturmthal (1977) *Ann Am Acad Pol Soc Sci* 12 12-21; Anderson (1978) *Ind Rel J Econ Soc* 278 278-295; EN James "Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections" (1978) 13 *Harv CR-CL L Rev* 247 247-356; N Nicholson "Mythology, Theory and Research on Union Democracy" (1978) 9 *IRJ* 32 32-41; RC Hartley "The Framework of Democracy in Union Government" (1982) 32 *Cath U L Rev* 13 13-128; GP Santos "Title I and Union Democracy"

perhaps most famously, with the work of Sidney and Beatrice Webb in 1897.[285]

(1983) 12 *Rev Law & Soc Ch* 449 449-483; R Kidner "Trade Union Democracy: Election of Trade Union Officers" (1984) 13 *ILJ* 193 193-211; K Mackie "Law Commentary: Three Faces of Democracy and Three Missing Persons: The Trade Union Act 1984" (1984) 15 *IRJ* 83 83-97; P Elias & K Ewing *Trade Union Democracy, Members' Rights and the Law* (1987) 1-317; AA Landman "Trade Union Democracy and the Law in South Africa" (1987) *MBL* 92 92-101; KJ Mackie "New Feature — Trends and Developments in Industrial Relations Law. One More Time: How Do We Democratise Organisations?" (1987) 18 *IRJ* 155 155-158; B Hepple "The Role of Trade Unions in a Democratic Society" (1990) 11 *ILJ* 645 645-654; M Ford "Citizenship and Democracy in Industrial Relations: The Agenda for the 1990s?" (1992) 55 *MLR* 241 241-258; G Perusek "The Internal Politics of Trade Unions: The Neglected View of Sidney and Beatrice Webb" (1993) 18 *Lab Stud J* 32 32-42; ST Ieronimo "RICO: Is it a Panacea or a Bitter Pill for Labor Unions, Union Democracy and Collective Bargaining?" (1994) 11 *Hof Lab LJ* 499 499-545; J Stepan-Norris "The Making of Union Democracy" (1997) 76 *Soc For* 475 475-510; MH Belzer & R Hurd "Government Oversight, Union Democracy, and Labor Racketeering: Lessons from the Teamsters Experience" (1999) 20 *J Lab Res* 343 343-365; S Estreicher "Deregulating Union Democracy" (2000) 21 *J Lab Res* 247 247-263; AC Frost "Union Involvement in Workplace Decision Making: Implications for Union Democracy" (2000) 21 *J Lab Res* 265 265-286; MJ Goldberg "An Overview and Assessment of the Law Regulating Internal Union Affairs" (2000) 21 *J Lab Res* 15 15-36; BE Kaufman "The Early Institutionalists on Industrial Democracy and Union Democracy" (2000) 21 *J Lab Res* 189 189-209; H Morris & P Fosh "Measuring Trade Union Democracy: The Case of the UK Civil and Public Services Association" (2000) 38 *BJIR* 95 95-114; E Webster & G Adler "Introduction: Consolidating Democracy in a Liberalizing World – Trade Unions and Democratization in South Africa" in G Adler & E Webster (eds) *Trade Unions and Democratization in South Africa, 1985-1997* (2000) 1-19; CW Summers "From Industrial Democracy to Union Democracy" (2000) 21 *J Lab Res* 3-14; MJ Goldberg "Union Democracy, American Democracy, & Global Democracy: An Overview & Assessment" in S Estreicher et al (eds) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 75 75-100; S Leader "Configuring Union Democracy: The United Kingdom Experience" in S Estreicher et al (eds) *The Internal Governance & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 491 491-514; G Strauss "The Present State of National Union Democracy" in (ed) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 57 57-74; MJ Goldberg "Derailing Union Democracy: Why Deregulation Would Be a Mistake" (2002) 23 *Berk J Emp Lab L* 137–148 137-148; P Fairbrother "Union Democracy: Processes, Difficulties and Prospects" (2006) unpublished paper presented at a conference on *Union Democracy Reexamined* hosted by the Harry Bridges Center for Labor Studies at University of Washington, 26-02-2006 (copy on file with author) 1-21; G Wood & P Dibben "Broadening Internal Democracy with a Diverse Workforce: Challenges & Opportunities" in S Buhlungu (ed) *Trade Union & Democracy: Cosatu Workers' Political Attitudes in South Africa* (2006) 45 45-74; S Buhlungu et al "Trade Unions and Democracy in South Africa: Union Organizational Challenges and Solidarities in a Time of Transformation" (2008) 46 *BJIR* 439 439-468; S Buhlungu "The Rise and Decline of the Democratic Organizational Culture in the South African Labor Movement, 1973 to 2000" (2009) 34 *Lab Stud J* 91 91-111; Goldberg (2010) *Emp R & Emp Pol Jnl* 121-151; K Voss "Democratic Dilemmas: Union Democracy and Union Renewal" (2010) 16 *Transfer* 369 369-382; P Hirschsohn "The 'Hollowing-Out' of Trade Union Democracy in COSATU? Members, Shop Stewards and the South African Communist Party" (2011) 15 *Law Dem Dev* 279 279-310; and finally, J Maree "COSATU, Oligarchy & the Consolidation of Democracy in an African Context" in S Buhlungu & M Tshoaedi (eds) *COSATU's Contested Legacy* (2012) 56 56-89.

[285] The Webb's seminal work was first published then, and saw numerous reprints and editions thereafter [see Webb & Webb *Industrial Democracy*, available online at

Wood offers insight into the interrelatedness of trade union democracy and accountability in the context of South Africa, by stating the following:

> "As ostensibly the collective voice of their members, what unions do is inherently bound up with questions of democracy. This concerns both the extent to which union leaders accurately represent the wishes of, and are accountable to, the rank and file and the manner in which they can ensure that these interests are represented within and without the workplace. To neo-liberals the effects of these challenges are necessarily contradictory; to be effective at all but the most micro-level, union leaders have to constantly reign in their membership. This 'Olsonian trap' means that unions are only in a position to negotiate or reach deals with other collectives if they can force their members to keep to any agreements made."[286]

On the face of it, therefore – and were one to operate from within a strictly confined, yet generalised interpretation of the union democracy concept – trade union democracy is about the extent to which unions accommodate, respond to and promote general member/worker participation/involvement and control within that particular trade union.[287] Union democracy addresses how organised labour reacts to and engages with their members within both the everyday functioning of the union and the broader, societal role of organised labour. It includes how unions organise their

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<https://openlibrary.org/books/OL7163419M/Industrial_democracy> (accessed 7-05-2018)]. Whereas the book delved into an all-encompassing examination of early labour organisations and the law at the time, a not-insignificant focus thereof was on the internal democratic practices and procedures of unions, and their potential role within the broader society.

[286] G Wood "Trade Unions & Theories of Democracy" in G Wood & M Harcourt (eds) *Trade Unions and Democracy: Strategies and Perspectives* (2006) 19 35.

[287] This is of course completely disregarding a multitude of broader views and interpretations, involving the role of unions and their democratic principles (or lack thereof) in the broader society, and the influences thereof. See in this regard Frost (2000) *J Lab Res* 268, who in citing the research of Leiserson [W M Leiserson *American Trade Union Democracy* (1959)], lists the three central functions of unions as (i) the democratic functioning of the union itself, (ii) the increasing of workplace democracy (including the strengthening of employee's democratic rights), and (iii) "advancing a more democratic society at large". BJ Fick "Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society" (2009) 12 *J Lab & Soc* 249 254 in turn provides an overview of five attributes that explain how independent trade unions are uniquely placed to contribute to this democratisation process, namely their "democratic representation, demographic representation, financial independence, breadth of concerns and placement within society for access to both elites and grass roots". Regarding the interplay between prominent unions and the community protest phenomena within contemporary South Africa, and the alignment between organised labour and societal needs, see M Paret "Failed Redistribution or Failed Administration? Official Union Narratives of Community Protest in South Africa" (2015) 42 *Politikon* 345 345-366. Regarding the role played by unions in fostering workplace democracy, see Frost (2000) *J Lab Res* 265-286.

structure, their officials, office bearers and employees – primarily through the trade union's constitution and related internal policy/procedural guidelines and customs/ practices, in order to ensure democratic participation by the membership. Furthermore, it encompasses how unions implement and put into effect the various constitutional clauses that address aspects of union democracy, involving, for example, member involvement, balloting or internal dispute mechanisms. To a significant extent, trade union democracy means a type of "majoritarianism" in that – regardless of the level of the union structure involved (that is, plant/workplace, regional, provincial or national) – it entails the ability of the membership, *as a conceptual collective*, to participate within the union, *as a conceptual entity*.[288]

In contrast, a trade union's accountability towards its members, in the context of this study, focuses on what is done within the context of the union-member relationship, when, for lack of a better phrase, things go wrong.

The point of departure of this study is accordingly premised on the acceptance that, despite a particular union acting or reacting from within a democratic paradigm, the mere presence of such a democratic culture or ethos within that union, or of an overarching democratically structured union constitution, does not in any manner guarantee against things going wrong.[289] Therefore, a scenario where a union's members receive inept advice regarding an employment dispute, act accordingly and are dismissed; or a scenario where a union fails to expeditiously fulfil its mandate in

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[288] Alternatively, it speaks to the overarching context, of labour unions as a collective unit, on the one hand, and all of their members (and workers/society as a whole), on the other.

[289] In this regard, writing at the time of significant upheaval in the internal functioning of unions in the USA – in light of the spreading influence of communism within organised labour – B Aaron & MI Komaroff "Statutory Regulation of Internal Union Affairs – II" (1949) 44 *Ill L Rev* 631 635 state as follows:

> "It is generally agreed that trade union democracy cannot be achieved by government fiat. Model union constitutions have not always prevented despotic rule by union officers, and there is little reason to hope that statutory requirements could not similarly be subverted as a result of hostility, indifference or fear on the part of a union's membership, coupled with action on the part of its leaders in violation of the letter or the spirit of the law."

With this being said, and leaving aside for a moment any logical fallacy (*non sequitur*) concerns, an interesting counterpoint can be made to this statement: In the discussion surrounding union officials below, the point is demonstrated that the more structured and bureaucratic a union becomes (typically directly linked to its membership and influence growth), the more oligarchic it tends to become. Whereas structure and bureaucracy do not necessarily correlate directly with improved delivery of union services, the argument that it does, can certainly be made. Assuming this to be correct, and furthermore assuming that the more oligarchic an association becomes, the less democratic it arguably functions – this results in a countervailing view that the more democratic a union, the more likely it is to be less service-orientated or focused, given its less bureaucratic, official-heavy (oligarchic) structure.

effectively representing its members in a labour forum, with the result that the members do not receive what they might otherwise have been entitled to, does not involve or require a broader consideration of trade union democracy *per se*. Whether or not a union is democratically focused, for example by allowing the collective membership to meaningfully have an impact on union policy decisions at the next annual congress, or to vote for the removal of an official or office-bearer from a particular committee, is not of immediate use to that particular member, or group of members, if things go wrong and the question arises what trade union members can do to enforce their rights (if at all) against the union.

Accordingly, this study will not seek to re-examine or re-contextualise the extensive literature and research available on trade union democracy. This is not to say that union democracy, both at a macro-level and down to the everyday functioning of the union in a workplace, factory and shop floor is not deserving of ongoing consideration. It is just not the primary focus of this dissertation.

3 3 Trade union officials, office bearers and representatives

3 3 1 Contextual framework

Coetzee, writing in the context of a 1970s South Africa, stated the following:

> "The reality of democratic life in trade-unionism, as in every other social institution, does not depend wholly or even mainly on its internal structure. Constitutions apart, there are two main elements in the working of every trade union and the relationship between them has a great influence on the unions' vitality and purpose. These elements are: (1) the full-time permanent officials, and (2) the active membership. The official is conscious of the difficulties of negotiation, the balance of forces, and the economic facts on which successful execution of policy depends. The members, on the other hand, are conscious of their interests and are not hampered by the success of a union. When the equilibrium between them is seriously disturbed, a union either becomes bureaucratic or disintegrates. An examination of the registered trade unions in South Africa between 1924 and 1950 reveals the emergence of a new profession; that of the permanent trade-union official. This development undoubtedly influenced the democratic character of trade-union organization …".[290]

More recently, Pons and Deale stated as follows: "The role of the shop steward is extremely important to the union's effective functioning since shop stewards provide the critical link between the union office, membership and the management of the

[290] JA Grey Coetzee *Industrial Relations in South Africa: An Event-Structure of Labour* (1976) 21-22.

company."[291] This undoubtedly remains true today. These passages serve to highlight the important role of both officials and members within a trade union and the drastic consequences that may arise if there is an imbalance between these two groups.

Shop stewards (referred to as "trade union representatives" in the LRA), in fulfilling their role envisaged by the LRA,[292] serve as the direct representative of the trade union in the factory or workplace. Understandably, shop stewards have a broad series of duties and functions.[293] Finnemore states the following about shop stewards, given their placement within the union-member-employer paradigm:

> "Shop stewards are in the difficult position of having to manage discontent on all sides arising from members' frustrations, management's dissatisfaction, community concerns and sometimes even disapproval of union officials. In addition, management has the expectation that the shop steward's main role is conveying messages (and sometimes even bad news) from management to workers, while union officials and members expect shop stewards to forcefully convey the workers' needs and problems to management."[294]

However, shop stewards are but one part of the mechanism through which unions act. They are joined by union officials (employees of the trade union) and office bearers (elected representatives). Collectively, they constitute the very embodiment of the union (along with the membership, of course) – and are the actors through which union democracy and accountability is put into measurable and observable action.[295]

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[291] A Pons & P Deale "Trade Unions and Organisational Rights" in A Pons & P Deale (eds) *Labour Relations Handbook* (RS 15 2006) *Organisational Rights* 6–1 6-28.

[292] As per, *inter alia*, s 14 of the LRA.

[293] M Finnemore *Introduction to Labour Relations in South Africa* 11 ed (2013) 112 lists the following: Recruiting members; representing members in any disciplinary/grievance procedures within the scope of their employment; communication link between members and union officials; engaging with the employer in work-related matters; arranging strike ballots; obtaining mandates from members during the course of employment negotiations; organising and attending union meetings; representing the membership at provincial/national union meetings (such as the National Congress); monitoring compliance with wage and related agreements on the part of the employer; and finally, participating in workplace committees.

[294] Finnemore *Introduction* 113.

[295] In this regard, Fairbrother reasons further that much of the recent analysis (from the international comparative perspective) examining the nature of democracy within modern labour associations, has seen a shift in focus away from the membership, and onto that of the leadership:

> "Rather than emphasising a form of union organisation characterised by widespread debate and discussion, accountability and membership involvement, the emphasis in the prevailing analyses is on leadership. In other words the focus has been on accountability, rather than on membership control. In practice, however, there is a complex inter-relationship between these two features of unionism, participation and representation, worked out in terms of the policies and practices pursued

As is to be expected, much has been written about the internal functioning of unions, from the perspective of how their representatives (in the broadest sense) interact with the general membership. Any source that seeks to provide an overview of how unions operate, cannot ignore the central role played by shop stewards, officials or office bearers. As a result, there exists significant overlap both in how these roles are described, along with the challenges associated with each. But central to any such approach, is the fact that trade unions, as much as they share a myriad of commonalities, are also distinct bodies in terms of their individual structure, aims and objectives, and functioning. In emphasising this point, Buhlungu and Tshoaedi make several crucial points about the power relations within modern trade unions that are of critical importance in understanding the complex dynamics of their internal operations:

> "The conventional approach to the study of power in trade unions focuses on how union members and the leaders mobilise and build power vis-à-vis external opponents, principally employers and state agencies. In this approach, the focus is on the ability of trade unions to muster sufficient power to confront these opponents… What has been neglected in the majority of studies is the way in which power operates and is deployed by different groups within trade unions, whether by leaders against members, full-time officials against workers, educated workers against workers with little or no education, men against women, skilled against unskilled workers … [I]n a union setting, power does not reside in a single place or group but is diffused more widely among the various levels of the organisation. This means that power does not operate in a zero-sum fashion, where either a group or individual has it or does not. Different groups or networks have different amounts of power, depending on their structural location and the resources that the possess…. [P]ower in a trade union is 'relational', that is, individuals and groups have power relative to others and the relative power each individual or group possesses is subject to change, depending on a variety of factors".[296]

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by unions in the context of specific historical and material circumstances". Fairbrother *Difficulties and Prospects* 1-2; [references omitted].

[296] S Buhlungu & M Tshoaedi "A Contested Legacy: Organisational & Political Challenges Facing COSATU*"* in S Buhlungu & M Tshoaedi (eds) *COSATU's Contested Legacy* (2012) 1 6-7. The authors add a further 3 points to the aforementioned: Firstly, that "different groups within a trade union deploy power to extract concessions from or derive advantage over other groups". The example provided here is where "full-time officials may deploy the power they have by virtue of their knowledge and education to win debates and get their points of view adopted as union resolutions" [Buhlungu & Tshoaedi "Organisational & Political" in *Contested Legacy* 7]. Secondly, that power may be deployed in a "benevolent or altruistic way", in order to ensure common-ground and solidarity in regard to the strategic objectives of the union. In this case, the authors posit the use of power to manage internal differences or factions within the union decision-making scenario [Buhlungu & Tshoaedi "Organisational & Political" in *Contested Legacy* 7]. Finally, that any such power being held by a particular grouping or individual is always transient in nature – see Buhlungu & Tshoaedi "Organisational & Political" in *Contested Legacy* 7.

As such, trade unions are not static or homogenous entities and a multitude of intersectional spheres operate within each one of them.[297] The complexity of trade unions is shaped along all of these different structural praxes that constitute modern unions, and is something that must be kept in mind when unpacking how they function. It is a point worth making as one considers the role of trade unions' functionaries – that their roles are shaped both by the constitution of their union and by the dynamics of the internal organisation of their specific union. In what follows, an overview will be provided of what could be termed the "standard" or "traditional" viewpoints, long-held and long-developed over the course of modern industrial relations, of what pitfalls and challenges are posed to unions with regard to the way in which these representatives interact with the general membership.

3 3 2 Union organisational complexity

The first of these viewpoints is encapsulated by the phrase "[w]ho says organisation, says oligarchy".[298] As argued in the context of exploring the judicial control of trade unions in the USA, the following statement is particularly relevant:

> "As private associations grow larger and more bureaucratized not only are they able to inflict greater injury on private persons, but also their internal structure tends to change, with leaders possessed of bureaucratic acumen likely to succeed those who are committed to ideals but lack administrative skill. Robert Michels in his classic study of political parties demonstrated the great difficulty in preventing organized groups from becoming controlled by oligarchies. Sheer numbers make it more

[297] By way of example, and in light of the aforementioned discussion around where power is exercised and held, a union sees a multitude of interactions at their various branches, between members and shop stewards, between the members themselves, between the shop stewards themselves, and between the shop stewards, members and the next level of the union structure, be that a regional branch committee or higher, depending on the union in question. Intermingled herein, would be the occasional (or more frequent) interaction with office-bearers or officials from higher structures, or other branches, and *their* members or shop stewards – and all of this then at the lowest level of the union structure, with this being repeated, *mutatis mutandis*, at all the higher regional, provincial and national levels as well. When this same matrix of individuals, committees and structures is then viewed through the prism – as highlighted by Buhlungu & Tshoaedi above – of the additional (paraphrased) dynamics of union leaders against members, full-time officials against workers, educated workers against workers with little or no education, men against women, skilled against unskilled workers, the complexity is rapidly escalated.

[298] Salamon [Industrial Relations Theory and Practice 1 ed (1987)] as quoted in Finnemore *Introduction* 116 – with the original wording hereof (the so-called "iron law of oligarchy") to be attributed to the German sociologist Robert Michels, following his 1911 treatise on Political Parties.

> difficult for members to control their leaders, for 'the individual disappears in the multitude, and therewith disappear also personality and sense of responsibility.' Organizational tasks become more numerous and complex, requiring an increase in the power of the leaders and the growth of a bureaucracy. Correspondingly it becomes more difficult for the members to make their opinions felt; they become more hesitant to express opinions, for they feel unqualified to do so. The leaders and administrators often develop vested interests in the maintenance of their own power and will tend to advance themselves at the expense of the basic purposes of the organization … Experience with some of the most democratically structured labor unions has shown the great difficulty in guaranteeing members control over their leaders".[299]

This quotation highlights one of the major challenges facing modern trade unions – that of losing contact with members, their specific needs and requirements, due to the ever-expanding internal union administration process and the bureaucracy of the organisation.[300]

While this process of bureaucratisation may occur for different reasons,[301] the reality remains that as the trade union structure expands and negotiations with employers occur at a more centralised level, the possibility of a gradual rift evolving between the union and its members, increases.[302] Furthermore, if shop stewards are no longer involved in facilitating critical negotiations (given their occurrence at a level removed from the factory-floor), their role within the union can become gradually more diminished. This, in turn, may result in a situation where a combination of limited feedback from the elected officials (to the membership as a collective), and the lack of direct involvement by the shop stewards (in the decision-making process), brings about a general state of disinterest on the part of the members, which ultimately negatively impacts on member participation.[303]

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[299] Anonymous "Judicial Control of Actions on Private Associations" (1963) 76 *Harv L Rev* 983 989, [footnotes omitted].

[300] See in this regard L Ensor "The Problems of Established Trade Unions" (2004) 28 *SALB* 25 25, who states: "The problems the established trade unions face are those of age; officials tend to get cut off from the workers through spending more time on office work, industrial council meetings, and other related activities; there is a hardening of the arteries when leadership has become so entrenched that there is a constant cry for new faces, and finally decisions are made by a few people so that a gap is created between the ideal of democracy and the actual practice" [note to reader: Whilst the aforementioned article was reproduced in 2004, it is an edited version of an article that first appeared in the June 1974 edition of the SA Labour Bulletin].

[301] Finnemore *Introduction* 116-117; S Bendix *Industrial Relations in South Africa* 5 ed (2010) 178-179.

[302] Finnemore *Introduction* 116.

[303] Finnemore *Introduction* 116-117; Bendix *Industrial Relations* 179. This is certainly not a situation unique to South Africa. See for instance Kaufman (2000) *J Lab Res* 201-204 and G Lockwood "Trade Union Governance: The Development of British Conservative Thought" (2005) 10 *J Pol Ideol* 355 358-

The converse of this sees the possibility where the union office-bearer or official's influence increases considerably, as not only is he/ she largely responsible for communication between the members (as found within the differing geographical areas of the various shop-floors represented by that union), but he/ she also has the capacity to control member meetings.[304] Thus, member apathy remains a problem, with many members seeking only active involvement in the event of a crisis that directly affects them.[305] This leads to low meeting attendance resulting in decisions being taken by the officials or a minority of the total membership, being those who were actually present in large enough numbers to constitute a quorum.[306] In spite of the subsequent ratification of union officials' actions, many daily decisions are made by the latter without the prior consent or knowledge of the members, purely due to the simple reality that members cannot be present at all times (in order to give their input) because of their obvious employment commitments.[307] Given the inevitable structure

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[304] Finnemore *Introduction* 116. See further Lockwood (2005) *J Pol Ideol* 358, who in summarising the analysis and studies done on branch voting figures in the UK, states:

> "[There were] high levels of member participation on a few contentious issues, but low levels of participation in relation to issues such as the election of officials at the national and local levels. The low levels of turn-out at branch meetings and in elections was used as one justification for legal intervention in trade union affairs by Conservative governments between 1979 and 1997. The Conservative perspective was that 'collective participatory decision-making' enabled militant union leaders and activists to control union constitutions. Trade union business was considered to be dominated by the majority groups by virtue of their greater knowledge of union practices, procedures and rule-books".

[305] Bendix *Industrial Relations* 178.

[306] Finnemore *Introduction* 117. See further Ensor (2004) *SALB* 26 who states:

> "For the members of a union to have more power against the officials there must be good attendance at meetings and a large amount of interest in the day-to-day activities of the union. This rarely occurs, apathy being the normal state of affairs, to be broken only by a crisis. There are many reasons for this. Most union members, like other people, spend most of their time at work or with their families. Their remaining free time is taken up with friends, entertainment, and other recreational activities. Most trade union meetings are concerned with technical administrative matters, which are not of deep interest to the average member. As long as there is no trouble at the office only a small minority finds participation in union affairs sufficiently rewarding to sustain a high level of interest and activity."

[307] Bendix *Industrial Relations* 178. See further G Short & H Mastrantonis "Trade Union Commitment and Participation: A Theoretical Review" (1994) 14 *IRJ* 4 5 who state:

> "In a bureaucratic organization, leaders can lose contact with the needs, aspirations and interests of their members and hence, the union becomes less representative. However, such a situation may be accompanied by increased bargaining effectiveness and a more streamlined decision-making ability" [references omitted].

Similarly, as suggested by Bendix *Industrial Relations* 179, the employer might take issue with certain of the requirements surrounding the democratic functioning of a union:

of modern labour associations, which has a broad base of numerous branches and an increasingly tapered upper structure through regional, provincial and national bodies, it is perhaps unavoidable that power becomes centralised within certain key points, committees and functionaries of the trade union. How the particular union seeks to offset this possible imbalance is directly connected to the broader question of union democracy, control and – by implication – accountability.

3 3 3 The complexity of modern labour relations' systems

The second viewpoint on challenges around union-membership interaction focuses on the increasing complexity of the modern labour world, involving as it does the nexus between statute, judicial and related labour relations' bodies (such as the CCMA and bargaining councils), employers (local and international), the state, organised labour, workers and the public at large – and how unions and their representatives/leaders navigate this field.

Senior officials of trade unions are compelled to develop wide-ranging fields of expertise in order to effectively handle the ever-increasingly complexity of our labour law and the institutional environment, which results in members becoming progressively more dependent on the former for information and advice.[308] This situation may contribute to the alienation of members as the structure becomes "top-heavy" with specialised officials. With this imbalance in expertise and general labour experience, the possibility exists that the union official, due to his (or her) relative influence, can control the membership by means of advice being offered that might suit the needs of the minority (including the officialdom), rather than the majority.[309]

"[Employers] are wont to insist on rapid decision-making and that union leaders 'control' their members. A union which insists on continual report-back may not be able to give an immediate decision; and a leader who represents the interests of the members and abides by the majority decision cannot 'control' the members, although he may be able to influence them and to dissuade them from irresponsible actions. Thus, the management call for union leaders to act 'responsibly' may contradict the democratic principle on which unions are based."

[308] Finnemore *Introduction* 117. The authors continue in making the point that "many workers are poorly educated and do not have access to the Internet, thus compounding the problem of communication and dependence on face-to-face, direct communication and expertise [of union officials] even further" – see Finnemore *Introduction* 117.

[309] Bendix *Industrial Relations* 179; Finnemore *Introduction* 116.

3 3 4 The complexity of union leadership power

The third viewpoint on challenges to union-member interaction focuses on the dynamics surrounding the trade union leader. As the various leaders within the trade union structure assume greater managerial responsibility, they might begin to sympathise with the concerns of the employer, as the union begins experiencing dilemmas similar to that of the employer.[310] This situation might result in union leaders becoming "estranged from the shop floor … and intolerant of what are perceived as trouble-making dissidents in their own union".[311] The possibility remains that high-ranking officials might become entrenched in their position of authority and make use of their increased expertise and knowledge to subvert any threats to their position.[312]

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[310] In his analysis of Friedman [as per the quote at the commencement of this chapter], Darlington (2014) *Lab Hist* 7 raises the "Faustian bargain" that is prevalent within the contradictory nature of trade unions – namely that "in exchange for demobilising the movement, unions obtain negotiating gains in wages and working conditions via an orderly, regularised and consensual system of collective bargaining and social reform within the framework of the existing capitalist system". In other words, once unions have used the combination of militancy to compel "employer/state concessions, they then inevitably proceed to dampen down this labour militancy as the price to be paid for collective bargaining rights and the unions' continuing support by employers and government" [Darlington (2014) *Lab Hist* 7]. Whilst mostly agreeing with the views of Friedman, see Darlington (2014) *Lab Hist* 7-8 for his discussion about the nuances within this broader viewpoint – and how this "dual nature of trade unionism is not always equally balanced". See further Ensor (2004) *SALB* 25, who provides context of the South African trade unions of the early 1970s, by stating:

> "Over the years, the established trade unions have striven to become more acceptable to the state, and have sacrificed their independence for the admitted benefits of recognition by the state for their members" [see the discussion on the dual nature of South Africa's labour system during this time, at § 10 3 6 below].

[311] Finnemore *Introduction* 116. See further Ensor (2004) *SALB* 25-26 who provides a colourful example of this, by stating:

> "A worker is moved from the factory floor to the trade union office has a completely different set of duties to perform. Quite often the organisers earn a lot more than they would on the factory floor; instead of being paid weekly they are now being paid monthly, and allowances are provided for transport ... and other essentials. While a worker approaches a manager as an employee, a trade union official approaches a manager as a virtual equal with a greater freedom of action. From being a production worker, a trade union organiser soon changes into an office worker ... The worker who becomes a trade union official ceases to be a worker economically and psychologically, and experiences the same gap between himself and the workers as does the non-worker."

[312] Bendix *Industrial Relations* 178-179. See further in this regard Finnemore *Introduction* 116 who states the following:

> "Union leaders may become extremely powerful both within their own union and in society as a whole. In a few instances they have even become corrupt, embezzled funds and abused their position by rigging elections to ensure they remain in power" [citing RB Freeman & JL Medoff *What Do Unions Do?* (1984)].

Darlington (2014) *Lab Hist* 12 states in this regard that the "central problem was that whilst the rank-

With these high-ranking officials often enjoying a fair amount of publicity, Bendix reasons it is but a small step to a "power complex" where the official views him- or herself as being more important than the individual union structure, with a resultant negative impact on union democracy.[313] Alternatively, the union leader – in particular, a long-standing one – might simply not see a future outside of the union and will try and maintain control (and the leadership position) indefinitely.[314] Subsequently, the organisation might be dominated by factions who wield considerable power and are more concerned with their own vested interests, rather than that of the union as a whole, let alone its members.[315]

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and-file of the union has a direct interest in fighting against the exploitation of employers and government, and indeed had everything to gain by fighting for the success of militant strikes, full-time officials had a vested interest in the continued existence of the system upon which their livelihood and position depended, and so ended up trying to reconcile the interests of labour and capital, which usually led them to temper workers' resistance."

[313] Bendix *Industrial Relations* 179. See further R Southall "The Changing Social Characteristics of Cosatu Shop Stewards*"* in V Satgar & R Southall (eds) *COSATU in Crisis: The Fragmentation of an African Trade Union Federation* (2015) 162 171-172, who cites Buhlungu's arguments about the "profound transformation" that took place within COSATU's union leadership following 1994 (S Buhlungu *A Paradox of Victory: COSATU and the Democratic Transformation of South Africa* (2010) UKZN Press, Scottsville 117-121). For views further afield, and discussed in greater detail at § 8 5 4 below, see the discussion of Herzfelder & Schriever, in regards to US attempts at regulating the power of union leadership: "Union leaders enjoy broad decision-making powers. In the absence of controls on these powers, union leaders might advance interests of their own rather than interests of the union's rank and file" – BA Herzfelder & EE Schriever "The Union Judgment Rule" (1987) 54 *U Chic L Rev* 980 980.

[314] See in this regard N Marrian "Adapt or Die" *Financial Mail* (3-9 October 2019) 24 26-27, who in quoting COSATU general secretary Bheki Ntshalintshali, writes:

> "Ntshalintshali cites another stark challenge for unions – what becomes of their leaders once they are voted out? In the past, union bosses would likely become MPs or cabinet ministers on an ANC ticket once they were voted out of the union. But space inside the ANC is diminishing. Ntshalintshali describes this as a 'lack of progression for leaders'. 'You have been working in the union and occupied the highest position, if you are not re-elected, what do you do? Are you not then a threat to the new leaders? … They have no career path, they have not been studying and they can't go anywhere in the union. You have no income, what do you do? It poses some challenges.' The result is that leaders fight at all costs to retain their posts if they do not have a political berth lined up… 'So some general secretaries refuse to leave even though they have run out of time. When eventually they are kicked out they become an enemy in the union, they divide the union and sometimes they split the union'."

[315] Bendix *Industrial Relations* 179. See in this regard the commentary by Darlington (2014) *Lab Hist* 13, on how much of the industrial unrest within Britain in the pre-WW1 era, "was local, unofficial and hostile to the existing [trade union] leadership" – primarily due to the perceptions amongst the membership that their own union officials were more interested in looking after their own interests, than that of the members.

3 3 5 The onus of control

Lastly, there is the viewpoint arising from where the ultimate control of a trade union is placed. One of the key principles underlying union democracy, namely that management (and control) of the organisation is vested in its members, is "an ideal which may not always be achieved in practice".[316] In this regard, Bendix states the following:

> "Numerous theorists who believe that unions move in a continual cycle, from democracy to oligarchy and back to democracy. Because of factors mentioned, a union which was originally established on a democratic base may eventually be dominated by a few skilled or powerful individuals. This phase will continue for some time until members become aware of, and dissatisfied with, the situation, whereupon there will again be an initiative towards democratisation. Unfortunately and almost inevitably, certain individuals will again achieve dominance, particularly if there is a lack of involvement on the part of members or if the union operates at a highly centralised level. Despite the problems mentioned, trade unions do attempt to conduct their affairs along democratic lines."[317]

The responsibility to ensure that such (oligarchical) practices do not become the norm rests with the members.[318] In general, as with most organisations of any substantial size, a system of internal "checks and balances" is vital in ensuring that factions within the association do not become overly powerful and manipulative.[319] The most certain means of countering oligarchy in the union context is to maintain an activist core of members, who will not allow constituent apathy to dictate the union's future policy.[320] Ultimately it remains the membership in its totality that is directly responsible for internal governance, and accordingly, through the responsible exercise of their voting power and regular involvement in union affairs, union democracy can be promoted.[321]

However, this begs the question: What happens in a union that does not have an activist core of members? What happens when general member apathy does, in fact, determine the current and present policy of the union? What happens when the

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[316] Bendix *Industrial Relations* 178.
[317] 179.
[318] 179.
[319] In the case of unions, one such mechanism whereby members can voice their displeasure at the actions of particular officials, is by ensuring that they are not re-elected to their position – see Bendix *Industrial Relations* 179.
[320] Finnemore *Introduction* 117.
[321] Bendix *Industrial Relations* 179.

members are disinterested in the daily operation and well-being of the union unless an employment-related crisis arises at their particular place of work? Is the point made by Bendix pertaining to the ebb and flow between oligarchy and democracy inevitable? Or is there perhaps another answer to the abuse of power that members may rely on (other than internal democratic processes)? It is in this regard, that the (potential) role of the trade union's constitution requires consideration.

3 4 The trade union constitution

3 4 1 Function of the trade union constitution

Two of the fundamental requirements for a union to successfully meet the expectations of their membership are efficient management and effective organisation.[322] With the needs and requirements of the union's members being diverse, the union must be structured in such a way as to best fulfil its obligations to its members. Of primary importance in managing these affairs is the trade union constitution.[323] Given that contemporary unions seldom resemble the small, craft-based "friendly societies" of the past, new challenges are faced when attempting to maintain the required efficiency and effectiveness. This already is one reason for the existence and composition of the constitutions of modern trade unions.[324] Specifically, union constitutions have had to be adapted in order to make allowance for "a multi-structured bureaucracy",[325] while simultaneously protecting the principles of democracy in decision and policy-making processes.[326] As a result, unions have to counterbalance the viability of the trade union as an organisation against its members' needs – since unlike corporations, "union leaders and officials are theoretically the servants of those beneath them".[327] Union leaders must, therefore, maintain and augment the unions' resources as well as assist their members in the taking of

[322] R Venter et al (eds) *Labour Relations in South Africa* 3 ed (2009) 82.

[323] J Grogan *Workplace Law* 12 ed (2017) 349 states that "[o]n joining a trade union, employees enjoy all the rights of membership, including the fruits of collective bargaining, but are bound by the union's constitution". Similarly, D Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 239 state that "[t]he constitution, together with any rules and regulations, 'collectively constitute the agreement which is entered into by its members'" – citing GJ Pienaar "Associations" in JA Faris (ed) *LAWSA* 3 ed (2014) para 616 para 620.

[324] See the analysis of South African labour associations' constitutions at § 3 5 below.

[325] Finnemore *Introduction* 112.

[326] 112.

[327] 112. See further the discussion on trade union officials, as at § 3 3 above.

strategic decisions.

Against this background, a trade union's constitution provides for, at the very least, the union's aims, scope and manner of operations, and membership rules. It is thus the primary instrument within which the principles, regulations and functions of the union, its representatives (namely officials, office bearers and the like) and its members are set out.[328]

3 4 2 Statutory developments

In South Africa, key to this state of affairs is the LRA, which sees the culmination of the gradual statutory recognition given to trade union constitutions which started following the events of so-called "Rand Rebellion".[329] Whereas the Industrial Conciliation Act 11 of 1924 made no formal mention of trade union constitutions,[330] its subsequent amendment in 1930[331] was the first to reference a registered trade union's constitution, albeit unrelated to the registration procedure of unions.[332] It was not until 1937, and the introduction of the Industrial Conciliation Act 36 of 1937 that the term constitution was used in the sense of how it is understood today.[333] By the time of the Industrial Conciliation Act 28 of 1956 (as it was initially known), the term "constitution" was used exclusively with reference to the controlling document of trade unions.[334] The current LRA (as discussed in detail in chapter 12) contains multiple direct references to trade union constitutions – starting, as it does, by making an employee's right to freedom of association subject to the constitution of the relevant union or union federation.[335]

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[328] See in this regard SR Van Jaarsveld et al "Labour Law" in JA Faris (ed) *LAWSA* 2 ed (2014) para 1 para 347, where is said: "The function of constitution of a trade union is to determine the rights and obligations of members of the trade union towards each other and as regards outsiders". When the aforementioned is considered in light of subs 95(5) of the LRA, the underlying purpose of the union constitution *vis-à-vis* the union becomes self-evident.

[329] See § 10 2 3 below.

[330] Subsection 14(2)(d) of the Act instead required unions to submit to the (then) newly created Registrar, *inter alia*, a "copy of its rules setting forth its objects, the purposes to which any of its funds may be applied, the subscriptions to be paid by members and any benefits to which they may become entitled, and the fines, levies and forfeitures to which they are liable, and the manner in which any ballot shall be conducted and controlled".

[331] This being the Industrial Conciliation (Amendment) Act 24 of 1930).

[332] See subs 9(b) of the Industrial Conciliation (Amendment) Act.

[333] See subs 4(1) of the Act – "Registration of trade unions and employers' organizations".

[334] The 1924, 1930, 1937 and 1956 Acts are discussed in more detail in chapter 10.

[335] See in general subss 4(1)(b); 4(2); and 4(3) of the LRA – discussed in detail in chapter 12.

The union constitution will contain the outline of the numerous internal operational procedures of the organisation. These include:[336] (i) the form of the structures and committees at the various union levels; (ii) the functions of these; (iii) the election procedures of the various officials and office bearers to the different structures and committees;[337] (iv) the functions of the paid officials; (v) financial regulations and procedures regarding union funds; and finally, (vi) the internal rules pertaining to disciplinary proceedings, voting procedure and the operation of union meetings.[338] Section 95 of the LRA regulates the circumstances under which a trade union can be registered.[339] In this regard, subsections 95(1)(b) and 95(3)(b) have as central requirements that a constitution needs to be adopted by the trade union in question, and that the constitution has to comply with subsections 95(5) to (6).[340] When the remaining pre-emptive requirements for registration are considered[341] in light of subsection 96(1)[342] – which requires a copy of the constitution to be submitted to the Registrar on the application for registration – the inherent importance of the constitution as the central component of the management of trade unions becomes clear.[343]

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[336] See Venter et al *Labour Relations* 83; Finnemore *Introduction* 112; Du Toit et al *Comprehensive Guide* 239-240.

[337] See for instance subs 14(3) of the LRA.

[338] Section 95(5) of the LRA is the relevant provision that regulates the contents of the union constitution within the South African context and is discussed in more detail at § 12 4 4 3 below. In this regard, Grogan *Workplace* 348 states:

> "Section 95(5) requires that, apart from the normal rules relating to meetings, the conducting of internal proceedings and financial controls, a union constitution must provide qualifications for membership, grounds for termination of membership or loss of union benefits, appeals against those measures, procedures for electing office-bearers, and for the conducting of ballots."

[339] Section 95 of the LRA.

[340] Subsection 95(6) of the LRA prohibits a trade union from registering if its constitution contains a provision(s) that directly or indirectly discriminates against any person on the grounds of race or sex. Subsection 95(5) of the LRA in turn, is prescriptive in setting out the various aspects that "must" be contained within the constitution of any trade union wishing to register.

[341] Subsection 95(1) of the LRA requires a suitable name, an address within South Africa, and that the union in question is independent. Regarding what is meant by an "independent" trade union, see in this regard subs 95(2)(a)-(b) of the LRA.

[342] Subsection 96(1)(b) of the LRA.

[343] Regarding the requirements for registration, and the approach of the Registrar in this regard, see Du Toit et al *Comprehensive Guide* 236-237.

3 4 3 Judicial involvement

The central importance of the trade union constitution has also been judicially recognised. As recently as 2015 the Labour Court (as per Snyman AJ) stated:

> "The court also considered the nature of the relationship [between union and official] and said: 'The basic foundation of a trade union or indeed a federation of trade unions, like the first respondent, is the mutual agreement among its members and between the members and itself. The contract among its members and between the members and the trade union is embodied in the constitution – together with whatever rules, regulations or policy documents that might govern the relationship inter se ... The constitution manifests the members' agreement to the essential characteristics, objects and purpose of the union, and it constitutes a contract concluded by way of offer and acceptance, expressing, inter alia, the intention of the members to associate with one another. The constitution determines the nature and scope of the union's existence and activities, while also prescribing and demarcating the powers of its various functionaries. Accordingly, as a matter of basic principle, the normal rules of contract, and the construction of contracts, apply to the constitution of a trade union'."[344]

These remarks demonstrate how the constitution of a trade union allows for the proper daily operation of that particular union. In short, a trade union constitution may be described as the primary document with regard to any matters pertaining to the external relationship between the union and third parties,[345] and the internal relationship between the union and its own members.[346] This would mean that if, for

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[344] *Zondo v SA Transport & Allied Workers Union* 2015 36 ILJ 2916 (LC) 2924C-G, in quoting *National Union of Metal Workers of South Africa v Congress of South African Trade Unions* 2014 JOL 31585 (GJ) paras 34-38 [their emphasis]. See further *SA Transport & Allied Workers Union v Zondo* 2015 36 ILJ 2348 (LC) 2356C-D, which is quoted by *Zondo* 2924B-C.

[345] Included herein would be persons and entities ranging from, *inter alia*, the public at large, employers and employer-associations, individual employees and non-union members, the state, its organs (such as the Department of Trade and Industry, Department of Labour) and its institutions (such as the CCMA and the Labour Courts), bargaining councils, "big-business", other unions and union federations. Regarding other third-party providers of, for example, services and supplies to a union – the individual contract (or service or sale) that applies within the context of the transaction between the two, would obviously enjoy preference. However, in similar vein to agreements between companies and suppliers, upon questions being raised regarding whether or not the union official who initiated the transaction was mandated/entitled to do so, and whether the actions of the official were within the context of their expected and ordinary duties – the union constitution (and internal decisions) can again become central to such an enquiry. See in this latter regard, by way of example, The *Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1948 3 SA 831 (A) and *ABSA Bank Ltd v South African Commercial Catering & Allied Workers Union National Provident Fund (Under Curatorship)* 2012 3 SA 585 (SCA).

[346] See in this regard *Ngcobo v Food & Allied Workers Union* 2012 33 ILJ 1337 (KZD) 1350G-H, where Swain J (in citing *LAWSA* para 347) says: "The function of the constitution of a trade union is to

example, one was tasked with examining what procedures would have to be followed by a trade union and its members in a case where potentially corrupt officials or office bearers were to be investigated, disciplinarily dealt with and, if necessary, removed from office, one would investigate what the constitution of the union in question has to say.[347] Similarly, if one sought to determine what the procedures would be in cases where, for example, unruly or undesirable members were to be expelled from the ranks of the union,[348] or alternatively what the impact would be for members who had fallen behind in the payment of membership dues,[349] the constitution of the union in question would again serve as the basic point of departure.

This means that if one had to examine aspects of the union/member relationship pertaining to the *accountability of that union towards its own members*, the union's constitution would serve as the basis from which to launch any further investigation.

3 5 South African trade union constitutions – an evaluation

With the remarks above in mind, the constitutions of 25 registered South African trade unions are examined in this section. Collectively, the constitutions in question are of unions that represent in excess of 2,8 million workers[350] and are broadly representative of the type of unions, industries and members prevalent within the

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determine the rights and obligations of members of the trade union towards each other and as regards outsiders".

[347] In the case of officials, above and beyond what was contained in the union constitution, the employment contract that exists between the official and his union, in their capacity as employee and employer respectively, would obviously be of primary importance in regulating any dismissal from the employ of the union. See in this regard Van Jaarsveld et al "Labour Law" in *LAWSA* para 355, who confirms (in reference to *Gründling v Beyers* 1967 2 SA 131 (W) 138) that despite the appointment and powers of office-bearers and officials being dealt with in union constitutions, as per statutory prescript, "the legal relationship between such an official and his or her trade union is therefore a contractual relationship based on the contract of employment". See further in this regard *Metal Workers* and *South African Municipal Workers' Union v Mokgatla* 2016 2 All SA 451 (SCA).

[348] See in this regard *Mphage v SA Municipal Workers Union* 2013 34 ILJ 1764 (LC); *Apollis v General Industries Workers Union of South Africa* (J423/15) 2015 ZALCJHB 93 (3 March 2015) SAFLII <http://www.safliiorg/za/cases/ZALCJHB/2015/93.pdf> (accessed 10-02-2017); *Zondo v SA Transport & Allied Workers Union* 2015 36 ILJ 2916 (LC); *SA Transport & Allied Workers Union v Zondo* 2015 36 ILJ 2348 (LC); and, Chauke v FAWU (C122/2016) 2016 ZALCCT 10 (18 March 2016) SAFLII <http://www.safliiorg/za/cases/ZALCCT/2016/10.pdf> (accessed 10-02-2017).

[349] See in this regard *NEWU v Sithole* 2004 11 BLLR 1085 (LAC).

[350] The total number based on the membership numbers for the unions obtained from the Department of Labour, is 2 813 350 – and is listed below, alongside the union's in question.

South African labour relations system.[351] Therefore, while these union constitutions do not necessarily reflect the entire South African union movement, the sheer volume of members that fall under the sample considered provides a justifiable snapshot of the everyday operations of local trade unions and how their internal relations (also with their members) are regulated.[352]

At the outset, however, three points need to be made. Firstly, in selecting the trade unions surveyed, two broad criteria, namely size and category, were used. This simply means that small, medium and large unions – in terms of membership – were chosen,[353] along with a spread across different union categories, as outlined in the "Trade union categories" section (at § 2 5) above.[354] Secondly, whereas the point of

[351] The constitutions being considered below are listed in this footnote, along with their membership – as obtained from the Department of Labour, off the union's annual certified membership statement (see subs 100(a) of the LRA): [union name; [membership total]; (year of statement)] (i) the Association of Mineworkers & Construction Union (AMCU) [152 706] (2015); (ii) the Banking, Insurance, Finance & Assurance Workers Union (BIFAWU) [544] (2017); (iii) the Building Workers Union (BWU) [2 549] (2016); (iv) the Chemical, Energy, Paper, Printing, Wood & Allied Workers' Union (CEPPWAWU) [66 691] (2012); (v) the Commission Staff Association (CSA) [637] (2016); (vi) the Communication Workers Union (CWU) [14 405] (2017); (vii) the Electronic, Allied & Metal Workers Union of South Africa (EAMWUSA) [1 024] (2016); (viii) the Food & Allied Workers Union ("FAWU") [126 852] (2016); (ix) the Health & Other Service Personnel Trade Union of South Africa ("HOSPERSA") [66 186] (2016); (x) the Independent Municipal & Allied Trade Union ("IMATU") [88 387] (2016); (xi) the Motor Industry Staff Association ("MISA") [43 820] (2017); (xii) the National Education Health & Allied Workers Union ("NEHAWU") [277 317] (2016); (xiii) the National Security Workers Union ("NASWU") [414] (2015); (xiv.) the National Union of Mineworkers ("NUM") [176 232] (2016); (xv.) the National Union of Metalworkers of South Africa ("NUMSA") [335 913] (2015); (xvi) the Public & Allied Workers Union of South Africa ("PAWUSA") [8 637] (2017); (xvii) the Police & Prisons Civil Rights Union ("POPCRU") [163 234] (2017); (xviii) the Public Servants Association of South Africa ("PSA") [240 596] (2017); (xxix) the South African Commercial, Catering & Allied Workers Union ("SACCAWU") [185 256] (2016); (xx) Solidariteit/Solidarity [165 222] (2016); (xxi) the South African Democratic Teachers Union ("SADTU") [248 364] (2014); (xxii) the South African Medical Association ("SAMA") [8 065] (2014); (xxiii) the South African Municipal Workers Union ("SAMWU") [159 824] (2016); (xxiv) the South African Transport & Allied Workers Union ("SATAWU") [222 767] (2014); and finally, (xxv) UASA – The Union [57 708] (2016).

[352] When the number of unionised members in South Africa is considered – as of 2016, this was placed at 3 794 055 (as discussed at § 2 4 2 above) – the unions in question represent 74% of the total membership (2 813 350 of 3 794 055), which by any measure is a sizeable proportion.

[353] By way of example, membership numbers of the selected unions accordingly range from as little as 414 ("NASWU") and 544 ("BIFAWU"), through 66 691 ("CEPPWAWU") and 88 387 ("IMATU"), to 277 317 ("NEHAWU") and 335 913 ("NUMSA").

[354] The unions are drawn from across the craft (BWU; CWU; NASWU), industrial (AMCU; CEPPWAWU; EAMWUSA; FAWU; HOSPERSA; IMATU; MISA; NEHAWU; NUM; NUMSA; PAWUSA; POPCRU; SACCAWU; SAMWU; SATAWU), general (Solidariteit/Solidarity; UASA; PSA) or white-collar categories (BIFAWU; CSA; SADTU; SAMA) categories. It must be noted, as is evident from the discussion surrounding union categorisation (at § 2 5 above), that several of the aforementioned labour

departure is to determine whether or not these constitutions make allowance for procedures regulating the accountability of union officials and representatives for their conduct in relation to the unions' members, it must be stated that placing too much emphasis on the constitutions considered for purposes of this study could be problematic.[355] Thirdly, the constitutions were obtained through the Office of the Registrar of Labour Relations in the Department of Labour during the course of August 2017. Whereas the constitutions and/or amendments examined represent the most recent versions on record with the Department,[356] it must be pointed out that there is an understandable variance in how recently the constitutions have been amended – ranging from 1998 through to 2016.[357] While the majority of the union constitutions

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associations could also be allocated to more than one category, depending on the specific criteria being focused on.

[355] Essentially, three possible problem-areas can be identified: Firstly, the point must be made that constitutions, by their very nature, but specifically in the realm of labour relations, are fluid documents that are susceptible to change. They serve, in theory at least, as the mechanism or instrument through which the needs of the membership are to be regulated. These constitutions accordingly exist, if you will, at the instance of the collective – and they continue to exist precisely because of their intrinsic capacity to change. Therefore, whilst addressing the substance of the union constitutions in question so as to provide a point of departure into the nature of South African labour association procedure as a whole, would suffice – to critically comment on the content of the individual constitutions, would be ignoring the unique machinations and influences within each of them that in turn plays a vital role in shaping that union and its operation. Secondly, in the interests of objectivity, it would be both inaccurate and improper to pass critical judgment of those constitutions considered, when the reality of how they measure up to the hundreds of other union constitutions not considered remains unknown. Simply put, a measure of circumspection is required when being critical of the few that have been examined, in the absence of certainty in how they compare – relative to those *not* considered. Lastly, it must be noted (as implied in the first point above) that unions themselves often need to shift and re-focus their aims and objectives, as their needs – and that of their members – change, in light of a myriad of external factors and forces. Therefore, far be it for the aim of this study to comment critically on the current guise of a union policy document, which might see crucial changes effected to it at that union's very next National Congress. Thus, and in conclusion, whilst it would be fair to use the examination of the few to shed light on possibilities within the many – to individually focus on the few, as purportedly being representative of the many, would need to be avoided against.

[356] In accordance with subs 96(1)(b) of the LRA, for the purposes of the registration application.

[357] Notwithstanding the aforementioned point, the bulk of the constitutions have been amended within the past five years or less, with only 3 being amended/submitted without changes since the 1990s. The complete list with the trade union and the year of the most recent version of its constitution, as submitted to the Registrar in terms of the LRA requirements – is as follows: (i) AMCU (2015); (ii) BIFAWU (2013); (iii) BWU (1998); (iv) CEPPWAWU (2006); (v) CSA (1997); (vi) CWU (2015); (vii) EAMWUSA (1998); (viii) FAWU (2016); (ix) HOSPERSA (2014); (x) IMATU (2015); (xi) MISA (2014); (xii) NEHAWU (2009); (xiii) NASWU (2012); (xiv) NUM (2017); (xv) NUMSA (2013); (xvi) PAWUSA (2013); (xvii) POPCRU (2011); (xviii) PSA (2013); (xxix) SACCAWU (2009); (xx) Solidariteit/Solidarity (2014); (xxi) SADTU (2015); (xxii) SAMA (2013); (xxiii) SAMWU (2011); (xxiv) SATAWU (2013); and finally, (xxv) UASA (2016).

have seen fairly recent changes, several do not appear to have been amended at all over time (or any changes have not been submitted), this despite the significant events in the South African labour relations environment in recent times.

3 5 1 South African trade union constitutions – shared characteristics

As is to be expected, the constitutions surveyed all share a series of distinct characteristics relating to the key aspects of the internal organisation of trade unions. Several of these are as a direct result of the statutory requirements to be found in the LRA, which prescribes certain topics to be regulated by trade unions in their constitutions.[358] In many cases, the constitutions use identical wording in setting out their provisions.[359]

3 5 1 1 Benefits and services

All the constitutions, as would be expected, outline what benefits the unions will

[358] As mentioned, the details surrounding s 95 of the LRA in particular, pertaining as it does to what must be contained within the constitutions of registered labour associations, are also discussed below in chapter 12 – in the context of the direct regulation of trade unions.

[359] A good example hereof are the clauses regulating strike ballots, and union representatives' immunity – discussed below.

strive to provide to their members. In this regard, the preamble[360] or aims/objectives[361]

[360] See for instance, *inter alia*, the following examples: "fight for a fair living wage and decent working conditions", and "oppose discrimination in all its forms in the workplace" (AMCU cl 1(a)-(b) respectively); "seek, further and protect the interests of its members and workers in general" (CEPPWAWU's Preamble clause); "a united non-racial South Africa free of oppression and economic exploitation" (CWU cl 1.1); "render a professional service to all our members through democratically elected structures which are mandated by members in the interests of protecting them against any unfair practice" (HOSPERSA's Mission clause); "[o]nly effectively organised and united workers are able to improve wages, raise their standard of living and protect themselves against the insecurities of life" (NEHAWU Preamble clause); "fight and oppose discrimination in all its forms within the Union, the factories and in society" (NUMSA Preamble clause (a)); "[u]nions are under a solemn obligation: to represent members forcefully and effectively in negotiations with the employer/management and to conduct internal union affairs according to democratic standards" (PAWUSA Preamble clause); "to struggle for the abolition of the Capitalist System and for the establishment of a Classless Society" (SACCAWU cl 1.3); "to the transformation of education and dedicated ourselves to the development of an education system which is fully accessible, equal and qualitative, free of apartheid legacy and which is the just expression of the will of the people" (SADTU cl 1); "to foster an esprit de corps among teachers and Education Workers and to promote and maintain high standards of ethical conduct, professional integrity and efficiency in the promotion and maintenance of standards of teaching and learning" (SADTU cl 6.10); and finally, "[the union] is dynamic, proactive, and transparent and believes in democracy, excellence and professionalism, non-racial and non-sexist, humility, collectivism, solidarity and unity as its core values" (SAMA 2.2).

[361] See for instance, *inter alia*, the following examples: "[t]o institute legal action on behalf of AMCU, its members and office bearers in line with the objectives of AMCU and, where possible, to legally assist members in matters relating to employment" (AMCU cl 6.1.12); "to regulate relations between trade union members and their employers" and "to encourage the settlement of dispute [sic] between the trade union members and employers and employers' organizations by conciliation, mediation, or arbitration" (BIFAWU cl 4(4) and cl 4(8) respectively); "to protect the job security of members, to advance their employment prospects, and to serve their individual and collective interests" (CEPPWAWU cl 2(e)); "to establish and administer funds for the benefit of its members and/or their dependents" (CSA in cl 4.14); "[t]o promote, support or oppose, as may be deemed expedient, any existing or proposed legislation or other measure affecting the interests of members" (CWU cl 7.6); "negotiate and enter into any collective agreements between members and their employers in relation to their employment" (FAWU cl 5.5); "[t]o promote safe and healthy working conditions" (HOSPERSA Aims and objectives clause); "[f]acilitate and secure the establishment of conditions and regulations governing the training of members for and admission to employment and to provide or co-operate in providing skills, knowledge, training and examination in subjects of concern to members in the performance of their duties" (IMATU cl 4.13); "[t]o borrow, invest, lend, subscribe or donate money for the furtherance of the objects of the Union" (MISA cl 4(15)); "[t]o affiliate with and participate in the affairs of any international workers organizations or the International Labour Organisations" [sic] (NASWU cl 3(e)); "to improve the political, social, economic interests and material welfare of former, current and prospective members of the union, workers and labour organisations generally" (NUM cl 1.7.5); "to strike without fear of dismissal, to picket and to participate in secondary strikes and protest action, to promote or defend the socio-economic interests of workers" (NUMSA cl 5(a)(iii)); "[t]o provide information and produce publications about the Union and its work on a regular basis in languages and design that can be easily understood" (POPCRU cl 7.3.12); "to take such steps as are deemed necessary to secure and maintain cordial relations and the fullest measure of co-operation with employers and the general public in matters affecting any organ of state with a view to efficiency and

clauses (many of which are shared by all the constitutions) can be encapsulated in a general phrase of the union striving to "generally to do all things that will be in the interest of members in their individual and collective capacities".[362]

3 5 1 2 Trade union status clauses

All the constitutions have what can be termed a "status clause", which sets out the legal nature of the trade union in question. The extent to which the clauses elaborate on the legal status of the union, runs the gamut from minimum compliance[363] with the LRA,[364] to setting out in more complete terms the separation between union and members.[365] Furthermore, the overwhelming majority of constitutions all share certain key phrases or wording. Apart from making direct reference to their being non-profit associations, 21 of the 25 status clauses (with two slight variations)[366] make reference

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economy combined with the well-being of those employed" (PSA cl 4(3)); "to oppose any policy, practice or measure which will cause division or disunity amongst Members or Workers" (SACCAWU cl 1.16); "to promote professional integrity and high standards of ethical conduct among members" (SAMA cl 4.1.8); "[t]o work for the achievement of a society based on economic, social and political justice and equality" (SAMWU cl 2.3.1); "to improve – workers' hours of work and leave provisions" and "the social benefits, including unemployment insurance, retirement and medical funds and the provision of housing" (SATAWU cl 8.2.2 and 8.2.6); and finally, "[t]o plan, organise and execute its activities independently" (UASA cl 3.3).

[362] See for instance AMCU cl 6.11.1, where is stated "[t]o do all such things as are in the interests of AMCU and its members and which are conducive to and consistent with the aims and objectives of AMCU", and NEHAWU cl 2(b): "to protect the job security of members, to advance their employment prospects, and to serve their individual and collective interests".

[363] See for instance CSA cl 2.2 and IMATU cl 2 that merely state "[t]he Association shall be an association not for gain" and "[t]he Union shall be independent and shall be an association not for gain" respectively.

[364] Subsection 95(5) read with subs 95(5)(a) of the LRA states: "The constitution of any trade union… that intends to register must– state that the trade union… is an association not for gain". Considering the prescriptive nature of this subsection, as would be expected, all the union constitutions so considered make reference to their being an organisation not for gain.

[365] See for instance SAMA cl 3.1-3.4, where is said:

> "The organization shall be a body corporate with perpetual succession, capable of entering into contractual and other relations and of suing and being sued in its own name. [cl 3.2] It shall hold property apart from its members. [cl 3.3] The liability of members shall be limited to the amount of their subscriptions outstanding or other monies due to the Organization at any time. The Organization is an association not for gain. [cl 3.4] Members and office bearers have no rights in the property or other assets of the Organisation solely by virtue of being members or office bearers. The Organisation's income and property are not distributable to its members or office bearers, except as reasonable compensation for services rendered. The financial transactions of the Organisation are to be conducted by means of banking accounts."

[366] Namely FAWU cl 4.1, which speaks of it as being an "independent entity having perpetual

to the unions' being a corporate body having perpetual succession.[367] Closely related hereto, there are fifteen of the 25 constitutions explicitly stating that the association is capable of entering into contractual and other relations and of suing and being sued in its own name,[368] with slight variations in two instances.[369]

Far less frequent is a phrase pointing to the separate holding of property or assets by the union apart from its members – with only eight of the 25 constitutions making reference to this.[370] Similarly, only six of the 25 make reference to the liability of the members (to the union) being limited to their outstanding subscriptions.[371]

As is apparent from the above, significant equivalence exists in the wording and underlying approach to the trade union status clauses. Eleven of the 25 constitutions see virtually identical clauses being used, word-for-word in general (subject to minor adjustments to reflect the individual union in question),[372] while a further three constitutions share a slightly different version.[373]

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succession", and PAWUSA cl 2.2, which describes itself as merely a "corporate body with separate legal existence".

[367] The constitutions in question are: AMCU cl 5; BIFAWU cl 5; BWU cl 4; EAMWUSA cl 4; MISA cl 3(1); NASWU cl 4; Solidariteit/Solidarity cl 4.1; UASA cl 4; CEPPWAWU cl 1(2)(b); NEHAWU cl 1(2)(b); HOSPERSA cl 5.1; CWU cl 4.1; NUM cl 1.4.1; NUMSA cl 1(3); POPCRU cl 4.1; PSA cl 2; SACCAWU cl 29; SADTU cl 4.1; SAMWU cl 1.2; SAMA cl 3.1; and SATAWU cl 4.1.

[368] The constitutions in question are: AMCU cl 5; BIFAWU cl 5; BWU cl 4; EAMWUSA cl 4; MISA cl 3(1); NASWU cl 4; Solidariteit/Solidarity cl 4.1; UASA cl 4; NUM cl 1.4.1 read with cl 1.4.1.1-1.4.1.3; POPCRU cl 4.1 read with cl 4.1.1-4.1.3; PSA cl 2; SACCAWU cl 29; SADTU cl 4.1; SAMWU cl 1.2; and SAMA cl 3.1.

[369] These being FAWU cl 4.1, which only makes reference to being able to sue or be sued, and PAWUSA cl 2.2, which states the same but adds the "in its own name" qualifier.

[370] The constitutions in question are: AMCU cl 5 NUM cl 1.4.2 PAWUSA cl 2.3 POPCRU cl 4.1.4 SACCAWU cl 29 SADTU cl 4.1 SAMA cl 3.2; and SAMWU cl 1.2.

[371] These being NUM cl 1.4.3; POPCRU cl 4.1.5; SACCAWU cl 29; SADTU cl 4.1; SAMWU cl 1.2; and SAMA cl 3.3.

[372] The clause (as adjusted) reads as follows: "This trade union shall be a body corporate with perpetual succession capable of entering into contractual and other relations and of suing and been sued in its own name and shall be an organisation not for gain." The constitutions that closely reflect this wording are AMCU cl 5; BIFAWU cl 5; BWU cl 4; EAMWUSA cl 4; MISA cl 3(1); NASWU cl 4; Solidariteit/Solidarity cl 4.1-4.2; UASA cl 4; CEPPWAWU cl 1(2); NEHAWU cl 1(2); and HOSPERA cl 5.1.

[373] The wording of this clause (as adjusted) is as follows: "The union… is an association not for gain; and a corporate body having perpetual succession, legal existence, and all the legal powers of a juristic person." The constitutions that closely reflect this wording are CEPPWAWU cl 1(2); NEHAWU cl 1(2); and HOSPERSA cl 5.1.

3 5 1 3 Trade union constitution supremacy

Although not common, several of the constitutions contain what can be broadly referred to as a "constitutional supremacy" clause.[374] By this is meant a clause that explicitly confirms the constitution to be applicable to all members of the union, and that by implication, all within the union are subject to its provisions.[375] However, the overwhelming majority of constitutions see numerous clauses spread throughout the constitution (as opposed to it being found within single clause) that – when read either individually or collectively – point to the primacy of the constitution (either by virtue of the effect of the clause,[376] or the persons referenced therein). One such example sees the constitution stating that joining the union is dependent on the members' agreement to subscribe to the constitution – and then furthermore allocating duties to bodies or functionaries to ensure compliance.[377]

Numerous unions require specific officials, representatives or committee-structures to monitor and enforce compliance with the constitution. This ranges from the union president[378] to chairpersons of the various internal structures,[379] or committees directly.[380] Further confirmation of the importance of the union constitution is demonstrated by how unions regulate how the constitution may be amended. Thirteen

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[374] These include PSA cl 5; CEPPWAWU cl 5; NEHAWU cl 5(1); IMATU cl 5.3.5; FAWU cl4.10; NUMSA cl 2(1)(a)-(b); and SATAWU cl 9.2.1.

[375] For instance, both CEPPWAWU cl 5 and NEHAWU cl 5(1) have identical clauses which state as follows: "This constitution is the source of all rights and responsibilities within the union, and Is the final authority concerning any dispute within the union". In addition, a couple of the constitutions refer to the need for compliance with the union's constitution and "regulations and by-laws made there under" (IMATU cl 5.3.5) – or "policies" (FAWU cl 4.10) – whilst mention is also made of having to comply with the constitution and lawful decisions made by various union structures (FAWU cl 4.10; NUMSA cl 2(1)(a)-(b); and SATAWU cl 9.2.1). Lastly, certain unions simply ascribe the constitution to be directly applicable only to the members, whilst nonetheless still making provision for compliance thereto by officials and the like elsewhere in the document: SACCAWU cl 3.2-3.2.1 states that "[a]ll members are obliged to… abide by the clauses of this Constitution".

[376] A simple example, mirrored in some form or other across all of the constitutions in question, is where the functioning or decisions of a union-structure/committee is required to be done in compliance with that union's constitution – PAWUSA cl 16.4.11.12-16.4.12.1.

[377] AMCU cl 2 read with cl 7, cl 11.5.6.6 and cl 20.2.1.3(ii).

[378] Included herein are BIFAWU cl 12(1)(a)(ii); CSA cl 16.1.2; CWU cl 15.1.2; EAMWUSA cl 11(1)(a); MISA cl 8(6)(c); NASWU cl 11(1)(a); NUM cl 12.1.2; HOSPERSA cl 18.1.7; SACCAWU cl 24.4.1.2; SADTU cl 13.5.1; and SAMA cl 10.1.1.1.2.

[379] These include SACCAWU cl 19.5.1.2; POPCRU cl 12.4.2; SADTU cl 10.6.1; SADTU cl 11.4.1; SADTU cl 12.6.1; SAMA cl 9.2.1.1.1; and Solidariteit/Solidarity cl 14.5.3.

[380] One example would be of the National Executive Committee ("NEC"), as per HOSPERSA cl 5.7.3, which is in turn tasked with monitoring compliance by the lower committee-structures.

of the 25 constitutions require a two-thirds majority by their National Congress (NC) (or equivalent),[381] one requires a unanimous vote (or ballot, if contested) by the NC,[382] with a further three not specifying the majority required, but simply that the NC is the body that must effect any such amendments.[383] With three exceptions,[384] some unions allow for amendment via resolution by the NEC, but with one key proviso: the proposed amendment must be circulated to the various committee-structures/organs within the union, and upon any branch making the request, a ballot of the entire union must be held in order to confirm the change.[385]

The overwhelming majority of constitutions also make provision for the interpretation of the constitution by functionaries or bodies,[386] also in cases of a dispute arising internally,[387] or to allow for decisions on policy to be made where the

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[381] AMCU cl 33; CEPPWAWU cl 81; HOSPERSA cl 69; PAWUSA cl 25; POPCRU cl 28.1; MISA cl 19(1)(a) read with cl 2(11); NEHAWU cl 85; NUM cl 22; NUMSA cl 14; PSA cl 91; SADTU cl 20; SAMA cl 14; and Solidariteit/Solidarity cl 22.

[382] FAWU cl 21.

[383] CSA cl 23; SACCAWU cl 45; and SAMWU cl 18.

[384] UASA cl 18 merely requires a resolution by either the NEC or NC, however – in the case of the latter – the majority of NC must first agree to have the amendment discussion/proposal heard at the NC. IMATU cl 13 allows for amendment by the NC, through unanimous resolution by the NEC, or by ballot of the Regional Committees (if decided as necessary by NEC). In regards to the Regional Committees' ballot, a majority vote by the regions representing in total the majority of the union's members is required. SATAWU cl 49 on the other hand, is the only example where either the NC, NPC or CEC (if mandated by NC) may amend with a simple 50% plus 1 majority vote.

[385] BIFAWU cl 19; CWU cl 46; EAMWUSA cl 17; BWU cl 17; and NASWU cl 17.

[386] See for instance HOSPERSA cl 78, where is stated:

> "The responsibility for the interpretation of this Constitution or any matter arising in connection therewith shall be vested in the National Executive Committee and its decision shall be final and binding. The General Secretary is the custodian of this Constitution and all matters arising shall be addressed to him".

POPCRU cl 29.1 states in turn:

> "Whenever any doubt arises as to the interpretation of any of the provisions of the Constitution, the NC shall make a ruling on the matter and such ruling [by majority vote] shall be the only final interpretation of the Constitution, provided that the CEC shall be empowered to make an interim ruling on the interpretation prior to the NC's final decision".

Lastly, SACCAWU cl 46 states:

> "The responsibility for the interpretation of the terms of this Constitution or of any matter arising in connection therewith shall be vested in the National Congress and its decision shall be final and binding".

[387] See for instance NUM cl 23.2-23.3, where is stated:

> "The Central Committee must interpret the Constitution if a dispute arises and its decision shall be final and binding. [cl 23.3] If there is a dispute in a structure about the interpretation of any clause in this Constitution that structure must refer the dispute to the next higher structure for its decision".

Lastly, SACCAWU cl 47.1 states: "Any dispute in the interpretation of the meaning of any words in this

constitution is silent.[388]

Perhaps the most consistent acknowledgement of the importance of the union constitution is in the reference thereto in the context of internal disciplinary procedures. The constitution is declared to be the standard against which the conduct of union members, officials, office bearers and employees is measured. Almost without exception, the conduct of representatives (and members) are judged against whether or not the conduct infringes the union's constitution. The issue of internal discipline will be discussed separately in more detail below.

3 5 1 4 Control of union bodies and functionaries

Brief mention can be made of the fact that eighteen of the 25 constitutions empower specific union committees or functionaries to intervene,[389] investigate,[390] suspend,[391] dissolve[392] or take control over [393] other, lower union committees or organs/branches.[394]

The primary justification for such intervention stems mostly from the lower

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Constitution shall be determined by the CEC."

[388] See for instance CSA cl 15.6.20-15.6.21, where the NEC is mandated "to decide all matters of procedure on which the Constitution is silent; [cl 15.6.21] to give final ruling on any question pertaining to the interpretation of this Constitution subject to the general rules of interpretation provided by law and to the directives as may be given by the National Conference from time to time". See further PAWUSA cl 16.4.8, which also mandates its NEC; and EAMWUSA cl 10(5)(j), which empowers its Executive Committee – along with NASWU cl 10(5)(l), that mandates the Executive Council.

[389] SAMWU cl 9.3.2(e) states, of the power of the CEC to "amend, reverse or prohibit any decision or activity of a province or its sub-structures which it considers to be against the interest of the union or its members or which is not in compliance with adopted policy".

[390] See for instance CSA cl 10.3, where is stated: "[T]he NEC, shall have the right the assign one or more of its members or any official to investigate the affairs of the provincial structure at any time and shall notify the provincial structure concerned of the reasons therefor. Such an assignee shall have access to all records of the provincial structure and the power to take the records into custody for consideration by the NEC." NASWU cl 12(1)(e) is very similar in terms of the its structure, and powers so enabled.

[391] See for instance SAMWU cl 9.3.1(f); UASA cl 11.6.3.11.

[392] SADTU cl 13.3.4(k) empowers the NEC to "dissolve or suspend [the] PEC, REC or BEC for action contrary to the terms of this constitution".

[393] BIFAWU cl 11(5)(i) empowers the NEC to, *inter alia*, "take over the management of the affairs of any such office as it deems fit, until the affected positions are filled". See further UASA cl 11.3.8, which mandates the Management Committee to investigate the lower Sector Committee, and "take over the control thereof if, in its discretion, it will be in the best interest of [the union] and its members to do so".

[394] As will be apparent from the discussion to follow below, at § 8 3 3 4 3 and § 9 3 3 2 2 2, this is similar to the so-called "trusteeship" mechanism used in the USA.

committee or body acting contrary to the terms of union's constitution,[395] or in defiance/contravention of instructions issued by (or policies of)[396] a higher committee[397] or functionary.[398] Examples do exist where the grounds for intervention are anything but specific.[399] Furthermore, some of the constitutions prescribe no grounds at all, and simply mandate the specific committees to warn, suspend or disband lower organs or branches, or suspend or terminate the period of office of an office-bearer.[400] An additional common theme is to offer, as grounds for intervention, the violation of (or failure to comply with) the constitution *along with* the broader term of "in the interests of the union".[401]

As is evident from the above, while the union constitution plays an important role in providing a standard against which conduct can be measured, significant power can be wielded by committees or functionaries, based purely on their office and related powers granted to them in terms of the constitution.

3 5 1 5 Legal action on behalf of the union and/or members

With two exceptions,[402] all the constitutions surveyed make provision for the union

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[395] See for instance Solidariteit/Solidarity cl 15.10.3; cl 16.5.1(j)-(k).

[396] See for instance MISA cl 7(14)(c), where the power is granted to the NEC to "vary, set aside or repeal any decision of any committee created in terms of this Constitution where, in its opinion, such committee had deviated from a stated national policy of the NEC". See further SADTU cl 13.3.4(k) – "policies or decisions of the National Congress, NGC or NEC".

[397] See for instance BWU cl 10(3)(h), "action contrary to the terms of this constitution *or to instructions issued by the Executive Council*" [my emphasis].

[398] See for instance BIFAWU cl 11(5)(i), which empowers the NEC to suspend any BEC, any official or office-bearer "for actions contrary to the terms of this Constitution or to directives issued by the NEC, or NC".

[399] HOSPERSA cl 5.5.1.3. See further NUMSA cl 5(3)(e)(vi), that also speaks of "on sufficient cause shown".

[400] See for instance IMATU cl 7.2.3.2.8, and the power of the NEC to "[w]arn, suspend or disband any Branch, Branch Committee, Region or Regional Committee and suspend or terminate the period of office of any Branch office bearer or Regional office bearer provided there shall be a right to appeal against the exercise of such powers in terms of the provisions of this Constitution and after following due process." Furthermore, in terms of cl 7.2.3.2.7, the NEC is empowered to "[r]egulate and control the conduct of Branch Committees and Regional Committees, their office bearers and trade union representatives, review the decisions of Branch Committees and Regional Committees and alter or reverse such decisions; provided that any meeting whose decision is altered or reversed shall have a right of appeal in terms of the provisions of this Constitution."

[401] See for instance AMCU cl 20.1.15. SAMWU cl 9.31 read with 9.3.2 in turn speaks of a structures' failure to comply with the constitution *and* "acting contrary to the interests of the union".

[402] Both SAMA and SAMWU appear to make no reference to the union providing legal assistance for

to legally assist its members in regard to matters relating to employment.[403] The form that these clauses take, sees constitutions that either: (i) make reference thereto solely within their aims/objectives clauses;[404] (ii) by means of clauses regulating the continued membership of the worker despite being dismissed, with the union providing legal assistance in fighting the dismissal;[405] (iii) by empowering specific union functionaries to institute such proceedings;[406] or finally, (iv) through a combination of the aforementioned.[407]

A variation sees broader provisions empowering specific functionaries, or the union (as a whole), to institute or defend legal actions/proceedings. In this regard, ten of the constitutions empower the NEC (or equivalent)[408] to institute and defend any legal action (or a variation thereof), at the very minimum, on behalf of the members,[409] or on behalf of (most frequently) the union as well as the members,[410] or on behalf of the members, the union and the officials or office bearers.[411] Of interest, is the fact that only one constitution sets out in any detail what is to be understood by legal assistance

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their members regarding employment matters – other than what is said in general, broad terms in their aims/objectives clauses.

[403] As is to be expected, there is some variation within the various constitutions, but all share the key point of departure of legal assistance being provided by the union to their members for employment-related issues. See eg, BIFAWU cl 4(7), which states: "to obtain and provide legal and other professional assistance to trade union members in connection with their employment". Furthermore, the aforementioned is over and beyond the numerous references across all constitutions (primarily within the aims/objectives clauses) to assist members in conciliation, mediation and arbitration procedures/hearings, in the ordinary context of employment.

[404] See BIFAWU cl 4(7); CWU cl 7.12; MISA cl 4(7); NUMSA cl 5(g)(i); and PSA cl 4(b).

[405] See CEPPWAWU cl 13(2)(b)-13(3); NEHAWU cl 13(4); NUM cl 2.7.3; and SATAWU cl 9.5.4.

[406] See FAWU cl 11.2.6.15; PAWUSA cl 16.4.6; Solidariteit/Solidarity cl 14.7.1; and UASA cl 11.6.3.7.

[407] See AMCU cl 6.1.12 read with cl 7.4.2, IMATU cl 4.6 read with 5.4.2 – both combining (i) & (ii); BWU cl 3(g) read with 10(3)(e), CSA cl 8.2 read with 15.6.17, EAMWUSA cl 3(g) read with 10(5)(g), NASWU cl 3(g) read with 10(5)(g), POPCRU cl 7.3.7 read with 8.8; SADTU cl 6.13 read with 13.3.4(f)-(g) – all combining (i) & (iii); SACCAWU cl 22.6.16 read with 33.2 – combining (ii) & (iii); HOSPERSA cl 7.8.2-7.83, 7.5-7.6, 8.2.1 read with the Aims & Objectives clause (10th bullet-point) – combining (i), (ii) and (iii).

[408] PSA cl 69(9)-(10) speaks of its "Board of Directors".

[409] Solidariteit/Solidarity is the only example of the constitutions considered which does not have separate clauses providing a general power to any of its functionaries/organs to institute legal action on behalf of the union in general, or in respects of its members, apart from what is stated in its "Doelstelling" (aims/objectives) clause at cl 3.4.2 and 3.5.

[410] See CWU cl 17.2.7; FAWU cl 5.11 read with 11.2.6.7; HOSPERA Aims & Objectives clause (10th bullet-point) read with cl 7.9; IMATU 7.2.3.2.3; NUM cl 9.6.1-9.6.2 read with 17.1-17.2; SADTU cl 13.3.4(f)-(g); and PSA cl 69(9)-(10).

[411] See AMCU cl 20.1.8 and MISA cl 7(14)(e).

or proceedings. In this regard, the constitution of Health and Other Services Personnel Trade Union of South Africa ("HOSPERSA") defines "legal assistance" as:

> "[I]n relation to all disputes which are the subject of potential legal proceedings, a written opinion obtained or given by the Union and made available to the member concerned under the hand of the Provincial Secretary summarising the facts of the dispute as reported to the Union by that member and making recommendations whether the dispute, given these facts, should be pursued or abandoned and shall exclude any other forms of legal assistance without the specific authority in writing of the National Executive Committee."[412]

It furthermore defines "legal proceedings" as follows:

> "[It] shall not include internal disciplinary proceedings in any workplace or institution where members are employed and all proceedings and remedies for conciliation, determination and/or resolution of labour disputes, and/or the enforcement of employee's rights and/or determination of matters of mutual interest and as are provided for in any labour legislation in force from time to time as may be excluded by the National Executive Committee from time to time, but shall include all other instances of the said proceedings, remedies and determination of matters of mutual interest which the National Executive Committee, or the Provincial Executive Committee having jurisdiction, may, in their sole discretion subject to the provisions of this Constitution, determine are to be instituted on behalf of any member by the Union."[413]

Ten of the constitutions, while empowering specific functionaries to institute or defend legal action,[414] make no reference to members in these clauses, and instead focus purely on defending or instituting proceedings on behalf of the union itself.[415] Lastly, six of the constitutions – apart from making reference to legal action on behalf of the union, or the union and its members – also make direct reference to the capacity or competence to *act against individual members*. By way of example, clause 10(3)(c) of the Builders Workers Union ("BWU") states that its Executive Committee shall have the power to "institute or defend legal proceedings by or against the Trade Union or

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[412] See HOSPERA definitions, under cl 1.1.

[413] See HOSPERA definitions, under cl 1.1.

[414] As with the examples above, here, too, the NEC (or its equivalent – adjusted for the peculiarities of each unions' structure – or where the union in question has national and regional/provincial decision-making bodies) is authorised to take the decision to institute or defend the proceedings.

[415] See BIFAWU cl 11(5)(e); CEPPWAWU cl 42(2)(j)-(k); CSA cl 15.6.6; NEHAWU cl 50(2)(h); PAWUSA cl 16.4.11.7; POPCRU cl 12.2.1.9; SACCAWU cl 18.4.10 read with 22.6.6; SAMA cl 9.3.2.4; SAMWU cl 7.7.6 read with 9.3.2; and UASA cl 11.6.3.5 read with 11.8.4.6.

on behalf of *or against individual members*" [my emphasis].[416]

All of this certainly points to an acknowledgement on the part of organised labour that relations between themselves and their members can deteriorate to the point that legal action either needs to be taken or defended against. The extent to which this is regulated by the union's internal disciplinary procedures will be explored in greater detail below.

3 5 1 6 Balloting

Subsections 95(5)(p)-(q) of the LRA[417] require that the constitutions of unions' wishing to register must provide that before calling a strike, "a ballot of those of its members in respect of whom it intends to call to the strike" must be conducted;[418] and provide that members of the union "may not be disciplined or have their membership terminated for failure or refusal to participate in a strike"[419] if "no ballot was held about the strike",[420] or "a ballot was held but a majority of the members who voted did not vote in favour of the strike".[421]

All bar three of the unions surveyed comply fully with this requirement.[422] Similarly,

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[416] The constitutions in question, apart from BWU as mentioned here, are EAMWUSA cl 10(5)(e); NASWU cl 10(5)(g); NUMSA cl 5(3)(e)(vii)(1)-(2) read with 6(2)(d)(viii)(1)-(2); SATAWU cl 28.4.23; and UASA cl 11.6.3.7.

[417] Subsection 95(5)(p) in particular, is of interest given the recent promulgation in December 2018 of a NEDLAC Code of Good Practice, which touches directly on the question of pre-strike balloting. With this being said, the Code has been instituted in the context of a notable amendment to the LRA, which has also seen new Guidelines being issued, focusing on, *inter alia*, balloting. The impact of the aforesaid, is discussed in more detail at § 12 4 4 4 below.

[418] Subsection 95(5)(p) of the LRA.

[419] Subsection 95(5)(q).

[420] Subsection 95(5)(q)(i).

[421] Subsection 95(5)(q)(ii).

[422] NUMSA sees compliance in terms of subs 95(5)(q), by means of cl 4(a)(ii). However, its chapter 10, which deals with "Ballots" (and the associated procedures), states as follows under cl 10(1): "A ballot must be taken: (a) when it is compulsory in terms of this constitution; (b) if demanded by the National Congress, Central Committee, Regional Congress, Local Shop Stewards Council or Factory General Meeting". Whilst there are several references to ballots in the rest of the constitution, these pertain to specific scenarios (such as being used when removing an official from office) – and no provision is made of the holding of a ballot prior to a strike. Secondly, whereas SACCAWU cl 35.11 makes reference to a ballot being called prior to strike, it is qualified by this only being done "should it be deemed necessary" – and no further mention is made of any protection afforded to members against discipline for non-participation in such a strike, as per subs 95(5)(q) of the LRA. Lastly, SAMA makes no mention at all of strike action anywhere in its constitution, and this is presumably why no clause regulates a ballot being held prior to strike action.

all bar one have explicit provisions setting out the procedural requirements surrounding how ballots are to be conducted within the unions (in terms of subs 95(5)(o) of the LRA).[423] The issue of balloting – particularly in light of the recent amendments to the LRA – will be discussed in greater detail at § 12 4 4 4 below. As already mentioned in chapter 2, it is in the area of (unprotected) strike action that a trade union's (potential) accountability to its members comes into sharp focus.

3 5 1 7 Functions of trade union representatives

Subsection 95(5)(j) of the LRA requires that a trade union constitution must "provide for other office bearers, officials and, in the case of a trade union, trade union representatives, and define their respective functions". The functions of trade union representatives are in turn outlined in subsection 14(4) of the LRA.[424] The term "union representative" refers to the representative of the union within the workplace – most commonly described in the various union constitutions as the "shop steward" (but with expected variations depending on how the unions are structured).[425] All the unions also see a variety of other representatives at varying levels within the union structure, as discussed in the "Trade union structure" section at § 2 6 above.[426]

Whereas all of the unions have numerous clauses prescribing the powers, functions and duties of officials or office bearers, their relation to each other and their role within

[423] The exception is again that of SAMA, which – apart from providing for a "show of hands" to be the default decision-making mechanism (care of cl 5.1.1), allows for a "secret ballot" where 20 per cent (or more) of the members present in that meeting request it (care of cl 5.1.2) – but makes no further mention of what the procedure for a secret ballot would entail. In terms of subs 95(5)(o) of the LRA, the constitution in question must "establish the circumstances and manner in which a ballot must be conducted".

[424] Subsection 14(4)(a)-(d) of the LRA speaks of assisting and representing the employee in grievance and disciplinary proceedings; monitoring the employers' compliance with either the LRA or related legislation, or collective agreement; the reporting of any contraventions of the LRA to the employer, the representative trade union or "any responsible authority or agency"; and finally, performing any other function as agreed between the representative trade union and the employer.

[425] The definitions clause, s 213 of the LRA describes a trade union representative as follows: "'trade union representative' means a member of a trade union who is elected to represent employees in a workplace."

[426] These include union officials and office-bearers, at local, provincial/regional or national levels, with the definitions clause, s 213 of the LRA describing both as follows: "'office-bearer' means a person who holds office in a trade union… and who is not an official; 'official', in relation to a trade union… means a person employed as the secretary, assistant secretary or organiser of a trade union … or in any other prescribed capacity, whether or not that person is employed in a full-time capacity."

the structure of the union, these are predominantly aimed (as is to be expected) at the internal management and functioning of the union. However, for the ordinary union member, the most frequent contact-point with the union occurs at local, workplace level, would be via the local branch meeting or workplace discussions – and these involve their duly-elected representative, the shop steward.[427]

This in mind, the majority (20 of the 25) of the constitutions provide for specific clauses that regulate what can be expected from shop stewards (or variations thereof) within those workplaces.[428] These shop steward functions share a series of common features, with the Association of Mineworkers and Construction Union constitution serving as a useful example and point of departure in this regard: (i) to conduct the affairs of the union at the workplace where they are elected; (ii) to receive and attend to all complaints affecting members concerning their employment, membership and working conditions; (iii) to report any improper employment practices or contraventions of employment laws; (iv) to represent members in internal disciplinary hearings and grievance procedures; (v) to represent members in consultations regarding the operational requirements of the employer; (vi) to represent members in any proposed terminations based on incapacity or in regards to health and safety issues; (vii) to act as a link between management and the members as employees; and finally (viii) to communicate with members on all union matters from regional or national offices.[429] Not all the shop steward clauses are so detailed or lengthy,[430] while several of the

[427] Several of the constitutions express this point directly – see for instance SACCAWU cl 7.3.1.10, where is stated that the shop stewards' shall "act as a link between Members in their establishment and the rest of the Union without undermining relevant structures of the union". SAMWU cl 5.8.9 serves as another example of the aforementioned, albeit with more detail: "To obtain mandates from members on any issues or matters of policy that members wish to be dealt with by the union. To report back to and obtain mandates from members on any issue or policy which higher structures may require to be addressed."

[428] The constitutions that do *not* specifically stipulate the functions of the representatives at shopfloor level, namely CSA, IMATU, PAWUSA, SADTU and UASA – nonetheless do not leave the regulation completely open-ended, by virtue of the overarching powers and functions of the officials and office-bearers at the higher levels, and their supervisory capacities. In the alternative, the functions of a branch committee can be stipulated, which will then contain the aspects of the functions expected of the shop stewards – see in this regard UASA cl 11.1.5.2 and SADTU 9.4.1-9.4.4.

[429] AMCU cl 11.4.1.1-11.4.1.8.

[430] Compare for instance what is said at BIFAWU cl 12(3)(e):

> "[T]he main purpose of the trade union representative councils shall be to implement and give effect to the decision of the NC, NEC or BEC, recruit members and promote their interests, investigate complaints form [sic] the trade union members in their workplace, represent trade union members on the Commission [CCMA] and collect membership fees."

constitutions simply make direct reference to subsection 14(4) of the LRA and list those provisions, together with minor additions.[431]

Regarding additional functions, some constitutions empower local shop stewards to conclude collective agreements within the workplace, subject to the proviso that this is only binding if the agreement is authorised/signed by the relevant functionary or committee higher up within the union.[432] Others require their shop stewards to build and maintain unity, order, harmony and discipline amongst the members in the workplace,[433] or to comply with the constitution.[434] Of further interest is the Solidariteit/Solidarity constitution, which is the only example where (within a clause specifying the duties of the shop stewards) the provision of "advice" to members is specified.[435] The constitution of South African Transport and Allied Workers Union ("SATAWU") is the only example of enabling shop stewards to "recommend to the POBC [Provincial Office-Bearers Committee] that local office-bearers, shop stewards or members be disciplined".[436] Lastly, mention must be made of several of the constitutions prescribing the competency of higher union bodies to resolve internal disputes between members at the local workplace/shop-floor level.[437]

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[431] See for instance BWU cl 11(2)(e)(i), which also makes reference to the trade union representative implementing/giving effect to higher union bodies, recruiting members and "generally promote their interests [and] represent members in matters before the Commission [CCMA]". See further EAMWUSA cl 11(2)(f)(i)-(ii); MISA 11(6)(a)-(b); NASWU 11(3)(i)-(ii).

[432] CEPPWAWU cl 16(4)(c) requires the signature of the General Secretary or his designate, whereas HOSPERSA cl 27.4 requires written authorisation by the NEC or PEC. SATAWU cl 17.2.12 speaks of requiring the relevant national/provincial office-bearer or CEC designate to approve the agreement, but adds to this that the agreements may only be "concluded and signed if the members have provided a mandate" for it. See further UASA cl 11.3.7.3 and NUMSA cl 4(1)(d)(ii)(1).

[433] See HOSPERA cl 27.2, SATAWU cl 17.2.8 and SACCAWU cl 7.3.1.3. POPCRU cl 19.2.6 speaks of "[e]nsuring the observance of the organizational discipline", coupled with [at cl 19.2.7] "[t]aking reasonable steps to address any deviation from the organizational discipline by any member or institutional [workplace] office-bearer".

[434] See for instance SAMWU cl 5.8.11, which reads: "To encourage members to abide by the unions constitution and policies and to use democratic means and procedures to obtain such amendment to either as they may consider necessary."

[435] Solidariteit/Solidarity cl 12.5.4 reads simply: "advies aan lede".

[436] SATAWU cl 17.2.15.

[437] See eg, CEPPWAWU cl 20(c) and 20(h); MISA 10(13)(c); SATAWU cl 19.6.1.6; FAWU cl 9.4.6.4; and SADTU cl 10.4.4(d). An alternative to this scenario, is presented by PSA cl 89, which states: "Any dispute between a member or office bearer, including the functional structures of [the union] if they cannot be solved mutually, will be settled by arbitration".

3 5 1 8 Removal from office

In terms of subsection 95(5)(m) of the LRA, the constitution of a union wishing to register must "establish the circumstances and manner in which office-bearers, officials and, in the case of a trade union, trade union representatives, may be removed from office". As such, all the constitutions in question attempt to regulate this aspect. Essentially, this is done either individually or by means of a combination of the following three scenarios: firstly, through a separate/specific clause(s) regulating the removal/vacancy of office, subject to grounds focused on the capacity or conduct of the individual;[438] secondly, removal by means of ballot, with the emphasis on the process surrounding that procedure (as opposed to the individual in question);[439] and, thirdly, through either a combination of the first two scenarios into a single clause, or separate removal and/or ballot provisions along with a combination of various internal clauses found within different sections of the constitution.[440]

Of importance is the point that the removal from office most frequently involves a capacity issue (by this is meant that there has been a change in the status or capacity of that individual in his/ her relationship *vis-à-vis* their union),[441] or a punitive aspect (in the sense that the official/office-bearer/representative in question has either failed to comply with, or contravened, some defined measure or standard),[442] or some form

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[438] See for instance, *inter alia*, AMCU cl 23; BIFAWU cl 14 and HOSPERSA cl 40.

[439] See for instance CEPPWAWU cl 56; CWU cl 37; and HOSPERSA cl 41.

[440] See eg, BIFAWU cl 13(2)(b) ["He/she may be summarily discharged by the BEC for serious neglect of duty or misconduct, which shall include conduct deemed by the BEC to be prejudicial to the interests of the branch"]; CSA cl 15.6.15; NASWU cl 12.2(f); Solidariteit/Solidarity cl 15.9.4 & 16.3.1; and SADTU cl 10.7.

[441] By way of example (it must be noted that numerous constitutions overlap in this regard) MISA cl 7(7)(a)-(e) includes, *inter alia*, the following criteria: (i) The individual has resigned; (ii) The individual has been expelled or suspended from the union; (iii) The individual has been absent without reason from 2/3 (union dependent) consecutive committee meetings; (iv) The individual has resigned their membership of the union; or, (v) the individual is no longer employed in the relevant industry. For further examples, similarly worded, see CEPPWAWU cl 52; CSA cl 13.2; CWU 26.2 & 35; HOSPERSA cl 40; NEHAWU cl 60; NUMSA cl 8(1); POPCRU cl 13(1); and UASA cl 13.

[442] Typically contravening the union's constitution or acting contrary to the interests of the union/members. Further examples of the wording used, is demonstrated by Solidariteit/Solidarity cl 16.3.1 and SAMA cl 7.5.1.6-7.5.1.7, and speaks of "serious misconduct" (involving non-fulfilment of office duties and violation of the code of conduct of the union), and "disgraceful conduct" (involving acts which may damage the image of the union), respectively. Of further interest is that of UASA, which at cl 13.1.3, is the only constitution where reference is made to a "fiduciary duty" (the office-bearer may be removed from office if the individual "acts in a manner which is in conflict with his fiduciary duty, to [the union]") – but, at risk of stating the obvious, the duty in question is limited to that which is owing to

of combination.[443]

In contrast, removal by ballot (provided for in either a separate clause in a broader removal clause, which may involve non-compliance on the part of the individual and/or capacity-issues)[444] does not require application of a defined measure or standard pertaining to the functionary.[445] Therefore, the removal by ballot stems from the democratic will of the concerned members' exercising their right to the removal from office of the (alleged) recalcitrant representative and is not necessarily based upon the action or inaction and changes in capacity or status of the individual functionary. This represents the most direct example of union democracy at play. If the required numbers of members can garner sufficient support, the individual can be removed for seemingly any reason, should the balloting outcome support the motion.[446]

The further point must be made that across several constitutions an overlap between vacating an office and removal from office exists. In other words, this means many of the constitutions contain a separate clause entitled "removal from office" (which also sets out the conditions or parameters against which the individual's conduct is to be measured). However, these same conditions/parameters are also be

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the union.

[443] See eg, MISA cl 7(7)(a)-(e) – as discussed at § 3 5 1 8 above in regards to the "capacity/status" criteria, but which also includes cl 7(7)(f)(i)-(iv), where is stated that the individual will be removed from office for:

> (i) "[C]onduct damaging to and/or calculated to damage the status of the Union, the Industry or trade unions generally; and/or [ii] conduct damaging to and/or calculated to damage the status of any member, Office-Bearer or Official of the Union; and/or [iii] insulting or interfering with any Office-Bearer or Official of the Union in the execution of his/her duties; and/or [iv] infringing any of the terms of this Constitution willfully."

[444] See for instance BIFAWU cl 14(4), which regulates removal by ballot within the broader clause that also makes provision for removal from office for infringing provisions of the union's constitution and acting in a manner that is detrimental to the interests of the union. To put it simply, the individual could accordingly face removal for non-compliance with the constitution *or* by virtue of a ballot being held for any particular reason, as seen fit by the affected membership.

[445] In the fourteen constitutions that contain specific ballot provisions, none of them stipulated specific grounds for a ballot to be called (other than the requirement that the membership wanted it/it is at the behest of the membership).

[446] As is to be expected, there are significant variations surrounding the quorum of such votes, what majority is required, who may vote, rights of appeal [as required in terms of subs 95(5)(n) of the LRA] and how the vote is to be conducted – along with differences in procedural steps – with some provisions requiring a petition that first triggers an investigation before a final ballot [SAMWU cl 5.4.5-5.4.7], compared to others where a simple (majority) vote suffices [UASA cl 13.1.5], or two-step process requiring sufficient numbers to initially call for a vote, to only then have a final ballot [MISA cl 18; NUM 14.3].

found in other constitutions, but as clauses which are prefaced by a different heading ("Vacation of Position", for example)[447] or a statement that "shop stewards must vacate their positions in any of the following circumstances".[448] The same criteria are accordingly used in different constitutions, either as confirmation of an office automatically becoming vacant, or as the means by which the removal process can be activated.

Lastly, mention may be made that when considering those constitutions that have a separate removal clause, examples exist where the contents thereof pertain *solely* to a removal by ballot (there is no reference to any additional grounds) based on popular support amongst the affected members.[449] This means that the distinction between a separate and complete "removal clause", or individual clauses prescribing removal where there is non-compliance on the part of a functionary, compared to that of removal by means of ballot is by no means clear-cut or firmly delineated. Even so, and even though one would expect the ballot to be one of a trade union's primary means of removal, this is counterweighed by examples of unions that make no provision at all for removal by ballot.[450] The important point to keep in mind is that whereas sixteen of the 25 constitutions separately (or by internal clauses) provide for removal by ballot, *all* 25 constitutions either have separate clauses regulating removal on capacity/non-compliance grounds, or have those and additional internal clauses providing for removal. Put simply, removal based on (in)capacity or non-compliance is by all accounts the most prevalent mechanism by which union functionaries are to be removed from office. The fundamental expression of "majoritarianism democracy" within trade unions – the removal by popular vote – lags behind.

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[447] POPCRU cl 13.1.

[448] SATAWU cl 15.6. Compare these with NEHAWU cl 60(1) and NUMSA cl 8(1). Furthermore, there are examples of constitutions that combine both concepts – see for instance PSA cl 88(1), entitled "[v]acating or termination of office".

[449] See for instance MISA cl 18(1)-(4), entitled "Removal and Reinstatement of Office-Bearers and Paid-Official".

[450] See for instance IMATU cl 8.9 and BWU cl 10(2) read with cl 13 – which provides for removal on capacity and punitive/non-compliance grounds, but does not directly provide for removal by ballot. Further examples of constitutions without removal by ballot, are CSA; Solidariteit/Solidarity; EAMWUSA; PAWUSA; SAMA; and SADTU. With that being said, the emphasis here is on *direct* provision of such a ballot-mechanism – several of the unions do not specify removal of functionaries by ballot, but *do* make provision for ballots within the context of union, for decision-making within the various structures. It is therefore conceivable that these ballot mechanisms could be used to move for the removal of functionaries.

3 5 1 9 Financial regulation and reporting

The LRA, specifically sections 98,[451] 99[452] and 100, regulate the management of a trade union's financial records.[453]

The standard expectation is that of "generally accepted accounting practice, principles and procedures",[454] and involves the keeping of books and records of the union's "income, expenditure, assets and liabilities",[455] along with preparing the necessary financial statements within six months after the end of each financial year.[456] Furthermore, registered unions need to ensure that their books, records of account and financial statements are duly audited on an annual basis,[457] with written feedback on the compliance with the union's constitution being provided in report-form to the union in question.[458] Unions also have to ensure that all such books, records and reports are available to the membership for inspection and submitted annually to the relevant representative meeting of the members, as per the union's constitution.[459] In addition, all of these (along with any other financial-related documentation) must be kept for a "period of three years from the end of the financial year to which they relate".[460] In terms of subsection 100(b) of the LRA, within 30 days of the union receiving the auditor's report, a certified copy thereof must be provided to the Registrar, along with the union's financial statements.[461] Finally, in briefly considering the LRA's regulation of union constitutions, subsections 95(5)(r) and (u) requires that the constitution must "provide for banking and investing" the union's money, and to

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[451] Entitled "Accounting records and audits".

[452] Entitled "Duty to keep records" – with the relevant section (pertaining to finances) being subs 99(b) LRA, which requires the union to keep record of all the minutes of its meetings for a period of three years.

[453] Entitled "Duty to provide information to registrar".

[454] Subsection 98(1) of the LRA.

[455] Subsection 98(1)(a).

[456] In terms of subs 98(1)(b)(i)-(ii), a "statement of income and expenditure for the previous financial year" and "a balance sheet showing its assets, liabilities and financial position" regarding the previous financial year needs to be prepared.

[457] Subsection 98(2) of the LRA.

[458] Subsection 98(2)(b).

[459] Subsection 98(3)(a)-(b).

[460] Subsection 98(4).

[461] Furthermore, in terms of subs 100(c) of the LRA, should the Registrar have any queries about the either auditor's report or financial statements, a written request will be sent to the union for further explanation, with the union being obliged to reply within 30 days of receipt of that request.

"determine a date for the end of its financial year", respectively.[462] Note that the changes introduced by the latest amendments to the LRA will be discussed in more detail in chapter 12 below. They are not referenced here, simply due to this analysis being done on constitutions that were all submitted to the Registrar *prior* to the amendments. As such, none of the constitutions being considered, will have included any changes to bring about alignment with the amendments.

The constitutions surveyed all provide for separate provisions that regulate – in varying degrees of detail – the different unions' finances. Ten of the constitutions make direct reference to sections 98(1)(b) and 98(2) of the LRA,[463] while five of the constitutions make reference to a type of membership indemnity clause: members who formally complain about undue expenditure will not be held liable for the financial implications thereof.[464] Whereas the bulk of the managerial responsibility relating to finances is most frequently regulated in terms of a separate clause(s), several of the constitutions have many internal clauses pertaining to specific committees/bodies or functionaries that also play a role in oversight of the union's finances.[465]

All the constitutions regulate how funds received are to be used or spent (including, in several instances, how surplus funds are to be invested), how this is to be done, and who is responsible for or controls these processes. The statutory provisions are either explicitly or implicitly referred to, as are the associated procedures, with the auditing of the associations' books and annual nature hereof being provided for. In

[462] Subsection 95(5)(r), (u) of the LRA.

[463] The constitutions in question are: AMCU; BIFAWU; BWU; CWU; EAMWUSA; FAWU; HOSPERSA; MISA; Solidariteit/Solidarity; and UASA.

[464] By way of example, UASA cl 15.2 states as follows: "If any Branch or Sector Committee incurs unauthorised expenditure except as provided for in this Constitution and/or budgeted for, the members present at the meeting at which such expenditure was agreed to, shall be jointly and severally liable for refunding the amount in question. No liability shall rest on the members who specifically requested their opposition to the incurring of such expenditure be recorded in the minutes of the relevant meeting." The other constitutions who have a similar clause, are as follows: SATAWU; MISA; EAMWUSA; and BIFAWU.

[465] This would typically involve committees such as the CEC or NEC, or functionaries such as the General Secretary. Furthermore, such oversight is always found at national level, but can also be repeated through the applicable structures at provincial, regional or branch level – depending on the individual union and its size. In addition, several unions either have so-called "Financial Committees", or dedicated Treasurers, also prevalent at the different levels within the Union, who also either assist in the process, or provide oversight. Lastly, it is also quite common for all reports on finances, and major decisions regarding such, to have to be approved and signed-off by the annual National Congress meeting.

short, what is required in the constitution of a trade union wishing to register, is indeed present in the surveyed constitutions. However, the implementation of those procedures, along with the continued compliance with the contents of the associations' constitution, remains in the hands of each union through its functionaries, with the ultimate oversight remaining with the membership.

3 5 1 10 Trade union representative immunity

Subsections 97(2) and (3) of the LRA contains important provisions regarding the effect of registration of a trade union. Firstly, by virtue of a trade union being registered, a member is not liable "for any of the obligations or liabilities of the trade union".[466] Secondly, members, office bearers, officials or representatives of registered unions are not "personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith … while performing their functions for or on behalf of the trade union".[467]

Given that the indemnification is prescribed by statute, it is perhaps unsurprising that seven of the 25 constitutions choose not to make specific provision for this.[468] Of interest, however, is that the majority of those unions that do regulate the indemnity of their representatives do so in far more specific terms than simple reliance on the "good faith" qualifier provided for in the LRA. In this regard, the term "good faith" is used in a mere five constitutions,[469] and then it is qualified, typically by making reference to the conduct having to be in compliance with the union's constitution, or that the conduct does not amount to "misconduct". In all the other instances, grounds precluding indemnity beyond that the act complained of must have been in "good faith" are envisaged. This gives rise to a scenario where, despite the overarching indemnity provided by the LRA in terms of subsection 97(3), trade union constitutions appear to introduce additional grounds in regulating the relationship between the union and its

[466] Subsection 97(2) of the LRA.

[467] Subsection 97(3).

[468] The constitutions that make no reference to the indemnity are BIFAWU; BWU; CSA; CWU; EAMWUSA; NASWU; and NUM. A brief comment can be made about the example of Solidariteit/Solidarity cl 23.31, which provides for an indemnity, but in the form of its definitions clause entitled "Vrywaring". Curiously, no mention is made elsewhere within the constitution of the term, so it is unclear where the provision is to see effect. Regardless, it is accordingly not counted along with the aforementioned, in that mention is made.

[469] PAWUSA cl 26; NUMSA cl 12(1); SATAWU cl 17.2; HOSPERSA cl 74; and AMCU cl 11.4.

functionaries, and the extent to which the union will indemnify its own, should their conduct fall outside the scope of protection envisaged by the Act.

There is wide-ranging variation in how the indemnification is described in the different constitutions, although there are also examples of overlap in the wording used. One typical example states the following:

> "The shop-stewards, officials, Office Bearers and committee members of the Union provided that they have not acted in a manner which would constitute misconduct, shall be indemnified by the Union against all proceedings, costs and expenses incurred by reason of any omission, negligence or other act done in performance of their duties on behalf of the Union and they shall not be personally liable for any of the liabilities of the Union."[470]

Eleven of the constitutions require the absence of "misconduct" for indemnification.[471] However, the term sees significant qualification, including that it is: provided for in terms of the union constitution;[472] not contrary to any lawful instruction, resolution, decision or policy of the union;[473] does not amount to gross or criminal negligence, fraud or deliberate deception, a misrepresentation of the authority of that office-bearer or official;[474] that the functionary is not taking improper personal advantage of an opportunity available to the union;[475] not without the necessary authorisation;[476] or finally, that it is not their own wilful act or default that is the cause thereof".[477]

Mention must be made of three constitutions that mandate various committees to adopt a specific internal union policy with regard to the "parameters of union liability to members",[478] whereas one of the constitutions sees a general waiver in regard to any claims against the union for the conduct of its representatives being implied by the application for membership.[479] Two constitutions make specific provision for the union

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[470] FAWU cl 18.
[471] AMCU; FAWU; IMATU; POPCRU; PSA; SACCAWU; SADTU; SAMA; SAMWU; SATAWU; and UASA.
[472] AMCU; HOSPERSA; and NUMSA.
[473] AMCU; CEPPWAWU; HOSPERSA; and NUMSA.
[474] CEPPWAWU; NEHAWU; and PSA.
[475] CEPPWAWU and NEHAWU.
[476] HOSPERSA.
[477] MISA and PSA.
[478] CEPPWAWU; SAMA and SAMWU – with such being required of their NEC, NEC and CEC, respectively.
[479] HOSPERSA cl 6.8.

to take out liability/fidelity insurance as protection against any possible claims.[480] Finally, one unusual example is provided by the constitution of Solidariteit/Solidarity, which provides that no members, office bearers or officials will be allowed to institute a claim against the union, or officials/office bearers in their personal capacities unless the former can provide proof that the union or its officials/office bearers were acting *mala fide* in the performance of their duties.[481]

3 5 1 11 Internal discipline

The final analysis in this section, is potentially the most directly linked to the broader issue of union accountability, focusing as it does on how the constitutions in question regulate their various internal disciplinary procedures.

At the outset, the point must be made that only three of the 25 constitutions do not have a specific, separate disciplinary clause(s) or annexure(s), but even then those constitutions make the necessary provision for discipline within various internal clauses.[482] Furthermore, all the constitutions make provision for appeals against disciplinary decisions. All but three of the constitutions make specific mention of the affected persons' right to make written/oral representations regarding the allegations brought against them,[483] while fourteen of the constitutions make specific reference to the right to call witnesses.[484]

There is significant overlap between the constitutions with regard to the various grounds that allow for disciplinary action to be instituted. These range from: bringing the union into disrepute;[485] infringing the union constitution;[486] conduct that is

[480] NEHAWU cl 82(4) and PSA cl 83.

[481] Solidariteit/Solidarity cl 23.31.

[482] The constitutions in question are IMATU, PAWUSA and PSA. IMATU empowers the NEC to draw up a separate Disciplinary Code in terms of cl 7.2.3.2.4. PAWUSA also empowers its NEC to determine such procedures (cl 16.4.11.10), but furthermore provisions for the use of a Disciplinary Committee structure at its various levels (cl 19.14). Lastly, PSA empowers its "Board of Directors" (NEC) to compile a "Code of Good Conduct", for application at its various levels (cl 69(1)).

[483] The constitutions where no mention is made, are SAMA; PSA; and IMATU (whilst acknowledging that SAMA, PSA and IMATU make provision for separate Disciplinary/Good Conduct codes, which presumably allow for same).

[484] The constitutions in question are: BIFAWU; BWU; CSA; EAMWUSA; FAWU; MISA; NASWU; NUM; NUMSA; SACCAWU; Solidariteit/Solidarity; SADTU; SAMWU; and SATAWU.

[485] AMCU; MISA ["conduct damaging to and/or calculated to damage the status of the union"]; and SATAWU.

[486] BIFAWU; BWU; CEPPWAWU; CSA; EAMWUSA; FAWU; MISA; NEHAWU; NASWU; NUMSA; POPCRU; SACCAWU; SADTU; SAMWU; SATAWU; and UASA.

detrimental to the interests of the union;[487] serious neglect of duty or misconduct;[488] conduct that breaches the policies or aims or objectives of the union;[489] "[i]nsulting, or using derogatory language, or interfering with any Office-Bearer or Official of the Union in the course of business, or in the execution of his/her duties";[490] conduct aimed at the incitement of fellow members against the union, or representatives;[491] failure to comply with any lawful decision of any organ of the union;[492] failure to declare benefits or donations over a specified amount;[493] or, finally, conduct that undermines the discipline of the union in question.[494]

Given the differing sizes and organisational structures of the unions involved, there is also widespread variation in which bodies oversee and implement the various disciplinary procedures. Whereas several of the constitutions see specific disciplinary committees having responsibility at different levels of the union, others allocate such

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[487] BIFAWU; BWU; CEPPWAWU; CWU [as well as acted in a manner with undermines the functioning of the union]; EAMWUSA; FAWU; NEHAWU; NASWU; NUM [or its members]; NUMSA; POPCRU [or its members]; SACCAWU; Solidariteit/Solidarity; SADTU; SAMA; SAMWU; SATAWU [and its members]; and UASA.

[488] Or a combination of both – see BWU; CEPPWAWU; FAWU; HOSPERSA; NEHAWU; NUMSA; Solidariteit/Solidarity ["growwe misdryf of oneerlikheid skuldig maak"]; SADTU ["unprofessional or unethical conduct"]; SATAWU; and UASA cl 7.1.3 ["wilfully defrauds the union in any way, which shall also mean to include any act of dishonesty or theft perpetrated against the union"]. A specific example of a constitution that is demonstratively more specific in outlining what is understood by some of these terms, is that of POPCRU, specifically cl 30.15. Here, the sanction (applicable to any member) of "unprofessional conduct" is deemed to include, *inter alia*, the following: "Wilfully takes, because of animosity or for personal advantages, any steps to secure the dismissal of another member" [cl 30.15.1]; "maliciously, carelessly, irresponsibly or otherwise not in fulfilment of official duties, criticizes the work of a fellow member in such a way as to undermine the confidence of the public in that member" [cl 30.15.3]; "where a member bargains on his/her own behalf on questions affecting each and all members of the group" [cl 30.15.4]; is addicted to alcohol/narcotics or the excessive use of such and similar substances whilst on duty [cl 30.15.5]; sexually harasses members or officials [cl 30.15.6]; or commits financial mismanagement or misappropriation of the union's funds. Of interest is the point that "bringing the organisation into disrepute" is also included here [cl 30.15.7-9].

[489] CWU; MISA [any policies adopted by the NEC or any Regional Committee]; NEHAWU; SADTU [breaches organisational protocol or policies]; and SAMWU [policies].

[490] MISA cl 15(1)(b).

[491] MISA cl 15(1)(d) – alternatively, writing, posting and/or circulating communications of any nature whatsoever which are considered to be derogatory in relation to the union, member, representatives or any fund which the union administers".

[492] NUMSA cl 2(4)(a)(i)(2).

[493] PAWUSA cl 9.4 places this at R500.00, and states further that "[f]ailure by any member or official to comply with this provision will result in disciplinary action which may include civil action, being instituted against such member or official".

[494] UASA cl 7.1.2.

responsibility to the existing Executive Committees (be that NEC, REC, Principal Executive Committee ("PEC") or BEC or equivalent), or more specific local entities (such as the LSSC). Similarly, the range of sanctions that can be imposed runs the gamut of temporary or permanent punishment, depending on the rank/position or status of the individual complained of. In this regard, the variation in severity ranges from a warning, through to the imposition of a fine, and on to suspension, or – finally – expulsion/dismissal from membership or office.

The variations at play with regard to the different procedures to be followed are as significant as they are perhaps inconsequential. For example, while many of the unions make direct reference to specific categories of representative and the specific disciplinary procedures applicable to them, other clauses within the very same constitution will make reference to procedures applicable to "members" (in general), that – given the wording and where the clause is positioned – nonetheless are equally applicable to the office bearers, representatives or officials (that are regulated in the other disciplinary provisions). To an extent, this is understandable, given that in the particular organisational structure of a union, a representative, or office-bearer (or even, in some instances, an official), can simultaneously be an ordinary "member" for the purposes of discipline. Therefore, the actual procedures and how they are implemented, are more nuanced and suited to each of the individual unions in question. Even so, it is clear that the core aspects that would be expected of fair disciplinary procedures are covered[495] – in other words, there are clearly defined procedural steps; an opportunity to be heard; an opportunity to appeal; and defined grounds and sanctions. As such, these internal procedures,[496] at least at face value,

[495] With the exception of those constitutions, as mentioned at § 3 5 1 11 above, that make reference to unseen, and as such, unexamined Codes of Conduct.

[496] Mention must be made, at this point, of three of constitutions, in regards to external involvement. Firstly, PSA cl 89, which states: "Any dispute between a member or office bearer, including the functional structures of the [union] if they cannot be solved mutually, will be settled by arbitration. The finding of the arbiter is final and binding on the parties". Secondly, UASA cl 7.2.14, which states:

> "In the Instance where the Chief Executive Officer [President] may be implicated in a transgression, the National Executive Committee [NEC] will appoint an independent person to investigate the matter and to conduct a disciplinary Inquiry if it is found that sufficient prima facie evidence exist to warrant such an inquiry".

These two instances are the only examples amongst the constitutions examined, that see reference to an external, non-union body, as a means to settle an internal union matter. Lastly, SATAWU cl 8.25, appears to suggest a similar procedure, in stating, under the aims and objectives of the union: "[to] regulate the relations between the union and its members and settle through negotiation, mediation,

seem fair. Suffice it to conclude by stating that the constitutions in question do demonstrate an attempt to manage and regulate internal disciplinary procedures to the extent that might be expected of a voluntary association of workers that is afforded legal status in order to function within a complex labour relations system.

3 5 2 South African trade union constitutions – singular approaches

The discussion in the previous section sought to consider the commonalities present in trade union constitutions, also how they seek to regulate different aspects that may impact on union-member accountability. What remains to be looked at more closely, are those individual examples where constitutions demonstrate alternative approaches. In doing so, one useful point of departure in the examination of any unique provisions contained in the trade union constitutions would be to consider: (i) The extent to which the constitutions regulate the interaction between the union and its members directly?; (ii) the extent to which the constitutions outline what services or benefits the unions will provide for its members?; and lastly, (iii) the extent to which the constitutions contain clauses of any nature that define a standard or level of service as owing to the membership? Below, these three questions will be addressed (with questions (ii) and (iii) dealt with together).

3 5 2 1 Interaction between union and member

The first question appears to be relatively simple to answer. As is apparent from the discussion above about commonalities among the constitutions, it is clear that there are, for example, procedures for balloting (as a decision-making mechanism), or procedures to be complied with in union meetings,[497] or even, disciplinary procedures. These involve, after all, direct interaction between the union and its members.[498]

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arbitration or inquiries, disputes between the union and any of its members, or between any members, office bearers, officials or structures of the union". However, this could arguably also be making mere provision of types of *internal* procedures, that the union aspires towards – and does not necessarily involve an external body.

[497] Whilst not specifically highlighted in the "shared Characteristics" discussion at § 3 5 1 above, a significant number of constitutions do regulate this aspect – in several instances to a surprising degree of detail.

[498] To this could be added the functions and duties of shop stewards, functionaries and related committees – given that in many instances, these also speak to interaction on certain levels between the union and members.

However, below four examples will be given of instances where trade union constitutions contain provisions that go beyond those commonly encountered in constitutions.

Firstly, the constitution of Public and Allied Workers Union of South Africa ("PAWUSA") contains a clause focusing on the rights of members.[499] In total, nine sub-provisions are listed that collectively seek to ensure and promote union democracy and the effective control by "democratically elected worker representatives at all levels",[500] by means of *inter alia* active discussion/free speech "concerning operations of" the union,[501] the right to "fair and democratic elections at all levels of the union",[502] full access to accounting records of the union and to "pertinent information",[503] to allow members to exercise their rights to "full participation" in decision-making processes,[504] and their rights to "fair disciplinary and grievance procedures".[505]

Secondly, and in similar fashion, the constitution of POPCRU has a clause entitled "Union democracy", which makes provision for the promotion and establishment of a "worker centred union" that seeks to "carry out and fulfil decisions by members in the spirit of unity, accountability and transparency".[506] This involves the promotion and safeguarding of the rights of members to an "adequate opportunity to participate in the initiation and development of policy-making … and to encourage the maximum democratic debate, together with the right to campaign to change policy", while keeping in compliance with the union's rules and policies.[507]

Thirdly, reference can be made to the constitution of South African Democratic Teachers' Union ("SADTU") and its clause entitled "Principles of Representation".[508] In citing that the union "shall function according to the conventional principles of democratic centralism", members are "obliged to defend the union in carrying out its decisions", so as to "secure the unity and cohesion" of the association.[509] The

[499] PAWUSA cl 7.
[500] PAWUSA cl 7.3.
[501] PAWUSA cl 7.1.
[502] PAWUSA cl 7.3.
[503] PAWUSA cl 7.5 and 7.6.
[504] PAWUSA cl 7.6.
[505] PAWUSA cl 7.8.
[506] POPCRU cl 7.4.2.
[507] POPCRU cl 7.4.4.
[508] SADTU cl 8.
[509] SADTU cl 8.1

implications of this are that all decisions taken by higher structures, "are binding on all lower structures and individual members",[510] that while members shall have the right to "pursue their views internally in the lead up to conferences or congresses" with the associated powers (subject to the union constitution) to determine or reverse the policies of the union[511] "[n]o member with his or her own ideology, theory and discipline shall be permitted".[512] In addition, in confirming that the union "shall be governed by both direct and representative forms of democracy", clause 8.2 states that the members shall be able to "participate directly in the affairs of the Union at the [lowest] level[s] of the Site and the Branch". With regard to the higher regional, provincial and national levels, the participation of members is ensured by means of electing "those who shall be responsible for governing the union".[513] SADTU – in its Code of Conduct[514] – outlines interaction between the union and members by confirming that the latter must respect the rules of the association,[515] and must "exhaust all internal processes provided by the union and its constitution".[516] Furthermore, it provides that "any member, group of members or structure that chooses not to follow due processes, as provided by the union and its constitution including taking the union to court, shall be regarded as having terminated their membership of the union".[517]

The fourth and final example is that of HOSPERSA. As has been discussed at § 3 5 1 5 above, and will be below, very specific and detailed clauses are provided that seek to establish expectations and obligations, from a trade union-member perspective, with regard to the provision of legal assistance. By way of example, and by mere virtue of a prospective member submitting their written membership application, they are deemed to waive any future claim in regards to "damages from the union, its office bearers, officials, employees and/or agents arising from any allegations of negligence or any other alleged actionable conduct on the part of the union, its office bearers, officials, employees and/or agents".[518] Furthermore, the members are deemed to indemnify these functionaries "harmless against all costs and

[510] SADTU cl 8.1.1.
[511] SADTU cl 8.1.2.
[512] SADTU cl 8.1.3.
[513] SADTU cl 8.2.
[514] See SADTU Annexure A.
[515] SADTU Annexure A cl 6.1.
[516] SADTU Annexure A cl 6.2.
[517] SADTU Annexure A cl 6.4.
[518] HOSPERSA cl 6.8.

financial consequences of any claim that may be instituted against such persons by any prospective member, member or former member of the Union".[519]

Furthermore, despite any external legal advice provided to the member, the sole discretion as to whether the union is to provide, or continue to provide, legal assistance, rests with the union (specifically the Provincial Secretary, or such functionary specified by the NEC). In short, upon a written reason being provided by the latter that, *inter alia,* "in his or her opinion the dispute which is the subject of the legal proceedings no longer has reasonable prospects of success in the light of any further legal opinion obtained, or further facts have come to light" and that such action is "no longer in the interests of both the member and the union", no further action need to be taken.[520] Should assistance terminate, the union's obligation to "render legal assistance to that member shall be deemed to have been fulfilled and all responsibility for the obtaining of further legal assistance and/or second opinions and/or the institution of legal proceedings in relation to the said dispute shall vest solely in the

[519] HOSPERSA cl 6.8. The full wording of the clause reads as follows: "Applicants for membership, by applying for membership of the Union, declare themselves fully acquainted with their rights and the nature and effect of this Constitution, in particular this provision, and solely by way of submission of their written application for membership offer to waive all past and future rights, giving rise to any claim whatsoever that such applicants for membership have or may have in the future, regardless of whether these rights have vested or could vest in the future, to claim damages from the Union, its office bearers, officials, employees and/or agents arising from any allegations of negligence or any other alleged actionable conduct on the part of the Union, its office bearers, officials, employees and/or agents and the Union shall be deemed to have accepted such offer to waive upon acceptance of the Applicant to membership. The members of the Union jointly and severally indemnify and hold the Union's said office bearers, officials, employees and agents harmless against all costs and financial consequences of any claim that may be instituted against such persons by any prospective member, member or former member of the Union. Such waiver shall endure irrevocably after such prospective member has been admitted to membership and after the person making such claim has ceased to be a member."

[520] HOSPERSA cl 7.6. The complete wording of the clause is as follows:

> "No member shall be entitled to demand that any or specific legal proceedings be instituted by the Union on his or her behalf, *despite the content of any written opinion obtained in the context of legal assistance afforded to the member,* or that the Union continue with any proceedings already instituted, in cases where the Provincial Secretary, who shall have the right to delegate this decision to any Union National Office employee as may be approved from time to time by the National Executive Committee, he is of the view and has certified in writing that in his or her opinion the dispute which is the subject of the legal proceedings no longer has reasonable prospects of success in the light of any further legal opinion obtained, or further facts that have now come to light and/or, having had due regard to all other considerations of policy as prescribed by the National Executive Committee from time to time, that in his or her opinion the proposed or current legal proceedings are no longer In the interests of both the member and the Union."

member at his or her sole expense."[521]

In addition, the member who requires legal assistance may also be requested by the union to submit a signed "written acknowledgement of debt on such terms and conditions as are acceptable to the Union", which amounts to the "first amount payable by the member, in respect of all legal costs and necessary disbursements incurred by the Union in instituting legal proceedings for and on behalf of the member". The NEC shall "prescribe from time to time the circumstances in which members can be called on to undertake liability for such excess and the amount of such excess".[522]

3 5 2 2 Services provided and the standards/levels hereof

As outlined in the "Benefits and services" section at § 3 5 1 1 above, and when read together with the various clauses setting out the duties or functions of the various representatives (also discussed above)[523] and the provisions of the LRA, it is readily apparent what services or benefits unions seek to provide in return for the dues of their members. In this area, there is evidence of significant overlap between the constitutions – in other words, commonality. However, the question to be answered at present is whether a particular *standard or level* of such benefits or services are specified. In other words, rather than a simple statement of "to legally assist its members in regards to matters relating to employment", the question is whether there are any examples of clauses in constitutions that prescribe what such legal assistance would entail, and whether there are any particular standards of service to which the union or its representatives can be held? In this regard, seven examples from the constitutions considered, require closer examination.

Firstly, the constitution of Independent Municipal & Allied Trade Union ("IMATU") states – under the title of "Code of conduct for office bearers and trade union representatives" – that every such functionary shall "[c]onduct him in a manner befitting his office and display the highest personal integrity".[524] The remaining twelve

[521] HOSPERSA cl 7.7. Furthermore, HOSPERA cl 7.8 states that failure on the part of the member to either comply the union constitution, or the requirements set out in these particular clauses, "shall mean that the Union shall have the right to forthwith withdraw any further cover in respect of legal assistance and/or the institution of legal proceedings (both in respect of current and future disputes) and withdraw from assisting or acting on behalf of the said member on written notice to the member".
[522] HOSPERSA cl 7.8.3.
[523] See § 3 5 1 4, § 3 5 1 7 and § 3 5 1 10 above.
[524] IMATU cl 8.10.1.

sub-provisions of the clause provide for a host of scenarios that outline the behaviour expected of the office bearers and representatives[525] but are essentially focused on interactions between those functionaries and the union.

Secondly, the constitution of PAWUSA – under the heading "Obligations of members and office bearers"[526] – states that members *and* office bearers are responsible for conduct that is at all times "in the best interests of the union [and] in the furtherance of the union's aims and objectives",[527] and to "ensure that their conduct does not expose the image of the union to possible harm and/or does not bring the union into disrepute".[528] However, in specifying the responsibility of every elected official (meaning office-bearer), these officials are also required to "to act in the best interest of the Union and to carry out his/her duties and responsibilities with the utmost good faith".[529] In addition, all members "and officials (office bearers) shall behave and conduct themselves in a manner that does not offend the principles of the union or prejudice the reputation of the union".[530] Again, as with the first example regarding a standard of service by the union, the most that would appear to be required is that office bearers should perform their duties and responsibilities with the "utmost good faith".

The third example, sees SACCAWU, under its objectives' clause, state that it will seek to "render efficient service to members".[531] Here too are examples of clauses outlining the rights and obligations of members,[532] but other than a right to information, to stand in any union elections, representation in matters of mutual interest, and protection from victimisation, harassment, unfair dismissal or other forms of unfair treatment,[533] – no further mention is made of what level or standard can be expected

[525] These range from *inter alia* recusing themselves where there might be a conflict of interest in a meeting [IMATU cl 8.10.4.], not discriminating against any particular individual or group [IMATU cl 8.10.2.], not using their office for personal gain [IMATU cl 8.10.3.], remaining until the end of all meetings to allow for proper discussion [IMATU cl 8.10.6.], not giving orders or instructions to individual employees of the union – and to be courteous in dealings with them [IMATU cl 8.10.9 and 8.10.10.], and to uphold the union's constitution [IMATU cl 8.10.12.].
[526] PAWUSA cl 9.
[527] PAWUSA cl 9.1.3 read with 9.2.2.
[528] PAWUSA cl 9.1.4 read with 9.2.3.
[529] PAWUSA cl 9.2.1.
[530] PAWUSA cl 9.3.
[531] SACCAWU cl 1.15.
[532] SACCAWU cl 3.
[533] SACCAWU cl 3.1.1-3.1.4.

from the union or its functionaries, other than the abovementioned "efficient service".

Fourthly, Solidariteit/Solidarity (under its goals) qualifies the provision of their service to their members as encompassing "expert, judicial and other professional services"[534] – while all rightful grievances ("*elke regmatige grief*") will be investigated. Furthermore, the undertaking is given to attempt to bring about redress for any unfair treatment and/or violation of a member's employment contract.[535] The union also commits to "thoroughly plan and organise its administration and lawful activities".[536]

Fifthly, SADTU, in its Code of Conduct,[537] "stipulates minimum standards of professional and acceptable conduct" for its member or leaders of the union, and states that the list is not exhaustive.[538] Furthermore, in confirming that all members and leaders of the union shall submit to the discipline of the union, and shall "be the custodian of the unions' constitution and all her decisions", the expectation is also voiced that all members and leaders shall "perform his or her duties with respect and dignity". Regarding a standard of service, the most that would appear to be required is that office bearers should perform their duties and responsibilities with "respect and dignity", within an implied broader concept of "professional and acceptable conduct".

The sixth example is offered by SATAWU,[539] where members, shop stewards, officials and office bearers are to promote "democracy and worker control in the union" by working in an "accountable and responsible fashion".[540] This is to be brought about by means of, *inter alia*, seeking the appropriate mandates from members,[541] accepting and offering constructive criticism "that builds the union",[542] the provision of information,[543] and "building strong and active shop steward structures".[544] Accordingly, a level or standard of service in this context would be tied to the concept

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[534] Translated from "deskundige, geregtelike en ander professionele dienste" – see Solidariteit/Solidarity cl 3.5.

[535] Solidariteit/Solidarity cl 3.6 – being translated from "en 'n poging aan te wend om herstel te verkry vir ontbillike behandeling en/of skending van die diensooreenkoms van 'n lid van die vakbond".

[536] Solidariteit/Solidarity cl 3.6 – translated from "om sy administrasie en wettige aktiwiteite deeglik to beplan en te organiseer".

[537] See SADTU Annexure A.

[538] SADTU Annexure A cl 1.

[539] Again, in terms of an aims and objectives clause – see SATAWU cl 8.8.

[540] SATAWU cl 8.8.

[541] SATAWU cl 8.8.1.

[542] SATAWU cl 8.8.2.

[543] SATAWU cl 8.8.3.

[544] SATAWU cl 8.8.5.

of accountable and responsible performance of duties and functions on the part of the shop stewards, officials and office bearers – but also the members.

The seventh and final example is provided by HOSPERSA. As was initially discussed in the "Legal action" section at § 3 5 1 5 above, where it was seen that HOSPERSA's constitution makes provision for defining in detail what is to be understood by "legal assistance" and "legal proceedings" – particular attention is paid to outlining the expectations, duties and obligations as between member and union.[545] Of interest is that the union is empowered to "prosecute any legal proceedings in the name of the member, including the right to depose to any Founding Affidavit on behalf of that member in any legal proceedings", and that the member shall grant the union the right to "do all things necessary to prosecute the proceedings on their behalf, including the right to settle or compromise the dispute".[546] This, by implication, speaks of a level or standard of service that would be on par with that of a legal service provider, given how the union is empowered to enter into legal proceedings in the name of the member.

3 6 South African trade union constitutions – an analysis

The analysis of South African trade union constitutions sought to highlight the commonalities and singular examples found in 25 broadly representative South African trade union constitutions, with a specific emphasis on aspects that may affect union-member accountability. From this analysis, a number of key points arise.

Firstly, barring some exceptions, the absolute minimum of unions appear to have placed any focus on the precise nature of the service that is to be offered by the union, or how the union is to go about effecting this. For the purposes of this study, this is significant. If specific/explicit and sufficiently detailed standards or levels of service were to be specified within a trade union constitution, it would offer a substantive measure against which the conduct of union officials could be measured. Whether or not this approach could (or should) be changed or influenced through legislative

[545] Reference must also be made to the discussion of the related provisions in the "Interaction between union and member" section at § 3 5 2 1, above.

[546] HOSPERSA cl 7.8.2. Coupled hereto, the member is also expected to "provide the Union, at the member's sole expense and within a reasonable time of being requested to do so, with all information and other material reasonably required by the Union in order to render legal assistance and/or to institute legal proceedings for and on behalf of the member" – see cl 7.8.2.

intervention, will be discussed in the further chapters of this study. As things stand, all that seems to be available to members in terms of holding the union or its representatives accountable, is either use of an internal disciplinary procedure (in light of possible non-compliance with very broad and open-ended terms and concepts), or exercising their democratic might to effect removal by ballot.

Secondly, in turning to the question of internal union disciplinary proceedings as a means to promote accountability, it was found that by and large the majority of procedures outlined in the constitutions seem fair. However, there are two key exceptions to this. The first, and perhaps simplest, concern involves the question of impartiality. Would an internal union structure be sufficiently "removed" from the individual(s) in question, so as to allow for an impartial hearing? There would no doubt be situations where this is feasible, but equally, it would not be difficult to acknowledge instances where this would be unlikely, if not impossible.[547] Secondly, and somewhat more complicated, is a concern about whether or not the grounds (resulting in disciplinary sanction) are clearly defined. Some certainly are.[548] But many of them are open-ended, and would require determination and interpretation by the applicable internal body or committee.[549] And here again, the first concern – that of an impartial hearing – enters the picture.

When the discussion about internal union discipline is considered in light of the broader question surrounding trade union accountability, a further point needs to be

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[547] In light of the discussion surrounding of "natural justice" in the context of unions in Britain – see § 5 3 4 1 and § 5 3 4 2 below – IT Smith & A Baker *Smith & Wood's Employment Law* 10 ed (2010) 608 state that it "may be summed up in brief as absence of bias (actual or potential), the right to a hearing and the maxim *nemo judex in sua causa* (that is, no one person should act as both 'prosecutor' and 'judge')."

[548] Arguably, and assuming that the particular clause(s) affected is clearly expressed, it would be fairly ascertainable to establish whether or not there was non-compliance with the union constitution. Similarly, and again assuming the relevant clauses or decisions/policies are clearly expressed, it would be ascertainable to determine non-compliance with a policy, decision, aim or objective of the union or union body. Likewise, determining what constitutes derogatory language or communication, interfering with a representative in the performing of their duties, inciting fellow members or not declaring benefits or donations, would presumably be ascertainable.

[549] Examples here, would involve the broad concept of "misconduct", or "bringing the union into disrepute", or "acting against the interests of the union and/or members". It goes without saying that many of these would be readily ascertainable – for instance, not complying with a duty to timeously provide membership or financial information to the relevant committees or functionaries. But there is equally many different scenarios that could easily fall within the parameters of these sanctions, that would wholly depend on the internal interpretation of the constitution, or related customs, practices, instructions and decisions.

made. Assuming that the trade union constitutions do in fact provide an acceptable template or model of how the majority of trade unions in South Africa would (and do) manage or regulate their internal disciplinary procedures, then such a model, it is submitted, does not *in and of itself* necessarily speak to union-member accountability. Whereas matters of internal union discipline are important (as will be seen below), the fact remains that ensuring accountability by means of internal disciplinary procedures will only be as effective as the underlying grounds that specify what types/levels/standards of service are to be expected from the union and/or its representatives. And as has been demonstrated above, this is the precise area where the overwhelming majority of union constitutions are found to be lacking.

Lastly (in the context of internal disciplinary procedures) and most importantly, the mere fact that a union has a constitution guaranteeing internal disciplinary proceedings underpinned by natural justice concepts, does not guarantee that those procedures will be followed, or even acknowledged. It stands to reason that several distinct variables, either individually, or collectively, would need to align before disciplinary procedures will be successful. These include: firstly, the officials themselves, as presumed initiators tasked with implementing the procedures, would need to be aware of, and understand, the requirements outlined in terms of the constitution; secondly, the officials would need to be willing, or deem it necessary, to enforce/apply the procedures in the manner required and outlined in the constitution; thirdly, and alternatively, an official or office-bearer, tasked with the oversight of the actual disciplinary process, would either have to be willing, or deem it necessary, to hold the "prosecuting" officials to account to ensure compliance; fourthly the member that the procedures are being applied to, who is – in other words – the respondent or accused in the matter, would need to be aware of, and understand, the requirements or procedures to be applied; fifthly, all of the above assumes that some sort of process is initiated at all, as opposed to a decision simply being taken, and the member being informed accordingly.

The extent to which the above is monitored, influenced and affected by judicial intervention – and the extent to which legislative amendment could (or should) play a role, will be examined in more detail in the further chapters of this study.

The third broad insight from the earlier analysis relates to the question about the extent to which interaction between union officials/office bearers/shop stewards and the general membership is regulated in trade union constitutions. In this regard, it was

demonstrated that this is by no means a widespread phenomenon.

This means two points of interest present themselves. Firstly, in those instances where union functionaries are held against a standard of "acting against/in detriment of the interests of" the association, there are only a handful of examples where that "standard" was also linked to acting against/in detriment of the interests of *the member* as well. Specifically, in only two of the 25 constitutions, provision is made for a scenario involving internal disciplinary procedures where the contravention is grounded on *either* the union's interests, *or* that of its members being infringed.[550] Related hereto are three examples where sanctions can be imposed for conduct prejudicial to the interests of the union *and* its members.[551] But the point to be made is that, with the exception of the above, all other sanctions regulating misconduct in its various forms are primarily focused on the union-functionary relationship.

3 7 Conclusion

The goal of this chapter was to build on chapter 2 and to provide a more detailed analysis of the current state of the internal organisation of trade unions (with specific emphasis on South Africa). Ultimately, the combined goal of chapters 2 and 3 was to provide an overview of accepted wisdom relating to trade unionism and the functioning and structure of trade unions as basis for the detailed consideration of trade union assimilation and regulation in the comparative jurisdictions chosen for this study.

These remarks in mind, the chapter first considered "democracy" as the fundamental organising principle of trade unions. At the same time, the chapter distinguished between trade union democracy and trade union accountability to its members. While there is no doubt overlap between the two concepts, the discussion showed that accountability remains focused on the practical consequences (and failures) of unionism. The discussion also considered trade union bureaucracy and illustrated that this phenomenon may lead to a divergence between the interests of members and their unions, which, in turn, heightens the need for proper accountability. As modern trade unions grow in size and complexity, an unavoidable element of

[550] The two examples are from UASA cl 7.1.2 (member) read with cl 13.1.2 (office-bearer); and POPCRU cl 8.5.2.1 (member). CWU cl 27(2) and NUMSA cl 2(1) also make similar provision, but these are outside the context of internal discipline (both appear under "rights and obligations/responsibilities of members" clauses).

[551] NUM cl 14.1.1 and 14.2.1; SATAWU cl 42.1.2; HOSPERSA cl 1.1 (defining "misconduct").

bureaucratisation results. This poses its own threat to internal union functioning, often impacting directly on member participation and activism. Modern trade union officials are frequently required to master a wide range of diverse yet interrelated fields, which in turn sees the member become increasingly dependent on them for advice and guidance. Herein lies a paradox: complexity fosters union bureaucracy, union bureaucracy fosters member alienation, and member alienation, in turn, fosters either *further* union dependency, or *further* union alienation. This complexity also plays itself out in the context of union leadership and the various underlying reasons that often see union leaders refusing to relinquish power. The traditional viewpoint of the union-member relationship, and the associated solution to the challenges posed by bureaucracy and the oligarchic tendencies of union officials and leaders, is said to be an activist membership, but this may be unrealistic. The disconnect between the union and official, on the one hand, and the member(s), on the other, raises the fundamental question this dissertation seeks to address, namely how to ensure proper accountability of unions to their members.

In the (very real and contemporary) presence of union apathy, the chapter questioned whether, as an alternative, the trade union constitution might provide a solution in providing effective accountability. Departing from the importance ascribed to trade union constitutions by the legislature (especially section 95 of the LRA) and the courts (describing this as the baseline agreement between members and their union), the chapter included an analysis of 25 representative trade union constitutions (of unions that collectively represent in excess of 2,8 million workers in South Africa) in order to distil how and to what extent they address trade union accountability to its members.

These constitutions were shown to be non-specific in terms of describing the detail of services to be offered by trade unions to their members or qualifying the required *levels* of such service. The analysis showed that it is far more common for unions to be concerned with irregular conduct of union officials *as against the union*, rather than regulating their conduct against the interests of the member(s). This aligns with a traditional (and purely democratic) perspective of the union-member dynamic, namely that the union and member are, in essence, the same. This already means that holding unions to account for non-compliance of any “standards of service” as found within a constitutional provision, is highly unlikely. Furthermore, with regard to internal disciplinary procedures, most of the union constitutions were found to contain

adequate processes, but the reservation remains that what is good on paper, does not necessarily translate into something tangible in reality.

This calls into question the viability of the union constitution serving as the universal remedy (or legal basis) for any perceived problems within organised labour, or for that matter, providing for appropriate union accountability to its members. It is with this insight in mind (and also the complexities of modern trade unions) that this study will now focus on how trade unionism was assimilated in different jurisdictions, how this resulted in different approaches to trade union accountability and to evaluate what the preferred approach is.

CHAPTER 4: EARLY TRADE UNIONISM IN BRITAIN – FROM INCEPTION TO LEGAL ASSIMILATION

> "[I]nevitably, the shape of the existing law is the product of various historical forces, and it can be properly understood only in its historical context. Consequently, a basic account of the development of the relationship between labour relations and the law is necessary to provide a perspective from which to view the present law."[552]

4 1 Introduction

One of the fundamental hypotheses of this dissertation is that the regulation of trade unions and trade union accountability to its members is fundamentally shaped by socio-economic forces at play over time in any given society. Another one of the fundamental points of departure of this study is that the approach to trade unionism has shown a similar pattern across jurisdictions – from initial resistance, through acknowledgement and assimilation, to readjustment culminating in the current approach to trade unions and their regulation. Simply put, current approaches to trade unions (and their accountability to their members) are the product of historical events and show distinct phases.

These remarks in mind, the purpose of this chapter is twofold. In the first instance, it serves as the first of three chapters in which trade unionism, the regulation of trade unions and trade union accountability in Britain, are considered. The focus on Britain – as was explained in chapters 1 and 2 – is evidently justifiable, not only due to its close connection with South Africa over the years, but also as the birthplace of modern trade unionism and the source for its propagation across countries and continents. Furthermore, for purposes of comparison, the British legal system shows similarities with that of South Africa (and the USA) in that it is a common law jurisdiction. This already means (as is the case with South Africa and the USA) that regulation of trade unions is to be found in a combination of legislation and common law principles. Secondly, given the close connection between trade unionism (and its regulation) and historical forces, this chapter will lay the groundwork for the two chapters to follow by focusing on the initial stages of the development and regulation of trade unions in Britain – up to the stage that may be described as acknowledgement/assimilation. Note, however, that the focus of this chapter primarily is on the legislative assimilation

[552] P Elias et al *Labour Law: Cases and Materials* (1980) 1.

of early trade unionism in British society. These early days were marked by and, indeed, the chapter will show as one of the results of this assimilation, abstinence from interference in internal trade union affairs. The involvement of the judiciary during these early stages was focused on the status of a trade union and protection (or otherwise) of trade union activities, not on the relationship between a trade union and its members. Underlying all of this, the traditional common law approach – namely that a trade union is a voluntary association at one with its members – prevailed. As chapter 5 will show, the period of adjustment in Britain from the 1950s onwards was marked by both legislative and common law developments. As such, in conjunction with chapters 5 and 6, this chapter contributes to an understanding and description of one model of the regulation of trade unions and trade union accountability based on both legislation and the common law, which will serve as a basis for comparison with the approaches in the USA (discussed in chapters 7 to 9) and South Africa (discussed in chapters 10 to 12).

Specifically, this chapter will, in the first place, explore early unionism in Britain with its origin in the (first) industrial revolution. The chapter will then consider the increase in statutory regulation – largely triggered by the growing power and influence of trade unions. Following on consideration of the legislative regulation and its effects on trade unions, the increased involvement of the British judiciary – through a series of key decisions – will be explored, also in juxtaposition with the ebb and flow of union influence and development. In particular, the discussion will highlight the fragility of unionism in the face of the British judiciary, which in turn requires consideration of the extent to which legislative mechanisms were required to restore the *status quo*. Underlying all of this, is the consideration of the nature of, changes in, and effects of the legal status of unions and, by implication, their relationships with their members. The chapter will trace the formation of the Labour Party, which primarily was in response to the abovementioned judicial intervention and will present the outcomes of the various Royal Commissions instituted to examine the increasing influence of organised labour on the industrial relations system of Britain. The importance of the Trade Disputes Act and its fundamental role (along with that of World War 1) in ushering in the broad acceptance of unions in British society will then be considered, before briefly considering certain statutory responses enacted in the aftermath of the War. Related hereto, the chapter will examine the change in the ideology of organised labour in Britain, specifically as far as its relationship with government and the judiciary

is concerned. In this regard, it should be mentioned that the chapter also illustrates the shifting and complex relationship between the judiciary, the law/statute/government and organised labour, a relationship that defines approaches to unionism and the regulation of trade unions.

4 2 The prohibition and proscription of trade unions in Britain

4 2 1 Early unionism in Britain

As the first industrialised nation, Britain has a collective labour history dating back more than two centuries[553] with the formation of the first national trade union movement in the latter part of the eighteenth century.[554] The British experience plays a crucial role in any account of unionism and serves as an excellent point of departure in understanding historic influences on contemporary trade unions.[555] It is also important to place the development of unionism within the context of the simultaneously developing British state. For example, in any analysis of the particular methods followed by organised labour during the formative stages of their development, it has to be kept in mind that unionism in Britain preceded (what would today be considered as) the fundamental democratic doctrines pertaining to enfranchisement – the most basic of which was universal suffrage.[556] Therefore, Bowers states that "[o]ne of the proffered explanations for the course which labour law has taken in Britain in contrast to the [European] Continent, where more workers' rights are guaranteed by statute, is that the Industrial Revolution and the birth of trade unionism preceded the advent of democracy for the industrial worker".[557] The

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[553] According to S Honeyball *Honeyball & Bowers' Textbook on Labour Law* 9 ed (2006) 1, the first recognisable labour legislation was the Ordinance of Labourers, "passed in 1349 following the Black Death (which caused labour to be in great demand)".

[554] WH Fraser *A History of British Trade Unionism 1700-1998* (1999) 3-4.

[555] R Hyman *Understanding European Trade Unionism: Between Market, Class and Society* (2001) 67, in quoting HA Turner *Trade Union Growth, Structure and Policy: A Comparative Study of the Cotton Unions* (1962) 14, states: "British trade unions, more than those of most countries perhaps, are historical deposits and repositories of history".

[556] Suffrage in the United Kingdom gradually developed over the course of the nineteenth and twentieth centuries by means of various legislative enactments (usually taking the form of the "Reform Acts"), the first being promulgated in 1832 – The Representation of the People Act 1832 (2 & 3 Will. IV c 45), also known as the First Reform Act. This Act saw suffrage being extended to previously under-represented urban areas, amongst others. See in this regard JA Phillips & C Wetherell "The Great Reform Act of 1832 and the Political Modernization of England" (1995) 100 *Amer Hist Rev* 411 411.

[557] J Bowers *Bowers on Employment Law* 6 ed (2002) 3. See further L Wedderburn "The Social Charter

consequence of this was explained by Kahn-Freund as follows:

> "I do not think that you will find any other country in which, in important sections of the economy, the trade unions had attained a considerable bargaining strength long before their members had obtained the franchise – no country, in other words, in which, through their own early history, the unions got so much used to the reliance on industrial rather than on political pressure, on collective bargaining outside the law rather than on legislation."[558]

This approach of "collective bargaining outside the law",[559] which saw trade unions often make use of the strike as their primary weapon of choice, rather than following less volatile alternatives, was crucial in shaping both the role that unions fulfilled within the British labour market and the conceptualisation of the union as an entity by the government of the day and society in general. It was this conceptualisation, in turn, that dramatically impacted upon how labour relations law, and trade union law, was viewed and shaped by the various role players involved.

As indicated earlier, the dramatic growth of these associations and combinations of trade can be directly attributed to the dawn of the industrial age.[560] The subsequent economic and manufacturing development saw the living and working conditions of the average worker (be it adult or child) deteriorating to frequently deplorable levels[561] and any protection against such circumstances through government intervention was simply unheard of.[562] In effect, with the class system central to relations in Britain, the

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in Britain: Labour Law and Labour Courts?" (1991) 54 *MLR* 1 7, who states: "But the crucial difference for labour law was the fact that 'on the continent unionism developed simultaneously with the mass political labour movement and its parties'. The decisive factor was that here [in Britain] 'trade union organisation came first and the political movement much later, on the Continent the sequence was the reverse'" [quoting Hobsbawn and Kahn-Freund, respectively. His emphasis].

[558] Bowers *Employment Law* 1, quoting O Kahn-Freund "Industrial Relations and the Law — Retrospect and Prospect" (1969) 7 *BJIR* 301 302.

[559] Bowers *Employment Law* 1, quoting Kahn-Freund (1969) *BJIR* 302.

[560] See V Feather *The Essence of Trade Unionism: A Background Book* (1963) 12. Hyman *Class and Society* 67 suggests that "Britain is recognized as the cradle of the 'industrial revolution'".

[561] Feather *Background Book* 12. See further W Thompson "Introduction: International Labor, 1800-2000*"* in N Schlager (ed) *St. James Encyclopedia of Labor History Worldwide: Major Events in Labor History and their Impact* (2004) ix ix who states: "[W]orkers shared the miseries of overcrowded slums bereft of space, sanitation, clean water, and access to adequate diet or medical care".

[562] Hyman *Class and Society* 67 explains this phenomenon as follows: "Central to the transition from feudalism to capitalism was the negative principle of detachment of the (relatively weak and undeveloped) state from economic life: the doctrine of laissez-faire". See further K Ewing, H Collins & A McColgan *Labour Law* (2012) 24; L Wedderburn "Labour Law and the Individual in Post-Industrial Societies*"* in KW Wedderburn (eds) *Labour Law in the Post-Industrial Era: Essays in Honour of Hugo*

employer was much more likely to enjoy the sympathy of the government, with such support coming at a high cost to workers.[563]

Against this political and economic background, the first "trade clubs" began forming in the various industrial centres around Britain.[564] As the membership and benefits of the individual clubs expanded, the latter began to associate themselves with similar organisations in neighbouring centres. As a result, basic federations of trade clubs formed.[565] This new interest in trade associations on a nationwide scale was demonstrated as early as 1771 when the first national federation of trade clubs was formed in Britain.[566]

4 2 2 Proscription of trade unions

Due to this increasing prominence of organised labour, it was not long before legislation in Britain at the turn of the eighteenth century were to prohibit "combinations in restraint of trade"[567] (the so-called Combination Acts).[568] They were inspired primarily by the overriding desire for stability in both the political and economic spheres[569] and were brought about through pressure exerted by the beneficiaries of

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Sinzheimer (1994) 13 19-21.

[563] C Crouch *Trade Unions: The Logic of Collective Action* (1982) 46 states:

"In the late eighteenth and early nineteenth centuries, when governments were in no way responsible to ordinary people, employers had little difficulty in gaining the support of governments in this task, and combinations of workers were often made illegal".

[564] Feather *Background Book* 13. In addition, Feather *Background Book* 13 explains that these clubs were both small and local, with meetings taking place either in various workers' homes, or more commonly, down at the local ale houses. These meetings discussed issues ranging from work conditions, hours and wages, to the establishment of funds (to which the workers of the club would make weekly contributions) providing health, burial and unemployment benefits to needy members. For a more expansive discussion of the various origins and forms of these clubs, see Fraser *British Trade Unionism* 4-5. See further Honeyball *Textbook* 1; P Davies & M Freedland *Labour Law: Text and Materials* 2 ed (1984) 116-117.

[565] Such federations had more members, which meant that contributions to the various funds were greater, which in turn provided for greater subsidies in the event of a particular member requiring assistance. It was therefore only logical that combinations of labour, in whichever form, began to appeal to a larger number of workers. See further Fraser *British Trade Unionism* 14-19, 26-27.

[566] Feather *Background Book* 13.

[567] Fraser *British Trade Unionism* 10.

[568] The Combination Act of 1799 (39 Geo. III c 81) and the Combination Act of 1800 (39 & 40 Geo. III c 106).

[569] Feather *Background Book* 13 explains that "the Combination Laws banning trade unions … [made] it illegal for any group of workers to combine together for any purpose relating to employment". Honeyball *Textbook* 2 state that the Combination Act of 1800 also enacted two further specific offences,

the status quo resulting from their fear of organised labour.[570] In addition, the Combination Act of 1800 granted jurisdiction to the Justices of the Peace and empowered them to pass sentence of up to three months' imprisonment for committing any of the offences stipulated within the legislation – and since, in the words of Bowers, "the magistrates came from the same class as the masters, [they] frequently did so".[571]

4 2 3 The Masters and Servants Act of 1823 and the Combination Act of 1825

The Masters and Servants Act[572] was introduced in 1823 and proved to be a particularly powerful weapon with which employers could attempt to control the conduct of their employees and the unions, since the Act provided that any employee who was absent from work before the expiry of their employment contract could be punished by up to three months' hard labour.[573] Notwithstanding this, some of the smaller craft associations persisted.[574]

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namely: "one of entering into contracts for the purposes of improving conditions of employment or calling or attending a meeting for such a purpose; and another of attempting to persuade another person not to work or to refuse to work with another worker." For an in-depth discussion of the Combination Acts, and what contemporary labour writers make of them – particularly in regards to the uncertainty surrounding how widespread their use was, see K Laybourn *A History of British Trade Unionism, c.1770-1990* (1997) 16-20. The author states further:

> "Trade Unions were already treated as illegal in England in common law and under existing statutes but the new legislation did by-pass the lengthy procedure ... by allowing for immediate summary jurisdiction [sic] before two magistrates."

[570] C Howell *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (2005) 3-4, 46-47, 49-50, 53. See further Fraser *British Trade Unionism* 11, who states that industrial uprisings in 1811 and 1812 (involving the physical destruction of weaving machinery set to replace manual labour) by a group of textile artisans known as the Luddites, which "thoroughly frightened the authorities because they had a radical political element in them and the brutal response to these events made clear that the state was now firmly on the side of capitalist development."

[571] Bowers *Employment Law* 2. See further in this regard C Barrow *Industrial Relations Law* 2 ed (2002) 5.

[572] Master and Servant Act 1823 (4 Geo. IV c 34).

[573] Honeyball *Textbook* 2 state that from 1858 to 1875, there were some 10 000 prosecutions per year brought under this provision.

[574] P Elias & K Ewing *Trade Union Democracy, Members' Rights and the Law* (1987) 2; Barrow *Industrial Relations* 4. However, it must be emphasised that conditions were certainly not easy for unions or their members. As Feather *Background Book* 14 explains "Nevertheless, workpeople did protest and resist. Many were prosecuted; savage punishments followed convictions and even as accused persons they were treated as felons". Feather *Background Book* 14 continues by stating:

> "Long hours of work on the one hand, unemployment on the other, rising prices, low wages, bad housing, degrading living and working conditions, the demotion of skilled craftsmen to the ranks of the unskilled – all these had produced strikes, lockouts, resentment and, often enough, physical violence."

The Combination Acts were eventually repealed in 1824.[575] However, this measure of success achieved by organised labour was short-lived. A spate of strikes following the repeal of the legislation[576] resulted in a swift response from the government with enactment of the Combination Act of 1825.[577] The 1825 Act introduced various "vaguely worded criminal offences"[578] pertaining to organised labour and industrial disputes, which included crimes such as molestation, intimidation, conspiracy,[579] violence and obstruction[580] – all of which were open to very wide interpretation by the courts.[581]

By way of further example, Barrow *Industrial Relations* 5 speaks of the so-called "Massacre of Peterloo" of 1819, following the Luddite riots, where "violence broke out a demonstration" that resulted in the deaths of 11 people, with "400 injured when the army broke up the protest meeting" – Barrow *Industrial Relations* 5 n18.

[575] The Combination Acts Repeal Act 1824 (5 Geo. IV c 95). See R Kidner "The Development of the Picketing Immunity: 1825-1906" (1993) 13 *Legal Stud* 103 104. The return of economic prosperity to England in the 1820s resulted in the threat of widespread public disorder on the part of the labour force being less immediate. Certain influential economists lobbied the Select Committee of the House of Commons, established to investigate matters affecting industry, and following their Report, the 1824 Act was introduced, effectively striking down the previous Combination Acts. See Honeyball *Textbook* 2 whom, in explaining the effect, state that the Act:

> "[R]emoved 35 prohibitions on combinations in various sectors of the economy, and repealed most of the 1800 Act. Moreover, union combination ceased to be per se criminal at common law."

See further Elias & Ewing *Union Democracy* 2. Laybourn *British Trade Unionism* 20-22, argues that part of the reasoning of the Select Committee in pushing for the repeal of the Combination Acts, was the belief that the repeal would, in effect, "bring about the demise of trade unionism" [at 21], since it was believed that "they only existed because they were banned and because working men saw them as their only safeguard" [at 20]. Barrow *Industrial Relations* 5-6, in turn, reasons as follows:

> "To many influential thinkers, the solution to labour unrest was to put into practice the economic doctrines of the time. They argued that the State, by prohibiting unions, was interfering in the free play of market forces in determining the price of labour. Employers should be free to use their capital, and workers to sell their labour, as they see fit. To these thinkers… unions were specifically attractive to workers because of their illegality. Once unions were free to negotiate with employers they would soon wither away, as the law of supply and demand would ensure that unions only secured the marker or 'natural' rate for their members. Once this rate was fixed through the free market, there would be no further role for unions. The view of these radicals influenced a House of Commons Inquiry into the operation of the Combination Acts."

[576] Elias & Ewing *Union Democracy* 2, in explaining the reasoning behind the sudden increase in strike action, state: "Feeling no doubt intoxicated with their new-found freedom, the unions greeted the repeal with a wave of strikes rather than the decline in membership which had optimistically been predicted." See further Laybourn *British Trade Unionism* 21.

[577] The Combination of Workmen Act 1825 (6 Geo. IV c 129). See further Elias & Ewing *Union Democracy* 3 n4, and Kidner (1993) *Legal Stud* 104.

[578] Elias & Ewing *Union Democracy* 3.

[579] 3.

[580] Honeyball *Textbook* 2.

[581] Bowers *Employment Law* 2, in providing examples of the extent to which the Courts applied the

As explained by Elias and Ewing, the Statute did however leave the principle of freedom of association (as introduced in 1824) intact, despite not making all combinations of workers lawful.[582] Section 4 of the Act merely provided that those combinations whose *sole* purpose was to attempt improvements in wages or variations in working hours were lawful – and as such did not include any organisations who sought to bring about changes in any other conditions of employment.[583] Finally, the Act allowed for the payment of contributions by workers to their unions.[584]

4 3 The acknowledgement and assimilation of trade unions in Britain

4 3 1 A period of transition and proliferation

The year 1825 marked the beginning of a gradual increase in membership numbers as well as a proliferation of unions.[585] Local societies and clubs openly initiated major drives for union support and countless unions made their appearance for the first

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offences contained in the Act, states:

> "[T]he courts soon applied [the offence definitions] to persuading a fellow worker to join a strike (R v Rowlands (1851) 5 Cox CC 436) and inducing a worker to leave in breach of contract (R v Druitt (1867) 10 Cox CC 592)." Regarding the Rowlands decision, Bowers *Employment Law* 2 states that the consequences of the judgment was modified by the Combination of Workmen Act 1859 (22 Vict. c 34), which "rendered it lawful to attempt, with the aim of securing changes in wages or hours, 'peaceably and in a reasonable manner, and without threat or intimidation to persuade others to cease or abstain from work'".

See further Kidner (1993) *Legal Stud* who discusses the impact of the 1825 Combination Act on the law of picketing.

[582] Elias & Ewing *Union Democracy* 3; Laybourn *British Trade Unionism* 21-22.

[583] Elias & Ewing *Union Democracy* 3.

[584] Feather *Background Book* 15.

[585] 15 states the following:

> "The 1825 Act in effect marked the beginning of the legal history of trade unions in Britain, although it was still difficult for a union to go about its normal business without it coming into conflict with the law, this in fact was to remain the case for another fifty years."

It was not all plain-sailing though. The year 1834 saw the events surrounding those who became known as the "Tolpuddle Martyrs" unfold. As explained by Laybourn *British Trade Unionism* 29, "six Dorsetshire farm labourers, from Tolpuddle, were prosecuted because of their attempts to form a union due to the zeal of a magistracy and government who were determined to stamp out potential industrial unrest in the countryside ... [The] labourers had not planned a strike or intimidated anyone and their only crime, a minor one at common law, was to administer an oath of secrecy." The labourers were tried "for the suppression of mutiny and conspiracy" [at 29] and were sentenced to transportation (to the penal colony of Australia) for 7 years. See further A Denning *Landmarks in the Law* (1984) 103-118, and his chapter on "The Tolpuddle Martyrs". For a succinct discussion of this period, and the varying changes that took place within the formative years of the modern union movements in Britain, see Laybourn *British Trade Unionism* 22-35; Barrow *Industrial Relations* 6-8.

time.[586] National unions became common, with increased membership translating into far greater power with which to negotiate with employers.[587] Importantly, these new federations of unions saw an "efficient internal organisation and a sound financial base"[588] combine with a "cautious approach to industrial action".[589] This resulted in many of them "build[ing] a nascent structure of collective bargaining with the masters, some of whom were keen to talk to spokesmen rather than numerous individuals."[590] However, this state of affairs was not necessarily supported by all parties concerned with labour relations. One notable and differing viewpoint was that of the judiciary, evidenced by their interference in the legal status of trade unions.

4 3 2 Judicial intervention – *Hornby v Close*

In the 1867 decision of *Hornby v Close*[591] the House of Lords confirmed trade unions to be illegal as restraints of trade.[592] The *Hornby* judgment[593] resulted in

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[586] S Bendix *Industrial Relations in South Africa* 3 ed (1996) 167 argues that the "new" unions making their appearance during this period were most similar to the contemporary labour associations of today.

[587] Hyman *Class and Society* 67 states that these "new unions were widely regarded (and defined by many of their own leaders) as radical and militant, but where they established bargaining relationships with employers a more pragmatic orientation soon prevailed".

[588] Honeyball *Textbook* 3.

[589] 3.

[590] 3. See further Laybourn *British Trade Unionism* 30-32.

[591] *Hornby v Close* (1867) 2 LRQB 153. See Bowers *Employment Law* 3.

[592] Bowers *Employment Law* 3.

[593] Elias & Ewing *Union Democracy* 3-5 provide a succinct discussion of the background to the *Hornby* judgment, the most relevant aspects of which can be summarised as follows: After the repeal of the Combination Acts, the rights and duties of trade union members in the association, rather than the right of association (which arguably had been guaranteed in 1825) shifted to the forefront of labour relations. As a result, the manner in which labour associations were organised, structured and managed began to gain importance, particularly with the steady increase in the numbers and reach of such associations. With this in mind, due to the great costs involved in pursuing any matter within the ambit of the courts, unions were compelled to rely on internal procedures (and the occasional use of external arbitrators) with which to settle disputes between unions and their members. Consequently, the first test case [*Hilton v Eckersley* (1855) 6 El. & Bl. 47] pertaining to the question of enforcing an association's rules, involved a combination of employers. In reaching its decision, the Court of the Exchequer Chamber held that the agreement that the employers were trying to enforce amounted to being in restraint of trade, and whilst not declaring the organisation criminal, it held that the agreement was incapable of being enforced in law. Elias & Ewing *Union Democracy* 4 state that whilst the abovementioned case concerned an employers' association, the court was very aware of the implication of the ruling with regards to trade unions, as it essentially meant the courts would be unwilling to receive labour associations who might seek the enforcement of their internal rules. In the end, the ruling issued in the *Hilton* case held little bearing to most unions, who had in any event become accustomed to managing their own problems internally. However, with the growth and consequent financial prosperity of unions,

potentially dire consequences for trade unions and, in the words of Bowers, "[i]n a pattern often to be repeated in later years, down to the present day, this judgment adverse to workers' interests was soon redressed by legislation."[594]

4 3 3 Royal Commissions and legislative protection

A Royal Commission[595] was established in 1867 with a view to investigating trade unionism as a whole, while simultaneously making recommendations regarding possible legal reforms to the system.[596] The Royal Commission on Trade Unions Report of 1869[597] was "grudgingly favourable towards trade unionism although it

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the question of their legal status did become a matter of concern – essentially due to the increasing exposure of unions to unscrupulous officials who were only too willing to attempt embezzlement of the associations' funds. In such situations, trade unions naturally sought to be able to prosecute the offender in an effort to retrieve their property, but were impeded in this by virtue of their unincorporated status – the latter problem being applicable not only to unions, but to all unincorporated groups. The underlying problem lay in the theory that since trade unions were unincorporated associations, the property of the union belonged to all the members jointly. As such, Elias & Ewing *Union Democracy* 4 explain that if a fellow member were to embezzle the funds, "it was not theft since the member was merely taking personal property, albeit owned jointly with others." The method whereby friendly societies avoided this problem, was to register in terms of the Friendly Societies Act of 1855 (18 & 19 Vict. c 63), which thereby permitted such bodies to prosecute guilty officials. Importantly, the Act was worded in such a manner as to allow trade unions to register and thus achieve the consequent protection offered by the Act. However, the perceived intention of the statute was circumvented by the decision reached by the Court of Queen's Bench in *Hornby*, where it was ruled that while associations with a purpose in restraint of trade might not make that organisation criminal, it remained illegal within the context of the Friendly Societies Act, and thus unions could not make use of the protection and recourse offered by the Act. See further O Kahn-Freund "The Illegality of a Trade Union" (1944) 7 *MLR* 192, for a particularly useful and detailed overview of these cases, and the attitudes of the judiciary towards unions at this time.

[594] Bowers *Employment Law* 3. The legislation referred to, initially took the form of Trade Unions Funds Protection Act of 1869 (32 & 33 Vict. c 61). As a result of the *Hornby* judgment, which in effect meant that officials could embezzle union funds at will, was obviously an untenable state of affairs that needed to be rectified. Thus, Elias & Ewing *Union Democracy* 5 explain the speed at which 1869 Act was promulgated as "… perhaps not wholly unconnected with the fact that only a year previously the [voting] franchise had been extended for the first time to working men."

[595] "The Eleventh & Final Report of the Royal Commissioners Appointed to Inquire into the Organisation and Rules of Trade Unions and Other Associations" [Cmnd. 4123 (1869)]. See further Kahn-Freund (1944) *MLR* 193.

[596] Elias & Ewing *Union Democracy* 5.

[597] 5.

recommended several severe restrictions".[598] Legislation enacted in 1871[599] and 1875[600] allowed unions to register, thereby not only providing the funds and property

[598] Hyman *Class and Society* 20. Regarding the restrictions, see Elias & Ewing *Union Democracy* 5-6, who furthermore explain that the Commission issued both Majority and Minority reports, with the former being particularly hostile towards unionism. In spite of this, skilful presentation to the Commission, by pro-union supporters who drafted the Minority report, saw the latter provide much of the underlying basis for the subsequent legislation enacted in terms of the Report.

[599] The Trade Union Act 1871 (34 & 35 Vict. c 31) and the Criminal Law Amendment Act 1871 (34 & 35 Vict. c 32) were enacted on the same day. Regarding the Trade Union Act, according to Elias & Ewing *Union Democracy* 6-7, the core recommendations of the Minority Report accepted by the Royal Commission in 1869, were reflected in three main sections of the Act: S 2 stipulated that trade unions were not to be considered as criminal conspiracies merely because the rules of the association were in restraint of trade. S 3 focused on potential civil law problems (in contrast to s 2 which focused on criminal law issues), by providing that the restraint of trade doctrine should not result in agreements concluded by unions, or trusts for that matter, being declared either void or voidable. Lastly, s 4 attempted to ensure that internal union affairs remained outside the realm of the court whilst simultaneously providing protection for the property interests of the association, and allowing the enforcement of agreements concluded by the union as against third parties. The Criminal Law Amendment Act, according to Honeyball *Textbook* 3, "cut down somewhat the scope of the offences of intimidation, molestation, and obstruction, but its effect was limited by the continued extent of the common law crime of conspiracy as revealed by the conviction of striking gas stokers in R v Bunn (1872)." Essentially therefore, Elias et al *Cases & Materials* 5 state that the Act repealed the relevant criminal offences provisions of the 1825 Combination Act and replaced them with a new set of offences that were more clearly defined. Regarding the decision reached in *R v Bunn* (1872) 12 Cox CC 316, Elias et al *Cases & Materials* 5-6 explain that the *Bunn* judgment negated the impact of the Criminal Law Amendment Act by virtue of ruling that the Act had "no effect on the common law offence of conspiracy to coerce, which therefore continued in operation, and was committed by forcing an employer to conduct his business in a manner contrary to his wishes." Elias et al *Cases & Materials* 5-6 conclude that Bunn was one of the primary reasons that saw a new Royal Commission appointed in order to reconsider the issue of common law conspiracy, thereby ultimately resulting in the repeal of the 1871 Act by means of new legislation enacted in 1875. The Royal Commission in question, was chaired by Sir Alexander Cockburn, the then Chief Justice of the Queen's Bench – and was the officially entitled the "Royal Commission Appointed to Inquire into the Working of the Master and Servant Act, 1867, and the Criminal Law Amendment Act, 34 & 35 Vict. Cap. 32, and for other purposes" [Cmnd. 1094 (1874)], and delivered its second and final report in 1875.

[600] The Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. c 86). Honeyball *Textbook* 3 state the following regarding the Act:

> "[It] gave immunity from criminal conspiracy where the defendant was acting in furtherance of a trade dispute, and the act would not have been criminal if done by one person alone. It also recognised some forms of picketing as legitimate by providing that mere attendance at a place for the purpose of peacefully communicating information would not amount to a crime of 'watching and besetting'."

Whereas Elias et al *Cases & Materials* 6 reason that the 1875 Act was the first time that the so-called "golden formula" was introduced into British labour law, most sources appear to agree that the concept was introduced by the 1906 Trade Disputes Act (see § 4 3 7 below). See B Simpson "A Not So Golden Formula: In Contemplation or Furtherance of a Trade Dispute after 1982" (1983) 46 *MLR* 463 463 n1, who attributes the origin of the term to KW Wedderburn, from his 1965 book The Worker and the Law. The "golden formula" stems from the immunities made available to trade unions (in terms of the applicable legislation) in regards to activities that are only in contemplation or furtherance of a trade

of unions with protection at law,[601] but also affording these trade unions formal recognition as legal entities.[602] In commenting on these developments, Honeyball and Bowers state that "[s]uch immunities became characteristic of the English approach to strikes and picketing",[603] which greatly contributed to Britain's distinctive labour relations system.[604]

4 3 4 A judicial onslaught

However, the period between 1875 and the early 1900s saw many of these gains come under serious threat due to the approach of the British courts,[605] in what amounted to a deliberate "judicial onslaught" in response to the rise in industrial conflict.[606] Howell explains that in several crucial cases,[607] "the British judiciary tore a

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dispute – see the further discussion at § 6 4 5 below.

[601] Honeyball *Textbook* 3; Elias et al *Cases & Materials* 6.

[602] See further Crouch *Trade Unions* 47 who states:

> "The winning of legal rights to organise came gradually as governments saw the likelihood of less social conflict if they permitted unions than if they tried to prevent them, and as they hastened to pursue policies that would attract political support from the rising number of manual workers who were achieving the suffrage during the latter part of the nineteenth century".

With this latter point in mind, Feather *Background Book* 20 gives an indication of how potentially important union members were to the furthering of political support, by stating that in 1874, the Trade Union Congress ("TUC"), which was a federation of various unions founded in 1868, served as representative for more than one million workers.

[603] Honeyball *Textbook* 3. For a critical discussion of the consequences of this "system of legal immunities", see in general CK Rowley "Toward a Political Economy of British Labor Law" (1984) 51 *U Chic L Rev* 1135 1135-1140.

[604] See further Wedderburn (1991) *MLR* 7-9.

[605] Howell *Trade Unions* 61-62 states: "The legislation protective of unions and strike action had been in place since 1875, but the courts were largely silent for the next decade and a half as the mid-Victorian compromise held."

[606] Howell *Trade Unions* 61. Regarding this period of transition, Wedderburn (1991) *MLR* 6 states the following:

> "But the period in which the organic structure of our labour laws was built, in the 50 years before 1920, was not a period of uniform stability; far from it – the military in Trafalgar Square in 1886, the great lock out of 1897, in 1907 a threat of chaos on the railways, in 1913 justified fears of a revolution, 'a time of remorselessly rising tension, of impending doom.'" [footnotes omitted; quoting from H Phelps Brown (1959), G Dangerfield (1935) and A Fox (1985)].

For a concise discussion of the trade union history of this period – in particular the interplay between strike action and union membership growth, see in general R Darlington "Strike Waves, Union Growth and the Rank-and-File/Bureaucracy Interplay: Britain 1889–1890, 1910–1913 and 1919–1920" (2014) 55 *Lab Hist* 1.

[607] *Temperton v Russell* [1893] 1 QB 715, *Taff Vale Railway Company v Amalgamated Society of Railway Servants* [1901] UKHL 1, [1901] AC 426, [1901] 1 KB 170 (CA) and *Quinn v Leathem* [1901] AC 495 – discussed further, where relevant, below. See Howell *Trade Unions* 61. In addition to these,

series of giant holes in the protection" which the 1875 legislation purported to provide trade unions and workers.[608] The means by which the courts effected this was by developing a new set of civil liability doctrines,[609] the result of which was that "trade unionism premised largely on collective action, was rendered virtually impossible".[610] Essentially, therefore, when criminal liability no longer was an option through which to target organised labour, employers began focusing their attention on restraining strikes by means of the civil law.[611]

4 3 5 Judicial intervention – the *Taff Vale* judgment

This approach serves as background to the *Taff Vale Railway Company v Amalgamated Society of Railway Servants*[612] judgment, one of the central cases in the history of British labour relations.[613] Despite earlier decisions that saw the gradual expansion of the means through which industrial action could be stymied,[614] the underlying approach was still informed by the "generally-held assumption" that any judicial threat to the right to strike would be defeated simply by virtue of the fact "that

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Lumley v Gye [(1853) 2 E&B 216] and *Allen v Flood* [(1898) AC 1] were two further cases worthy of mention, in demonstration of judicial "activism" in regards to organised labour's increasing influence – see D Howarth "Against Lumley v Gye" (2005) 68 *MLR* 195 for an in-depth analysis of the former (*Lumley v Gye*) and SC Basak "Principles of Liability for Interference With Trade, Profession or Calling I" (1911) 27 *L Q Rev* 399 and SC Basak "Principles of Liability for Interference With Trade, Profession or Calling II" (1911) 27 *L Q Rev* 399 for the latter (*Allen v Flood*).

[608] Howell *Trade Unions* 61.

[609] 61. These included "interference with trade, conspiracy to injure, picketing, and inducement to breach of contract"..

[610] 61.

[611] Honeyball *Textbook* 4. See in this regard R Brown "The Temperton v. Russell Case (1893): The Beginning of the Legal Offensive Against the Unions" (1971) 23 *Bull Econ Res* 50 for a thorough discussion of the implications of *Temperton v Russell* (at § 4 3 4 above) and its role in the lead-up to Taff Vale (above), that concludes with the following statement [at 66]:

> "The Temperton v. Russell case then was important in challenging the legal immunity of trade unions and it set an example which was to cause a changed interpretation of the Trade Union Law. It was the first stone on the road to Taff Vale." See further Wedderburn (1991) *MLR* 20-21 who states: "The fact is that from the moment the immunities were invented in 1871, decision after decision has produced new liabilities out of the hat to outflank them, most commonly (but not only) in tort, each adding a twist to the skein of the liabilities restricting union activity in the 'ordinary law of the land'".

[612] See § 4 3 4 above.

[613] Elias et al *Cases & Materials* 7 describe the Taff Vale decision as being "the seminal case in the political history of trade unionism".

[614] See further Honeyball *Textbook* 4.

only individuals and not the unions themselves, could be sued."[615] This assumption was to be shown to be unfounded.[616] According to Honeyball and Bowers, the decision reached in *Taff Vale* "directly threatened unions with bankruptcy, for the House of Lords held that they could not shelter behind their unincorporated status because the Trade Union Act 1871 had enabled them to be sued in their own name."[617] The unions, as a separate entity from its members, could thus be held liable in terms of the civil law for damages resulting from industrial action.[618]

4 3 6 The Labour Party and assimilation

Organised labour, in the aftermath of *Taff Vale*, dramatically increased their support for the recently formed Labour Party, thereby signalling a shift in focus towards the political realm as a means of furthering their cause.[619] It was the political pressure

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[615] 4.

[616] See D Lloyd "Damages for Wrongful Expulsion from a Trade Union" (1956) 19 *MLR* 121 126-131 and D Newell "The Status of British and American Trade Unions as Defendants in Industrial Dispute Litigation" (1983) 32 *ICLQ* 380 387, who starts his discussion on the impact of the Taff Vale decision by stating: "Originally, it was not thought that the Act [Trade Union Act 1871, at § 4 3 3 above] altered the common law principle that the common fund of a trade union as an unincorporated association was virtually unassailable in tort". Newell (1983) *ICLQ* 388 says of the judgment: "The decision was considered legally unsound on the basis that the Trade Union Act had not sought to alter the status of trade unions as unincorporated associations".

[617] Honeyball *Textbook* 4. The authors state further [Honeyball *Textbook* 4] that the Amalgamated Society of Railway Servants were ordered to pay the Taff Vale Railway Company (the employer) damages in the extent of £23,000, together with costs of £19,000 – a vast amount of money in 1901. See Howell *Trade Unions* 61-62 where various reasons behind the court's approach are discussed, including the possibility of "ideological and class bias on the part of judges". It must be noted that the original judgment of Farwell J, in favour of the employer, was overturned on appeal to the Court of Appeal, before finally being restored by a full majority following the further appeal to the House of Lords.

[618] Elias et al *Cases & Materials* 7 state the following regarding the judgment: "Previous decisions had established the scope of civil liability but individual union members did not have enough money for it to be worth suing them for damages (though injunctions could be obtained). In Taff Vale, to the surprise of most legal commentators, the House of Lords held that a registered trade union could be sued in tort in its registered name for the acts of its officials. Until that time it had been thought that unions, being unincorporated bodies, were effectively immune (largely for procedural reasons) from such liability. The combined effect of these legal developments was that virtually all industrial action involved the risk of torts being committed by union officials, for which the union itself could be made liable in damages." See Newell (1983) *ICLQ* 388 who reasons "It [the Taff Vale decision] was also interpreted as a full frontal attack on trade unions' capacity to take industrial action", before quoting the Webbs [at 388] as stating: "The immediate result [of Taff Vale] was very largely to paralyse the executive committees and responsible officials of all trade unions, and greatly to cripple their actions … Trade Unionism had to a great extent lost its sting" [S Webb & B Webb *The History of Trade Unionism* 3 ed (1920)].

[619] Honeyball *Textbook* 4. Elias et al *Cases & Materials* 7 comment that the Taff Vale decision provided

generated by these developments that resulted in the 1906 Report issued by the Royal Commission on Trade Disputes and Trade Combinations,[620] which saw the newly elected Liberal Government enact the Trade Disputes Act of 1906.[621] This Act established the core framework within which the law of industrial action was to operate over the following 55 years.[622]

4 3 7 The Trade Disputes Act of 1906

The Trade Disputes Act effectively prevented the use of labour injunctions, which (as Howell points out) was long considered the most potent weapon available to employers who were attempting to control industrial action,[623] and provided unions with immunity from liability for a multitude of torts. Central hereto, were sections three and four of the Act, which introduced what was to become known as the "golden

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the necessary impetus for the formation of the Labour Party, the result of which, "has since given rise to the saying that it was the Law Lords who created that party." Furthermore, Elias et al *Cases & Materials* 7 state that the growing influence of the Labour Party coincided with "growing political importance of the working class vote" after legislation was promulgated that (in 1867 and 1884) extended the franchise to include ever-increasing numbers of wage-earners [The Acts in question were The Representation of the People Act 1867 (30 & 31 Vict. c 102), and The Representation of the People Act 1884 (48 & 49 Vict. c 3), respectively]. See further Newell (1983) *ICLQ* 388-389 who states: "The popular outcry arising from the decision led to a substantial increase in British trade union membership, contributed to the growing popularity of the emerging Labour Party, and was one of the issues in the 1906 General Election." For an excellent overview of the history surrounding the formation of the Labour Party, and its relationship with the trade unions, see in general KD Ewing *Trade Unions, the Labour Party and the Law* (1984).

620 "The Royal Commission on Trade Disputes and Trade Combinations" [Cmnd. 2825 (1906)].

621 The Trade Disputes Act 1906 (6 Edw. 7 c 47). Regarding the background to the Trade Disputes Act, Howell *Trade Unions* 62 states the following:

> "The Trade Disputes Act had been preceded by the report of the Royal Commission on Trade Disputes and Trade Combinations, set up in response to Taff Vale … [The commission did however] recommend that legislation create a set of positive rights for trade unions, declaring them legal associations and declaring strikes legal."

622 Howell *Trade Unions* 62. See further R Kidner "Lessons in Trade Union Law Reform: The Origins and Passage of the Trade Disputes Act 1906" (1982) 2 *Legal Stud* 34 for an in-depth discussion regarding the promulgation of the Act – and J Saville "The Trade Disputes Act of 1906" (1996) *HSIR* 11, who says of the background to the Act:

> "The legal position of trade unions had been significantly clarified by the Acts of 1871 and 1875, and during the succeeding two decades this legislation was not seriously challenged through the courts. It was the new unionism of the later 1880s … that began to effect critical changes in public opinion (that is, middle- and upper-class opinion); and there followed militant counter-offensives by the employers of labour, on the ground and in the courts".

623 Howell *Trade Unions* 62.

formula" of protection.[624] The developments surrounding the Trade Disputes Act, therefore, had important consequences, not the least of which was that they essentially marked the end of judicial (and to a lesser extent, legislative)[625] intervention, so prevalent in the latter part of the nineteenth century, at least for the then foreseeable future.[626] With regards to this period of judicial activism, Howell maintains that it had a dramatic effect upon the "ideology and practice of the British labor movement, which in turn had a long-term effect on the evolution of the industrial relations system."[627] Foremost of these consequences was the utter failure of trust of the unions in any labour relations system that involved external parties, such as the

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[624] The relevant wording of the sections, is as follows:

> "[3] An act done by a person in contemplation or furtherance of a trade dispute shall not be actionable on the ground only that it induces some other person to break a contract of employment or that it is an interference with the trade, business, or employment of some other person, or with the right of some other person to dispose of his capital or his labour as he wills. [4 (1)] And action against a trade union … or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court."

Rowley (1984) *U Chic L Rev* 1137 explains that torts of conspiracy, inducing breach of contract, and interference with trade, business, or employment were included, with the proviso that the alleged acts were taken (in the words of the 1906 Act, s 3) "in contemplation or furtherance of a trade dispute", were accordingly protected. See further F Schmidt "Industrial Action: The Role of Trade Unions and Employers Associations*"* in B Aaron & KW Wedderburn (eds) *Industrial Conflict: A Comparative Legal Study* (1972) 2-3, where it is stated that the "constant struggle against interference with union activities … was successful in so far as the unions had themselves immunity from tort liability and their officials and members were protected within the framework of the famous golden formula [at § 4 3 3 above] of the Conspiracy and Protection of Property Act, 1875, and the Trade Disputes Act of 1906 and 1965: 'an act done… in contemplation of furtherance of a trade dispute'." See Saville (1996) *HSIR* 36-37, for a succinct overview of the Act – all four sections of it.

[625] Howell *Trade Unions* 62 reasons that the 1906 Trade Disputes Act permitted the creation of a "collective laissez-faire system", that essentially was to be the hallmark of British industrial relations up and till the mid-1960s. See further R Rogowski "Industrial Relations, Labour Conflict Resolution and Reflexive Labour Law*"* in R Rogowski & T Wilthagen (eds) *Reflexive Labour Law* (1994) 53 63-64 who, in describing the British collective bargaining system, states:

> "In contrast, in Britain the industrial relations system has traditionally viewed official labour law as undesirable state intervention. In accordance with the common law approach of the legal system, British industrial relations developed a piece-meal approach which is characterised by a reliance on incremental, uncoordinated changes introduced by collective agreements on various unforeseen occasions."

Compare this description of the legal system in Britain with that of the USA, where J Atleson "Law and Union Power: Thoughts on United States and Canada*"* in R Rogowski & T Wilthagen (eds) *Reflexive Labour Law* (1994) 139 146 states "[t]he [American] legal system thus reflects not a posture of self-restraint or a more passive reflexive approach but, instead, involves a clear interventionary stance."

[626] Howell *Trade Unions* 62-63.

[627] 62.

state, but particularly the judiciary.[628] It was this shift in outlook on the side of organised labour in Britain that was to give rise to what became the immunity-based labour relations system, so unique to Britain.[629]

4 3 8 The war years and union acceptance

While the period between 1906 and the commencement of the First World War showed a new avenue of attack upon unionism – which focused attention on the political activities of labour associations[630] – this period also signified the formal acceptance of unions,[631] with the war effort requiring the British Government to nurture

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[628] Howell *Trade Unions* 63. According to Howell *Trade Unions* 62-63, one particular consequence of this lack of trust, was the unsuccessful attempt by certain elements of organised labour, in 1899 and 1900, to gather support for implementing a similar compulsory conciliation and arbitration system to that which was introduced in New Zealand in 1894. Howell *Trade Unions* 63, in examining the underlying reason behind this lack of support, state that unions were convinced that they "could not trust the judges of this country [the UK] to give a fair and impartial verdict on any question as to the conditions of labour which might be remitted to them." See further P O'Higgins & M Partington "Industrial Conflict: Judicial Attitudes" (1969) 32 *MLR* 53 53 who state: "If there is one area in which the judges' undisclosed social and political premises are likely to be important factors in the determination of cases, it is in the field of industrial conflict between workers and employers". The authors [at 53] quote Scrutton LJ [TE Scrutton "The Work of the Commercial Courts" (1921) 1 *Camb LJ* 6 8] who queries:

> "This is one of the great difficulties at present with Labour. Labour says: 'Where are your impartial judges? They all move in the same circle as the employers, and they are all educated and nursed in the same ideas as the employers. How can a labour man or a trade unionist get impartial justice?'".

[629] In this regard, Howell *Trade Unions* 63 states:

> "For the largest, most influential unions, the degree of hostility manifested in this phase of judicial activism was interpreted to mean that no framework of labor law, even one embodying positive rights for unions, could offer protection from judges except blanket immunity from the scope of judge-made law … It made the ideology of 'voluntarism' virtually hegemonic within the labor movement, and it gave birth to the notion of 'trade union privileges,' that unions were somehow above the law, something that made them ideologically and politically vulnerable half a century later."

[630] Elias et al *Cases & Materials* 8. This essentially entailed attempts to prevent unions from using their funds for political purposes. Both Elias et al *Cases & Materials* 8 and HA Millis "The British Trade Disputes and Trade Unions Act, 1927" (1928) 36 *J Pol Econ* 305 313-314 discuss the impact of the *Osborne v Amalgamated Society of Railway Servants* (1910) AC 87 decision, with the latter stating that the Law Lords held "that no part of trade-union funds could used for political purposes, for such purposes were outside trade union objects recognized at law" [Millis (1928) *J Pol Econ* 313-314]. See further the discussion by Ewing *Trade Unions, the Labour Party and the Law* 22-29.

[631] As demonstrated by the passing of the Trade Union Act 1913 (2 & 3 Geo V c 30) by the Asquith's Liberal Government, essentially in response to the detrimental effects of the 1911 *Osborne* decision (above). As explained by Millis (1928) *J Pol Econ* 314:

> "The … Act … authorized both registered and non-registered unions, under certain conditions, to maintain and use political funds. Such a fund could now be established by majority vote on a secret ballot of all members of the organization."

relations with organised labour.[632]

In concluding his detailed overview of judicial intervention around the turn of the nineteenth century, Klarman states the following about its impact on the eventual assimilation of trade unions into the British labour relations system:

> "The British trade union movement came of age between 1867 and 1913. Trade unions in 1867, widely regarded as criminal desperadoes and on the verge of legal extermination, suffered under a legal regime that stifled any effective form of industrial action. In public debate, unions were subject to widespread vilification, being depicted as a 'blot upon our industrial system,' 'gangs of criminals leagued together for the establishment of a despotism wholly subversive of law and justice,' and 'enemies' of the state. Trade unionists complained bitterly of the law's unequal treatment, seeking elimination of criminal offenses defined specifically in terms of trade disputes, and abolition of the quasi-feudal law of master and servant. By 1913 the situation had changed dramatically. Unions had become an estate of the nation. Few politicians dared to make a speech opposing their interests without first noting the valuable services that unions performed for the nation. Mainstream opinion had concluded that strong unions benefited the economy by preventing fairly trivial, localized disputes that could cripple industry. To achieve this heightened status within the realm, the unions had been forced to battle tooth and nail against a predominantly hostile judiciary. In a variety of contexts, and often in plain contravention of Parliament's intent, the judges had endeavored to curtail union power. In the end, that judicial effort backfired, for in 1906 the combination of intense union distrust of the judiciary and the burgeoning political power enabled unions to secure a unique immunity from legal regulation. During a forty-year period, the unions had gone from asking for equal treatment to demand a special consideration – and getting it… Ironically, the unions chose to pursue absolute tort immunity principally because the judges had proved themselves so unrelentingly hostile to union interests that only legislation placing the unions beyond the judicial grasp would afford adequate protection."[633]

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[632] Elias et al *Cases & Materials* 8 states:

> "Legally then, both the industrial and the political activities of trade unions had attained a considerable degree of protection from judicial interference by the time of the First World War. Yet that War was a major landmark in the development of labour relations. Until that time the response of the state to unions had passed through various stages from total repression to hostile acceptance to reluctant toleration. But the War forced the government to foster closer links with the unions, and helped create a stronger feeling of mutual trust between them."

Darlington (2014) *Lab Hist* 6 says of this period:

> "Under the stress of war, it had been essential for the state to invoke the aid of the trade unions, to collaborate with them in a bid to avoid disruptive labour disputes, and in the process to make very substantial concessions to them, particularly in the matter of trade union status: the recognition of trade unions as an indispensable part of the state's war machinery."

[633] MJ Klarman "The Judges Versus the Unions: The Development of British Labor Law, 1867-1913" (1989) 75 *Virg L Rev* 1487 1601-1602, [footnotes omitted].

As a result, and with the exception of certain statutes,[634] a "general pattern of non-intervention in the direct regulation of collective labour relations" developed, to the extent that Elias et al state that in the period between the First World War and the mid-1960s there was very little legislation adopted affecting labour relations.[635]

Most of the regulation of the key areas of collective labour relations – such as the right of association, the right to union representation and minimum wage levels – was therefore left to the relative strengths of the parties.[636] In considering this particular aspect of British unionism,[637] Elias et al conclude that much of it was due to the traditional hostility between unions and the judiciary and that, as a result, organised labour tried to avoid judicial intervention, particularly since they "tended to assume that even favourable legislation [would] be emasculated by the judges."[638]

However, inevitably, the relative industrial peace that arose as a result of the various actors in the labour relations system being left to their own devices, gradually began to fade.[639] This led to Britain's period of readjustment from the 1950s onwards,

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[634] The most obvious example would be the Trade Disputes and Trade Union Act 1927 (17 & 18 Geo V c 22), which was promulgated in reaction to one of the first general strikes called in Britain, in May of 1926. See in this regard AL Goodhart "The Legality of the General Strike in England" (1927) 36 *Yale LJ* 464 464-465, who considers the underlying legal framework of British strike-law at the time (which falls outside the immediate focus of this study) by commencing with a brief explanation of the reason for the strike: it being called at the behest of the TUC in support of coal miners, following a breakdown in negotiations regarding wages, working hours and conditions. Whereas various industries downed tools in support of the action for a mere nine days, the majority of mineworkers continued striking for a further six months until November 1926, as explained by Millis (1928) *J Pol Econ* 313. The Act was repealed in 1945 following the victory of the Labour Party, by the Trade Disputes & Trade Union Act 1946 (9 & 10 Geo. VI c 52). See further AT Mason "The British Trade Disputes Act of 1927" (1928) 22 *Amer Pol Sci Rev* 143 143; Elias et al *Cases & Materials* 9.

[635] Elias et al *Cases & Materials* 9. See further Saville (1996) *HSIR* 39, who states:

> "[F]or over half a century after the 1906 Act there were no fundamental changes in labour law or in judicial decisions that were delivered in labour cases. The aftermath of the Great Strike of 1926 [see above] was only a limited exception with the passing of the 1927 Trade Disputes and Trade Unions Act. No doubt it was the weakness of the trade-union movement from 1926 to 1939 that was responsible for the absence of legal challenges to the unions, just as it was the new political situation after 1945 that also influenced their general position in society. During the 1950s, as Griffith [J Griffith *Judicial Politics Since 1920: A Chronicle* (1993) 94] commented, 'recourse to the courts was almost unknown as a means of resolving industrial disputes or challenging industrial practices'."

[636] Elias et al *Cases & Materials* 10.

[637] 10.

[638] 10.

[639] Howell *Trade Unions* 101 reasons that the long-term stability of British industrial relations during the early to mid-twentieth century, resulted from the fact that "judicial activism in labor law receded after the 1906 Trade Disputes Act, and the deep hostility of the British judicial system to collective organization and action on the part of the workers was replaced by the more positive public policy

discussed in more detail in chapter 5.

4 4 Conclusion

This discussion in this chapter described the development of unionism and its regulation in Britain, from inception to the stage of acknowledgement and assimilation. The discussion showed that the societal conditions of the industrial revolution saw the need for collectivisation amongst workers in order to offset the power held by employers. It was also emphasised that this collectivist organisation of labour pre-dated democratic rights for the overwhelming majority of workers in Britain, a factor which contributed significantly to the peculiar development, and underlying ideology, of British organised labour.

The chapter showed that – and this is a shared characteristic of the development of unionism in all of the jurisdictions considered in this dissertation – once unions' growth and influence reached the point where strike action as their chosen industrial weapon of choice became a prominent feature of the industrial landscape, the reaction was swift and far-reaching. First in the form of legislation, the government of the day sought – by means of the "restraint of trade doctrine" – to hold unions and their members to be criminally illegal associations, deserving of the full censure of the law. Consequently, during this initial stage of prohibition/proscription, violence was never far removed from the British industrial relations system.

Of further importance, however, is that the chapter demonstrated a repetitive cycle during early unionism in Britain, namely: unwanted union activity, which is heavily oppressed, resulting in reduced union activity, which results in easing union oppression, resulting in unwanted union activity, and so on. Nevertheless, the chapter also described the gradual statutory acceptance of labour associations, with a concomitant increase in union size and scope, leading to increased levels of internal efficiency and organisation. Key to the initial oppression of unions was the judiciary and its apparent sympathy and support for the employer as opposed to the working class. Underlying this oppression was the unincorporated status of unions in Britain which, despite the possible advantages to be gained through an incorporated status, British unions were at pains to defend. The discussion highlighted how organised labour was in favour of complete independence from the various state structures and

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presumption [with regards to industry bargaining]."

judicial oversight – thereby introducing the first instances of the collectivist *laissez-faire* approach so characteristic of British industrial relations. This approach, however, is also underpinned by the broader concept of "immunities", initially carved out by legislation in response to the judicial attack on unionism. As such, the British system offers a unique example of an initial piecemeal development of their industrial relations system, resulting from and culminating in a combination of judicial and legislative responses to organised labour activities.

The chapter also illustrated the role of various Royal Commissions in the British system. The discussion also brought to light the origins of the Labour Party and its direct relationship with judicial interference and oppression of trade unions. As such, the discussion showed how Britain introduced an institutional framework (in the context of this study) which shows close ties between organised labour and broader party-political structures. The chapter furthermore discussed the crucial statutory development of the so-called "golden formula", which was to serve as one of the key underlying foundations of British trade union immunity. Lastly, in a further example to bear in mind during the course of this study, the central role played by an external shock (in this case a world war) in radically changing the fortunes of organised labour is demonstrated.

CHAPTER 5: THE DEVELOPMENT OF TRADE UNION REGULATION IN BRITAIN – THE PERIOD OF READJUSTMENT FROM THE 1950S TO THE 1990S

> "Mrs Thatcher came to power committed to tame the unions. Breaking trade union power was a raison d'être of her Government. Her Ministers went about their business with very much less consultation with the ... trade unions ... The Conservative Government's trade union legislation was designed to make trade unions more responsive to the wishes of their members (which is another way of saying that it aimed to cut the personal power of trade union leaders), and to reduce the economic influence of the trade unions. This was done by providing for secret ballots for trade union elections (primarily through postal ballots), by requiring that secret ballots be held before industrial action is embarked on, giving government finance for such ballots, and by reducing trade union immunities".[640]

5 1 Introduction

This chapter is the second one tracing the development of trade union regulation in Britain. Chapter 4 was dedicated to consideration of the early (legal) assimilation of trade unions and showed four things important for a proper understanding of the intense period of readjustment to trade union regulation which forms the focus of this chapter. Firstly, chapter 4 showed that the initial legal development of trade union regulation in Britain was primarily based on legislative adaptation (as opposed to the common law) to the rising phenomenon of trade unions. Secondly, to the extent the judiciary became involved during the period of assimilation of trade unions (and did apply and develop the common law), the focus was not so much on the nature of trade unions (and their relationship with their members), but on the activities of trade unions and its effect on employers and society. Thirdly, chapter 4 showed that the initial period of assimilation culminated in a fairly lengthy period of "legal abstinence" from regulation, premised on the idea that a trade union is its members and is best left to self-regulation. Fourthly, chapter 4 showed that the development of trade union regulation was intricately linked to power relations in society (also at political level), a trend, as this chapter will show, that continued during the period of readjustment.

These remarks in mind, this chapter will commence with an examination of the underlying economic conditions in Britain that gave rise to increased tension between the government and organised labour. By necessary implication, this also requires consideration of the fundamental tenets of the British industrial relations system of the

[640] R Brazier "The Downfall of Margaret Thatcher" (1991) 54 *MLR* 471 486.

time. This will be followed by a discussion of the series of cases that marked the initial judicial response to the prevailing state of affairs. Closely related to these developments, is consideration of the initial legislative responses during this period of readjustment, the impact of another Royal Commission and ultimately – and of considerable importance – the promulgation, content and impact of the 1971 Industrial Relations Act.

The discussion of the 1971 Industrial Relations Act is done in the context of the various economic and political factors that influenced the design and implementation of the Act, the influence of parallel developments in the USA and includes consideration of the specific provisions of the Act pertaining to the internal management of unions. The intended institutional implementation of the Act's provisions will also be considered, which includes examination of key statutory bodies created in terms of the Act. This will be followed by a discussion of the repeal of the 1971 Act (including an analysis of the possible reasons for this), set against the backdrop of continued judicial involvement in the regulation of organised labour. The subsequent political and socio-economic turmoil of the late-1970s and early-1980s Britain will then be considered which also culminated in a series of enactments relating to the British industrial relations system. Again, this includes a focus on specific statutory bodies created in these statutes.

Importantly, the chapter concludes with an examination of the application and development of common law principles to trade unions and their relationships with their members. In a departure from the state of affairs described in chapter 4, this chapter will show that the period of readjustment to the regulation of trade unions and trade union accountability relied not only on legislative intervention, but also use and development of common law principles. Ultimately, this chapter will show that, during the period of readjustment in Britain, trade unionism was to undergo a reshaping that it is, in a sense, still recovering from. And, closely related to this, this chapter will abound with examples of different available legal mechanisms – both legislative and judicial in nature – to (ostensibly) ensure trade union accountability to its members.

5 2 The readjustment towards trade unions in Britain

5 2 1 Post-war economic pressures

The discussion in chapter 4 concluded with an acknowledgement that the initial

"non-interventionist approach" that characterised the post-war years in Britain – along with relative industrial peace – was not to last. Central to this was the change in political and public attitude towards the industrial relations system, certainly caused in part by the state of the British economy which began to decline towards the end of the 1950s.[641]

The first signs of this change in attitude manifested in the change in approach of the Government towards national economic management, with emphasis placed upon "economic modernization"[642] through intervention on a micro-economic level.[643] Once this new policy was accepted as the only reasonable method with which to ensure an economic upswing, problems began to arise with regard to the nature and structure of the labour relations system – in short, "a voluntarist industrial relations system with an abstentionist state made little sense."[644] Essentially, the new focus resulted in the Government considering labour and its associated institutions as subservient to the needs of micro-economic intervention policies. Howell states:

> "Common to all these shifts in the British political economy was the inability of the existing set of industrial relations institutions to offer any help; indeed, they acted as obstacles to economic restructuring. Managing job loss and resistance to changes in technology and work organisation could not be done at the level of industry bargaining, nor could productivity agreements be reached in the absence of workplace bargaining institutions."[645]

A growing perception for the need to implement changes in the structures of the British industrial relations system and of organised labour, therefore, arose from policies put in place to combat economic recession. However, this policy change was not the only reason for the renewed focus on industrial relations and trade unions. Whereas the economy did play a major role, it was the different consequences of, and reaction to, the condition of the British economy that collectively contributed to the complete overhaul of the labour relations system in general, and the internal

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641 C Howell *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (2005) 98 states:

> "By the end of the 1950s it was clear that whatever temporary advantage the British economy had gained from being among the victors during the Second World War had disappeared, and relative economic decline was obvious."

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governance of unions in particular. One of these consequences of (or reaction to) the economy, was strike action.[646] Economic pressure and the need to increase productivity of British businesses resulted in conditions of employment that were seldom viewed favourably by union members or their unions. The early part of the 1960s thus saw an increase in strike activity as indicative of unions' attempts at improving working conditions[647] and furthermore marked the increasing influence of shop stewards.[648] Litigation increased as employers tried to forestall the inroads sought by the unions, resulting in what can only be described as a "sympathetic response from the courts",[649] which again sought to erode the liability protection enjoyed by trade unions.[650] In the words of Howell, "the reappearance of judge-made law directly threatened collective *laissez-faire*, though it is unlikely that judges would have been so likely to act in the absence of widespread political and public disquiet with the industrial relations system."[651]

5 2 2 Judicial intervention – *Bonsor*, *Rookes* and *Stratford*

The period surrounding the mid-to-late 1950s and into the 1960s saw a series of judgments handed down that evidenced the growing willingness of the judiciary to re-establish a strictly-defined "playing-field" for industrial action, but also to involve themselves in internal union affairs. Starting with the 1955 decision in *Bonsor v*

[646] For a succinct discussion of the different patterns and underlying causes of industrial action during the 1960s and 1970s, see Howell *Trade Unions* 99-100.
[647] Howell *Trade Unions* 99-100; P Elias et al *Labour Law: Cases and Materials* (1980) 10.
[648] Howell *Trade Unions* 100. In this regard, Howell *Trade Unions* 100 argues that the media played a significant role, by means of its reporting on the prevalence and nature of the strikes, in creating a popular image of "militant shop stewards, resistant to change and eager to engage in unofficial strikes".
[649] Elias et al *Cases & Materials* 10.
[650] Howell *Trade Unions* 100 explains that one of the key dangers to union immunities posed by the judiciary, was that "a hostile judiciary could create liabilities [for unions] faster than the legislature could provide immunities (and then each effort by a British government to pass legislation plugging a new hole in union immunity created an opportunity for public debate about trade union power) ...". See further Elias et al *Cases & Materials* 10.
[651] Howell *Trade Unions* 101.

Musician's Union,[652] *Rookes v Barnard* in 1964,[653] and *J.T. Stratford & Son Ltd v*

[652] [1956] AC 104; [1955] 3 WLR 788. This case involved the alleged wrongful expulsion of a union member (Bonsor) from his union – and culminated in the House of Lords reversing the 1954 Court of Appeal decision, in holding that Bonsor was entitled to an action for damages (thereby overturning the law as it stood since 1915 [*Kelly v NATSOPA* (1915) 84 LJKB 2236; 113 LT 1055], for breach of contract, against the union in its own name. The judgment was particularly important in developing the law in recognising the "quasi-judicial" status of a trade union, as being an entity capable of being sued for breach by a member, separate and distinct from that of its members *inter se*. Furthermore, the judgment clarified the position of union officials, in circumventing the formerly held approach [as per the Kelly decision] that the officials (as agents of the members) – could not be sued by an individual member for their actions – it was now held that such officials could be seen to be the agent of the union (and not only of the members, *inter se*), and were therefore open to action. For in-depth discussions of the case, see D Lloyd "Notes of Cases - Damages for Wrongful Expulsion From a Trade Union" (1954) 17 *MLR* 360; D Lloyd "Damages for Wrongful Expulsion from a Trade Union" (1956) 19 *MLR* 121 121-135; GW Keeton "The Legal Status of the Trade Union*"* in TW Price & B Beinart (eds) *Butterworths South African Law Review 1956* (1956) 180; TC Thomas "Trade Unions and Their Members" (1956) 14 *Camb LJ* 67 and KW Wedderburn "The Bonsor Affair: A Post-Script" (1957) 20 *MLR* 105. A further matter to be mentioned at this juncture, would be the judgment in *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 [discussed further at § 5 3 3 2 below], which similarly dealt with an unlawful expulsion from a union, albeit with a focus on the reversal of the union's decision – as opposed to the associated claim of damages present in the *Bonsor* case.

[653] [1964] AC 1129. The facts of this case involved the dismissal of Rookes following a threat by a Union to institute strike action if Rookes (as the Union's former member) was not dismissed – since his continued employment contravened the closed-shop policy in place at the workplace. Rookes accordingly proceeded to institute an action for damages against the officials (including Barnard) of the AESD, "for using unlawful means to induce the corporation to terminate its contract of service with him, and/or conspiring to have him dismissed by threatening the corporation with strike action" [at 1129]. The aforementioned therefore amounted to a revival of a tort by the House of Lords, namely that of "intimidation" ("unanimously rejected" by the Court of Appeal – see KW Wedderburn "Intimidation and the Right to Strike" (1964) 27 *MLR* 257 259 n18, and the reference to similarities of the appeal process to that of the *Taff Vale* decision), but extended its application to that of threatening to breach a contract (therein relying heavily on *Lumley v Gye*) in the context of a trade dispute – thereby neatly sidestepping the protection formerly in place since 1906, under the Trade Disputes Act. H Carty "Unlawful Interference with Trade" (1983) 3 *Legal Stud* 193 194 explains the tort as follows:

> "[The] …tort involves the threat of an unlawful act (often the threat of a breach of contract) to cause economic harm to the plaintiff. Intimidation usually arises in a three party situation so that the unlawful threat is directed at a third party in order to harm the plaintiff."

DM Arden "Economic Torts in the Twenty-first Century" (2006) 40 *Law Teach* 1 8 says of it: "The remarkable thing about this tort is that liability stems from the making of [mere] threats". As for another remarkable aspect of the decision, Wedderburn (1964) *MLR* 260 states: "Their lordships swept away the line between breach of contract and tort as 'unlawful' acts, saying simply that the one is as 'unlawful' as the other". For in-depth discussions of the case, see in general Wedderburn (1964) *MLR* 257 257-281; CJ Hamson "A Note on Rookes v. Barnard. Intimidation. Joint Tortfeasors. Trade Disputes Act, 1906" (1961) 19 *Camb LJ* 189 189-199; CJ Hamson "A Further Note on Rookes v. Barnard" (1964) 22 *Camb LJ* 159 159-177; KW Wedderburn "The Right to Threaten Strikes" (1961) 24 *MLR* 572 572-591; KW Wedderburn "The Right to Threaten Strikes – II" (1962) 25 *MLR* 513 513-530 and C Wrigley "Trade Unions and the 1964 General Election" (2007) 21 *Contemp Br Hist* 325 331-333.

Lindley a year later,[654] the return to an industrial relations system that saw an approach involving judicial intervention and legislative reaction[655] was well and truly set.[656]

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[654] [1965] AC 269; [1964] 3 WLR 541. This matter involved a claim of damages against the respondent's (as officials of the W.L.T. & B. Union) for attempting to bring pressure to bear on a subsidiary company (Bowker & King Ltd) of the Appellants (Stratford), by means of preventing their members (and those of the parent union) from performing their duties in such a manner so as to bring Stratfords' business to a virtual standstill. The House of Lords again considered whether or not the action complained of amounted to the tort of intimidation (as dealt with in *Rookes*), and focused specifically on the wording of ss 1 and 3 of the 1906 Trade Disputes Act – in order to determine whether or not the action complained of fell within the confines of the so-called "golden formula" – that is, was it "in contemplation or furtherance of a trade dispute". KW Wedderburn "Notes of Cases: Stratford and Son Ltd. v. Lindley" (1965) 28 *MLR* 205 207-208, in describing the majority of the Law Lords' finding this not to be the case, explains the consequences of the judgment by stating: "This astounding decision is, in a sense, the gravest aspect of the case, because so many liberties of industrial action depend upon a reasonable interpretation of 'trade dispute'". For discussion of *Stratford*, see in general Wedderburn (1965) *MLR* 205 205-213; JA Weir "Chaos or Cosmos? Rookes, Stratford and the Economic Torts" (1964) 22 *Camb LJ* 225 225-233; Carty (1983) *Legal Stud* 193 193-207; S Deakin et al *Markesinis and Deakin's Tort Law* 6 ed (2008) 1 581-582; KW Wedderburn "Inducing Breach of Contract and Unlawful Interference with Trade" (1968) 31 *MLR* 440 440-446.

[655] A further case worth mentioning from this period, was that of *Torquay Hotel Co. Ltd. v Cousins and Others* [1969] 2 WLR 289; [1969] 1 All ER 522, a Court of Appeals decision that ostensibly brought clarification to "some of the issues in this controversial area of law" – see AS Grabiner "There Is a Tort of Interference with Contractual Relations" (1969) 32 *MLR* 435 435. The case revolved around picket lines being formed outside the Plaintiff hotel that prevented the delivery of supplies (fuel oil), following anti-union utterances of the manager of the Plaintiff hotel (who had no members of the Defendant trade union as employees) being quoted in the media. In addition to an interlocutory injunction application to suspend the picket (and the basis upon which the appeal was launched), the claim was based on the damages suffered for indirect interference with the contractual agreements in place between the Plaintiff and its fuel oil suppliers. The decision before the Court of Appeal turned around the fact that there was no trade dispute between the Plaintiff and Defendant union, and accordingly – the protection offered by the "golden formula" of s 3 of the 1906 Act [§ 4 3 3 above] did not apply to the union officials, acting as they did. The Court [as per Denning M.R.] did however rule that no injunction should have been ordered against the Union – with the finding that the Union was in fact protected by s 4 of the 1906 Act. Technically therefore, whereas the judgment removed the trade union as a party to the injunction awarded in the Court a quo – their officials were nonetheless found to have prima facie committed the common law tort for indirect interference.

[656] Regarding the reception of the controversial judgments handed-down by the House of Lords in both the *Rookes* and *Stratford* decisions, see Wedderburn (1965) *MLR* 213 who states, at the conclusion of his discussion of the *Stratford v Lindley* matter:

> "It is no great pleasure to watch experienced lawyers, many exulting, even heedless, often angry at criticism, anxious to paper over any cracks in the judicial edifice, rarely conscious of their own social policy assumptions, but confident of their 'objectivity' with all the security which only that unselfconscious enthusiasm can bring, hasten like their forebears, the jurists of 1901 and 1910, to the support of judicial interventions in labour law which not merely are novel, even questionable, law, but may prove even more disastrous than their predecessors of the Quinn [*v Leathem*], Taff Vale and Osborne decade, both for industrial relations and for the common law itself. What is puzzling, but sociologically interesting, is why (when all this could have happened in a dozen cases after 1918) did it happen in the sixties?". However, compare the aforementioned view with that of

5 2 3 The Trade Disputes Act of 1965, the Labour Party and the Donovan Commission

One of the direct consequences of this judicial intervention was the promulgation of the Trade Disputes Act of 1965[657] and the co-operation of organised labour in yet another Royal Commission, aimed at examining the operation of trade unions and employers' associations.[658] The Commission under the chairmanship of Lord Donovan published its report in 1968.[659] While the Report contained many recommendations regarding future industrial relations in Britain,[660] its eventual effect was played out in the series of legislative enactments in the first half of the 1970s (signifying the

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Weir (1964) *Camb LJ* 226, who states, inter alia, "These [two judgments – *Rookes* and *Stratford*] are said to bring industrial law into chaos; be that as it may, they do undoubtedly suggest a principle of order for the private law of economic torts. It was high time this house was put in order".

[657] The Trade Disputes Act 1965 (c 48). See P O'Higgins "Trade Disputes Act, 1965" (1966) 24 *Camb LJ* 34 34 who says:

"This Act was passed in answer to the concern expressed on behalf of trade unions as to the effect of the decision in the House of Lords in Rookes v. Barnard … on the legal liabilities of persons taking part in industrial action aimed at employers."

See further KW Wedderburn "Trade Disputes Act 1965 Redundancy Payments Act 1965" (1966) 29 *MLR* 53 53 who relates that, as a result of the *Rookes* decision, the then Minister of Labour was reported as saying (see n2; Second Reading of the Redundancy Payments Bill: 71 H.C.deb., col. 53) that since it appeared that the majority of strikes would potentially amount to a breach of contract, "protection was needed against this judicial innovation". The Act, in its entirety, consisted of two sections – the second of which was the "short title and extent" provision. S 1, entitled "Certain acts not actionable in tort or as delicts", consisted of two subsections, with subs 1(2) providing a six-month retrospectivity, whereas subs 1(1) dealt directly with *Rookes v Barnard*, and the threat to breach a contract of employment, to which one is a party or not, either directly or by means of inducing another to breach.

[658] Elias et al *Cases & Materials* 10-11. See further MA Hickling "Restoring the Protection of the Trade Disputes Act: Some Forgotten Aspects" (1966) 29 *MLR* 32 32, who states that "[w]hen the Trade Disputes Bill was introduced after the General Election it was explained as a measure intended simply to restore the status quo, pending the investigation by the Royal Commission of the whole position of labour unions and employers' organisations".

[659] "Royal Commission on Trade Unions and Employers Organisations" [Cmnd. 3628 (1968)]. See further Elias et al *Cases & Materials* 11; S Honeyball *Honeyball & Bowers' Textbook on Labour Law* 9 ed (2006) 5-6.

[660] KW Wedderburn "Report of the Royal Commission on Trade Unions and Employers' Associations" (1968) 31 *MLR* 674 674 and Anonymous "The Royal Commission on Trade Unions and Employers' Associations, 1965-1968: A Summary of the Report and Recommendations" (1968) 6 *BJIR* 275 provides a succinct summary of the key features of these recommendations. For a comprehensive understanding of the main points raised, and a contextual background to the Report immediately following its release, see RF Banks "The Reform of British Industrial Relations: The Donovan Report and the Labour Government's Policy Proposals" (1969) 24 *RI/IR* 333. See further R Kilroy-Silk "The Royal Commission on Trade Unions and Employers' Associations" (1969) 22 *ILRR* 544.

continuing political power struggle between the Labour and Conservative Parties).

The events during the period between the late 1960s and early-1970s could quite easily fill a chapter all on its own. Below, a brief overview of this period – and the transition from Labour- to Conservative Party rule – is provided.

As discussed earlier, the changing attitude to industrial relations stemmed in part from the pressures exerted upon the British Government by the national economy. Minkin states that the "[c]onflict between the government and the unions over incomes and economic policy was crucially related to the industrial strength of the unions, and it was on this issue that attention came to be focused when, in 1968, the [Donovan] Commission… reported its findings".[661] Despite the Commission's recommendation against the use of legislative measures to effect any changes to the system, but with public support heavily in favour of action against unofficial strike action, Wilson's Labour Party "made a huge break with party-tradition" and made public new proposals for "governmental intervention in the field of collective bargaining, including penal sanctions against offending trade unions and trade unionists".[662]

These proposals were outlined in the 1969 Government White Paper, entitled "In Place of Strife",[663] and were largely ascribed to the Labour Party's Secretary of State for Employment and Productivity, Barbara Castle.[664] Of the legislative enactments that were potentially to follow from this, Simpson said:

> "The proposed new legislation affecting industrial relations is probably attended by more political implications than exist in any other sphere of legislative activity at present time… Consideration of the political impact of the White Papers is thus at least as important as the likely effect of its proposals on industrial relations, and has unfortunately tended to push the latter more important consideration into the background."[665]

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[661] L Minkin "The British Labour Party and the Trade Unions: Crisis and Compact" (1974) 28 *ILRR* 7 27.
[662] 27, [my emphasis].
[663] "In Place of Strife: A Policy for Industrial Relations" [Cmnd. 3888 (1969)].
[664] See in this regard R Tyler "'Victims of our History'? Barbara Castle and In Place of Strife" (2006) 20 *Contemp Br Hist* 461 461-476 and RC Simpson "In Place of Strife: A Policy for Industrial Relations" (1969) 32 *MLR* 420 420-426, for a comprehensive discussion of the White Paper.
[665] Simpson (1969) *MLR* 420. Regarding the impact within the Labour Party itself, Tyler (2006) *Contemp Br Hist* 462 states that "In Place of Strife came closer to splitting the Labour Movement than any event since Ramsay McDonald formed his national government [following the landslide defeat suffered in October 1931 General Election, where the Labour Party lost almost 80% of its seats – see S Webb "What Happened in 1931: A Record" (1932) 3 *Pol Qrtly* 1] in 1931. It not only represented a final throw of the dice by a prime minister desperate to restate his post-devaluation [of the GB pound] credentials, but it also demonstrated the claustrophobic nature of the bonds as linked a Labour government to the

Within organised labour the White Paper proved so unpopular that Britain's biggest trade union federation brought out their own programme[666] on how to deal with unofficial strikes and inter-union disputes.[667] Although it would be an oversimplification to suggest that the White Paper was the proverbial straw that broke the camel's back, it could certainly be argued that it resulted in heightening tensions long-brewing within the Labour Party.[668] It was no surprise that Labour lost the 1970 General Election, an event that was ultimately to result in a renewed focus on the nature of the relationship between the trade unions and their political allies.

The tumultuous changes experienced in Britain during this period, which also saw a prominent series of strikes towards the end of the 1960s,[669] as well as the increasing

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trade union movement …".

[666] Minkin (1974) *ILRR* 28 explains that the General Council of the TUC "was pushed into producing its own 'Programme for Action'", which was to see close to eight million votes (with approximately 846,000 votes in opposition) at the TUC's Special Congress in Croydon [See Minkin (1974) *ILRR* 28 n77] confirm the level at which the Labour Party's proposed changes to industrial relations were being opposed.

[667] Regarding the TUC's approach to inter-union disputes, which is discussed in more detail in the "common-law" section at § 5 3 6 below, see in general: PJ Kalis "The Adjudication of Inter-union Membership Disputes: The T.U.C. Disputes Committee Revisited" (1977) 6 *ILJ* 19 19-34; PJ Kalis "The Effectiveness and Utility of the Disputes Committee of the Trades Union Congress" (1978) 16 *BJIR* 41 41-51 and C Ball "The Resolution of Inter-union Conflict: The TUC's Reaction to Legal Intervention" (1980) 9 *ILJ* 13 13-27.

[668] Minkin (1974) *ILRR* 28 says of this period:

> "The overall result of these trends was that, between 1968 and 1970, the parliamentary leadership-trade union relationship was affected by reinforcing tensions of electoral orientation, class, ideology, and government-union commitment. Confrontation over "In Place of Strife" expressed and symbolised the depth of the division" – and further, at [29-30]: "It was not surprising, therefore, that in this period there was a growing awareness of the divergent purposes of trade unionism and Labour governments, a feeling of estrangement from the party on the part of trade union officials, and an increasing propensity to question the usefulness of the connection."

[669] One of which in particular, the strike of female workers at the British-based subsidiary of the Ford automobile company in May of 1968, was to effectively result in the promulgation of the Equal Pay Act of 1970 (c 41). Says S Cohen "The 1968–1974 Labour Upsurge in Britain and America: A Critical History, and a Look at What Might Have Been" (2008) 49 *Lab Hist* 395 403-404 of the strike:

> "Who would have imagined that so much power lay in the manufacture of a few seat covers? The prediction was accurate; by late June 'Ford was losing £1 million of sales revenue each day … The matter was, therefore, of the greatest significance, not just for Ford but for the nation.' The nation was duly called upon in the persons of Minister of Labour, Barbara Castle and eventually the Prime Minister, Harold Wilson, himself. This top-level panic was brought about by what one management representative termed a 'handful of discontented women'; a few hundred workers 'with no previous experience of fighting a battle of their own, let alone one of this nature' had brought a multinational company and a national government to their knees. Coupled with the extraordinary power of the strikers during this period was their total intransigence … The sewing machinists were eventually

political nature of the strikes,[670] were to culminate in a series of protest rallies – spearheaded by the Trades Union Congress (TUC)[671] – that was indicative of organised labour's opposition to the impending promulgation of new legislation.[672] The new Conservative Government that was elected to power in 1970[673] was to attempt one of the most controversial changes to Britain's approach to trade unions and labour relations system.

5 2 4 The Industrial Relations Act of 1971

The Industrial Relations Act of 1971 ("IRA 1971")[674] saw a forceful attempt at reform that was never suggested by the Donovan Commission.[675] The Commission already had cause to consider the extent and prevalence of internal impropriety on the part of unions or their officials. In his analysis of membership disputes in organised labour during the 1970s, Kay describes the Donovan Commission's view on this issue as

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persuaded back to work on the promise of a government enquiry which predictably refused to concede their central demand, a skill-based upgrading within the company's pay structure. Two years later, the Equal Pay Act was passed as part of the package offered to the strikers… The 'Equal Pay strike' of 1968 was just one small bead in a string of workplace-based struggles which in one way or another posed serious challenges to the British ruling class in the late 1960s and early 1970s" [footnotes omitted].

[670] Cohen (2008) *Lab Hist* 405 states: "For one analyst [in citing J Kelly "Trade Unions and Socialist Politics" (1988) 108], '1968-74 was not only a period of rising wages militancy, it was also a time in which the political strike returned to Britain after an absence of almost 50 years'".

[671] Cohen (2008) *Lab Hist* 404.

[672] In this regard, Cohen (2008) *Lab Hist* 405 states:

"Continuing anger against the Bill and the Industrial Relations Act itself in fact 'provoked the biggest demonstrations that London had ever seen [and] lead to more days lost through strikes in 1972 than any year since the General Strike of 1926' [citing T Blackwell & J Seabrook "A World Still to Win: The Reconstruction of the Post-War Working Class" (1985) 135]. This unrest has been characterized as specifically 'political' in a sense not normally attributed to strikes over pay, working conditions, etc."

[673] For an in-depth analysis of the underlying causes to the Labour Party losing the General Election, see in general Minkin (1974) *ILRR* 7 7-37. See further C Balfour *Unions and the Law* (1973) 54, who writes:

"The General Elections had been fought partly on the issue of rising prices, linked to trade union pressure for wage increases and backed by the threat of unofficial strike action, and partly by the 'law and order' issue, in which student riots, anti-apartheid demonstrations and militant shop stewards were all made to appear in the public eye as one red-eyed group of troublemakers."

[674] Industrial Relations Act of 1971 (c 72).

[675] KW Wedderburn "Labour Law and Labour Relations in Britain" (1972) 10 *BJIR* 270 270, who commences his discussion of the new Act with the words "[a] revolutionary change is being attempted in British labour law by means of the Industrial Relations Act 1971."

"'with reasonable safety that … it is unlikely that abuse of power by trade unions is widespread'".[676] Despite this, the new Conservative Government was determined to push through significant changes to the British industrial relations system, with IRA 1971 being its key driver. This set in motion events that had been brewing since the latter half of the 1960s and were to explode across Britain during the 1970s and beyond. The eminent American labour law scholar, William B Gould, described the Act "as a highly selective transplant of American labor law"[677] and made the following remarks in this regard:

> "[T]he British Parliament passed the first comprehensive legislation relating to labor management relations in the United Kingdom. The legislation attempted to both restrict union abuses in the collective bargaining arena and provide statutory protection for unions and employees. The Industrial Relations Act of 1971, which is more comprehensive than all of the major labor legislation enacted by Congress in 1935, 1947 and 1959 viewed together,[678] establishes a wide variety of unfair industrial practices applicable to both unions and employers… An abiding theme of the Act is the encouragement of central union authority which, in turn, will be more attuned to the responsibility and orderliness in its dealings with employers. Thus… Great Britain has now imposed upon the conduct of unions and employers more formal and far-reaching regulations than those characterizing the U.S. system, a system which British experts traditionally regarded as excessively law-ridden. Moreover… the British have attempted an abrupt, mammoth, one-step codification. The suddenness of change contributed to causing political and social upheaval. The summer of 1972 in Great Britain was one of nearly unprecedented bitterness and tumult… While government ineptness in administering the statute, an unfavourable judicial ruling,[679] and ever-worsening unemployment and inflation have aggravated the turmoil, the hard feeling arising out of the summer's railway and dock strikes is largely attributable to the Act itself."[680]

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[676] M Kay "The Settlement of Membership Disputes in Trade Unions*"* in JR Carby-Hall (ed) *Studies in Labour Law* (1976) 160 165-167, citing (at n40) para 622 of the Donovan Commission. A point necessary to be made, as explained by Kay "Membership Disputes" in *Studies in Labour* 167 is that the Commission was exclusively focused on "discipline [of members] and [trade union] election malpractices", but whereas these "may be the most serious types of membership dispute and they are invariably justiciable … they comprise only a small number of the totality of membership disputes". The author reasons [at 167] that the most common type of dispute (as brought before the TUC) that were 'justiciable' in his research, were the "claim to entitlement to benefits under the [union] rules".

[677] WB Gould "Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971" (1972) 81 *Yale LJ* 1421 1425.

[678] This being in reference to the so-called Wagner (1935), Taft-Hartley (1947) and Landrum-Griffin (1959) Acts – discussed in more detail in chapters seven and eight, below.

[679] This being in reference to the *Heaton's Transport* case – discussed in more detail at § 5 2 4 10 1 below.

[680] Gould (1972) *Yale LJ* 1423-1424, [footnotes omitted].

These remarks make it clear that inasmuch as the IRA 1971 constituted an important attempt by the British Government to fundamentally change collective labour relations, its provisions require careful consideration.

5 2 4 1 Key provisions of the IRA 1971

In their analysis of the Act, Engleman and Thomson speak of the "eight pillars" that were at "the heart of the Act" as including, *inter alia*, the following:[681] A right of association, both in terms of belonging to a union and electing not to belong to a union;[682] statutory union recognition rights;[683] immunities for unions who registered in terms of the Act;[684] various measures aimed at the internal regulation of union affairs *vis-à-vis* their members;[685] a presumption of the enforceability of collective agreements (unless agreed otherwise);[686] the introduction of unfair industrial practices[687] – including in the realm of the so-called economic torts,[688] and state of emergency procedures (in the event of large-scale strike action).[689]

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[681] SR Engleman & AWJ Thomson "Experience Under the British Industrial Relations Act" (1974) 13 *Ind Rel J Econ Soc* 130 132. The authors state further (at 132) of one of the underlying influences: "Suffice it to say that many of its conceptions and terms came from the United States" – echoing the point made by Gould (1972) *Yale LJ* 1425 mentioned at § 5 2 4 above.

[682] Section 5, read with subss 65(2)-(3) of the IRA 1971.

[683] Sections 44-60.

[684] See s 96 (providing immunity for registered unions) and s 154, for the effects on organisations not registered in terms of the Act.

[685] Sections 65-66 – read with Schedules 4 and 5.

[686] Sections 34-35.

[687] As per ss 54, 55, 66, 70, Part V "Other Unfair Practices" (ss 96-98), s 130.

[688] Section 96.

[689] See Part VIII ss 138-140. The two "pillars" not mentioned in the main text of the study above, as per Engleman & Thomson (1974) *Ind Rel J Econ Soc* 132, are "'the selective enforcement of procedural agreements' and a 'possible statutory definition of bargaining units". See further Honeyball *Textbook* 6-7 who state the following:

> "The Act put the law at the centre stage in collective bargaining. It outlawed any obligation of trade union membership as a condition for job applicants (the so-called pre-entry closed shop) [s 7, read with subs 65(2) IRA 1971] and allowed other forms of total unionisation only with approval of the Commission on Industrial Relations [ss 17-18 IRA 1971] and a ballot of affected workers [ss 12-15 IRA 1971] ... One of the most important innovations of the Act was the introduction of unfair dismissal protection in its largely present form [ss 22-33 IRA 1971]. Trade union immunity was removed for sympathy and secondary action [ss 97-98 IRA 1971] except in certain circumstances …".

5 2 4 2 Selected, key purposes of the IRA 1971

In examining the "intentions underlying the Act", Engleman and Thomson identified five primary themes of the new Act, key of which – for the purposes of this study – was "to force the unions, primarily through the process of registration, to assert more control over their members and to make them responsible for actions within the scope of their agent's authority, in order to reduce what was seen as irresponsibility of much existing unofficial action".[690] Central to achieving this aim were sections 78 to 80 of the Act, which provided for the provisional registration of unions, with the associations then being placed on a permanent register subject to them meeting the statutory requirements.[691]

In the words of Gould, "[t]he burden of de-registration is placed upon unions: Given the almost total opposition of the labor movement to the statute, it was thought that unions might not wish to register, but would nonetheless hesitate to seek de-registration because of the serious consequences for organizations which are not registered".[692] The "serious consequences" of deregistration arose from numerous provisions in the Act such as, *inter alia*, an unregistered union facing an "unlimited" amount of damages being awarded against it for either breach of a collective agreement, or inducing individuals to break their individual employment contracts, or engaging in any other proscribed activity in terms of the Act.[693] This consequence

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[690] Engleman & Thomson (1974) *Ind Rel J Econ Soc* 133 Regarding the remaining four themes, these were namely: (i) updating and codifying the labour law in Britain; (ii) ensuring alignment of individual and collective labour law with "basic international standards"; (iii) providing "normative standards for the conduct of industrial relations"; and finally (iv) to reduce the relative bargaining power of the "stronger unions, which had been perceived as gaining power from anti-social activities" – see Engleman & Thomson (1974) *Ind Rel J Econ Soc* 133.

[691] In essence, the Registrar was required to provisionally register all those organisations/trade unions which "immediately before the passing of [the 1971] Act" were already deemed to be registered unions in terms of the previous applicable legislation (ie, the Trade Union Acts 1871 to 1964) – see subs 78(2) of the IRA 1971. Section 79, in turn, regulated the "transfer from the provisional register", to the new register in terms of the Act, with such needing to take place within six months of the Act being promulgated (as per subs 79(1) of the IRA 1971). Regarding some of the peculiarities of this envisaged process, said RW Rideout "The Industrial Relations Act 1971" (1971) 34 *MLR* 655 661:

> "[The r]egistration procedure is reasonably straightforward although no one has yet explained how the registrar is to obtain the necessary returns and rule book from a union which does not take the trouble to de-register but simply does not co-operate in its transfer to the permanent register… Once the union is on the permanent register the registrar must examine its rules to see that they confirm to the requirements mentioned."

[692] Gould (1972) *Yale LJ* 1438.

[693] 1438 and 1438 n98 for a succinct breakdown of the implications.

stemmed primarily from the fact that the "golden formula" protection afforded by the 1906 and 1965 Trade Disputes Acts[694] were "replaced in part by [sections] 96-98 [of the 1971 Act]".[695] *Un*registered unions (along with their members and officials) were thus completely exposed to the full impact of tortious liability, devoid of any immunity or protection.[696]

In support of this approach, Rideout wrote at the time:

> "The principal purpose of the Act is inhibitive. It is intended that, despite the absence of a likelihood of resort to the courts, all who contemplate action will hesitate long enough for a settlement by other means achieved … The second major purpose is to force on the unions a need to develop their central control. While concentrating on the improvement of local bargaining there is plainly no intention that the shop-steward should have his power increased. The union which allowed him to proceed in anything but a controlled manner would quickly find itself contemplating the risk of a disastrous drain upon its funds."[697]

Another important provision of the 1971 Act was section 141. In terms of this section, the Secretary of Labour was empowered to approach the Industrial Court/National Industrial Relations Court (NIRC)[698] (as discussed at § 5 2 4 8 below) for an order compelling a ballot by a trade union prior to industrial action being taken, when it appeared to the Secretary that "there are reasons for doubting whether the workers who are taking part or are expected to take part in the strike or other industrial action are or would be taking part in it in accordance with their wishes, and whether they have had an adequate opportunity of indicating their wishes in this respect".[699]

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[694] As discussed above at § 4 3 7 and § 5 2 3 respectively.

[695] Gould (1972) *Yale LJ* 1438 n98.

[696] Gould at 1439 furthermore points to another consequence, that of taxes:
"Moreover, unions which refuse to register relinquished tax rebates available to the registered unions with respect to interest on investments actually applied to the payment of the non-strike non-'industrial action' benefits (e.g. sickness payments). It has been estimated that non-registration will impose new tax liabilities of up to 5 million pounds a year on the unions. For a trade union movement that is financially beleaguered, this is no small matter" [footnotes omitted].

[697] Rideout (1971) *MLR* 655.

[698] In terms of s 167 of the IRA 1971 (the "Interpretation" clause), "'the Industrial Court' means the National Industrial Relations Court", or NIRC. References to Industrial Court or NIRC in the discussion at § 5 2 4 8 below, accordingly, refer to the same entity.

[699] See subs 141(1)(c) of the IRA 1971. Subsection 141(2) qualifies the power by requiring that the effects of the industrial action in question are, or are likely to be, "such as to be seriously injurious to the livelihood of a substantial number of workers employed in that industry". See P Elias & K Ewing *Trade Union Democracy, Members' Rights and the Law* (1987) 153-154 for further discussion on this point.

Related to these provisions, Schedules 4 and 5 of the Act contained various requirements outlining what was to be contained in the rules (constitution/rule book) of trade unions,[700] and their financial reporting requirements.[701] Notably, in comparing Schedule 4 of the IRA 1971 to the current section 95(5) of the South African LRA, it was required of British trade union constitutions to specify: (i) "[A]ny body by which, and any official by whom, instructions may be given to members of the organisation on its behalf for any kind of industrial action, and the circumstances in which any such instructions may be so given" [para 10]; and, (ii) "a procedure for inquiring into any complaint of a member of the organisation that action contrary to the rules of the organisation has been taken by the organisation or by any official of the organisation" [para 18].[702] Thus, registered unions had to explicitly state who, what and how it could give the instruction to its members to participate in industrial action – a requirement that proved itself to be particularly important as the discussion at § 5 2 4 10 1 below will show.

5 2 4 3 A union member bill of rights?

While the 1971 Act was comprehensive and far-reaching in terms of its impact on the British industrial relations system, its influence on the union-member relationship saw Elias and Ewing state that "[t]he Industrial Relations Act 1971 was the beginning of a new era in statutory regulation of union internal affairs".[703] The Act as a whole, but specifically those provisions that sought to regulate these internal affairs (along with Schedules 4 and 5), is of obvious importance to this study.

This significance of the 1971 IRA is enhanced by the fact that Britain had looked

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[700] See Schedule 4, entitled "Requirements as to Rules of Trade Unions and Employers' Associations", paras 1-24 of the IRA 1971.

[701] See Schedule 5, Part I, entitled "Annual Returns, and Qualifications, Appointment and Removal, and Functions, of Auditors"; paras 1-22 of the IRA 1971.

[702] Regarding further differences, also required were that the rules must specify:
(i) "[T]he powers and duties of the governing body of the organisation, of each of its officers and of officials who are not officers of the organisation" [para 7]; and
(ii) (a) "[A]ny descriptions of conduct in respect of which disciplinary action (whether by way of suspension, expulsion or otherwise) can be taken by or on behalf of the organisation against any of its members (b) the nature of the disciplinary action which can be so taken in respect of each such description of conduct, and (c) the procedure for taking disciplinary action, including provision for appeals against decisions of the committee or other body responsible for taking it" [para 16(a)-(c)].

[703] Elias & Ewing *Union Democracy* 11.

further afield in shaping its approach to the 1971 Act.[704] As will be apparent from the chapters to follow, 1935 saw the USA promulgate what was arguably regarded as a bill of rights for unions (by means of the Wagner Act), followed by a bill of rights for union *members* (by means of the Taft-Hartley Act initially, but essentially formalised by the Landrum-Griffin Act).[705] It was the apparent similarities between what was enacted in America by the turn of the 1960s, and the underlying intention of IRA 1971, that saw Gould – as quoted above – speak of the "highly selective transplant of American labor law".[706] Essentially, much like what had been done in the US following

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[704] See in general Gould (1972) *Yale LJ* 1421 1421-1486; JW Garbarino "The British Experiment with Industrial Relations Reform" (1972) 26 *ILRR* 793 793-804; RW Rideout "The British Industrial Relations Act" (1972) 1 *Anglo-Am L Rev* 42 42-50 and N Lewis "The Solar Plexus" in JR Carby-Hall (ed) *Studies in Labour Law* (1976) 35 35-109. The tendency of Britain to shape its employment practices along American lines, rather than that of Europe, is arguably still in place – with G Gall "Unions in Britain: Merely on the Margins or on the Cusp of a Comeback?" (2012) 23 *Manag Revue* 323 326-327 stating more recently as follows:

> "[A]lthough there are still considerable differences with governance of industrial relations systems in the United States, Britain continues to face towards the Atlantic and not towards Europe in regards of employment and workers' rights ... For the reader in continental Europe or the United States, the case of Britain is a somewhat strange phenomenon. The regulation of the employment relationship and industrial relations in Britain has become neither completely Americanised (ie., experienced massive deregulation) despite a period of extended Thatcherism and Blairism, nor has it become more like the continental pattern as a result of membership of the European Union and its social dimension (ie., maintenance of some considerable collective regulation or re-regulation). The rather idiosyncratic path of Britain reflects the contending pressures of global neo-liberalism upon a national state which still has a heritage of limited social democracy. In this sense, and despite the increasing colonisation of the European union by neo-liberalism, Britain is still mid-way between the Atlantic and the European landmass."

[705] These various American legislative instruments are discussed in more detail in chapters 7 and 8 below.

[706] Gould (1972) *Yale LJ* 1425. Given the title of Gould's article, it is however acknowledged to demonstrate a far more focused discussion on Taft-Hartley of 1947, as opposed to what happened in 1959. This is undoubtedly due to his writing in the year of Taft-Hartley's Twenty-Fith Anniversary (of amending the 1935 Wagner Act) – see Gould (1972) *Yale LJ* 1421. Whilst it remains undeniable that significant sections of the IRA 1971 were predominantly influenced by the 1935 Act, as amended by the 1947 promulgation – it is equally true that the 1959 Landrum-Griffin Act was as significant, focusing as it did on the internal operations of unions *vis-à-vis* their members. Thus, despite the 1959 amendment only warranting a mention by Gould within a footnote (as per Gould (1972) *Yale LJ* 1448 n146), a handful of other sources have made the material influence of Landrum-Griffin, justifiably clear: See for instance Garbarino (1972) *ILRR* 794, where is stated:

> "In its final form, the Industrial Relations Act is a formidable document indeed. It is the equivalent of a good-sized paperback volume – containing, with its nine accompanying schedules, a total of 187 pages. The Act is frequently described as being in large part some sort of combination of the United States' Wagner, Taft-Hartley, and Landrum-Griffin Acts".

Furthermore, compare this with Rideout (1972) *Anglo-Am L Rev* 42, who states:

> "In search of something no more capable of precise definition than industrial peace the present

the widespread enquiry into union corruption in the USA during the late 1950s,[707] a series of provisions were introduced that sought to explicitly prescribe rights and protections owing to union members by their union. One of the key provisions in the IRA 1971 which illustrated this statutory overlap with the US was section 65 and its guiding principles for organisations of workers.

5 2 4 4 Section 65 of IRA 1971

Apart from preventing "arbitrary or unreasonable discrimination" in excluding a worker from membership in a union (particularly important in the context of the heavily prevalent closed-shop environment in Britain at that stage),[708] the arbitrary or unreasonable discrimination also extended to protecting members' rights to voting, participation in meetings and the holding of any office within the union.[709] Furthermore, the voting in "any ballot of members" of the union was also to "be kept secret".[710] Of additional importance, given the topic of the study, were subsections 65(7), (8) and (10) of the Act.

In terms of subsection 65(7),[711] a member could not be subjected to any unfair or unreasonable disciplinary action by his union – and in particular, no disciplinary action could be taken for his "refusing or failing to take any action which" would amount to an

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British Government, with ill considered haste, and contrary to the advice of the Royal Commission on Trade Unions which reported in 1968 has decided to throw over voluntarism in favour of regulatory control. It has, moreover, with what may be thought to be an infuriating smugness, assumed that it can comprehend in one statute all the legislative development that took place in the United States between the Wagner Act and the Landrum-Griffin Act" [footnotes omitted].

Ultimately, the surprising fact that relatively few British sources from this period make direct reference to the apparent similarities between American and British labour legislation, is arguably explained by (as will be apparent from the discussion to follow) the short legislative lifespan of IRA 1971. The question of whether or not more would have been written on this topic – had IRA 1971 continued to remain in force as the central component of the statutory British labour law – will therefore have to remain mere conjecture.

[707] This took the form of the so-called McClellan Committee Hearings – discussed in more detail at § 8 3 3 2 below.

[708] As per subs 65(2) of the IRA 1971. Related hereto, subs 65(9) required, in turn, that prior to the termination of membership – a "reasonable notice of the proposal to terminate [the member's] membership, and of the reason for it" – had to be provided to the member in question.

[709] Subsection 65(4).

[710] Subsection 65(5). Related hereto, subs 65(6) IRA 1971 also provided for "a fair and reasonable opportunity of voting without interference or constraint".

[711] Read with subs 65(11).

"unfair industrial practice on his part",[712] or taking part in a strike.[713] Subsection 65(8), in turn, outlined the procedural aspects of any disciplinary action against a member – requiring, as it did and *inter alia*, written notice, a reasonable time to prepare and a full and fair hearing.[714] Finally, subsection 65(10) stated: "No restriction shall, whether by the rules of the organisation or otherwise, be placed on any member of the organisation in respect of his instituting, prosecuting or defending proceedings before any court or tribunal or giving evidence in any such proceedings".

Trade union members thus were, for the first time, offered protection against the actions of their own unions by means of statutory provisions. Members were protected, *inter alia*, by section 65 read with the schedules discussed above against arbitrary or unreasonable discrimination[715] or disciplinary action,[716] protected in terms of voting,[717] holding office,[718] participating in meetings,[719] financial maladministration[720] and taking action against their union.[721] Furthermore, union rules (in the trade union's constitution) were required to provide for the election, powers and removal of officials

[712] Subsection 65(7)(a).

[713] Subsection 65(7)(b) – read with subs 65(7)(c), which spoke of – in addition to a "strike" – "any irregular industrial action short of a strike". Additional provisos hereto, within subs 65(7)(b)-(c), further qualifies this and concerns whether or not the union, "or any other person, has called, organised, procured or financed" that unfair industrial practice, strike or action short of a strike, and "which *either* was not in contemplation or furtherance of an industrial dispute *or* constituted an unfair industrial practice on the part of the union or that other person" – see Kay "Membership Disputes" in *Studies in Labour* 178 [his emphasis].

[714] Firstly, with the exception of the non-payment of union dues – "no member shall be subjected to any disciplinary action by or on behalf of the union unless" that member has received written notice of the charges to be brought against him and has been given a reasonable time to prepare against them – in terms of subs 65(8)(a) IRA 1971. Secondly, in terms of subs 65(8)(b) of the IRA 1971, the member must be "afforded a full and fair hearing', and must be provided with a 'written statement of those findings", as per subs 65(8)(c). Lastly, "where the rules of the union allow for a right of appeal', the action can only be brought if "his appeal has been heard or the time for appealing has expired without his having exercised that right" – see subs 65(8)(d).

[715] Subsections 65(2) and (4).

[716] Subsections 65(7)-(8).

[717] Subsections 65(4)-(6).

[718] Subsection 65(4).

[719] Subsection 65(4).

[720] This concerns the appointment and regulation of external auditors, as per sch 5 of the IRA 1971.

[721] Subsection 65(10).

or governing bodies,[722] meetings,[723] ballots[724] and disciplinary procedures[725] and where members complained of non-compliance with union rules.[726]

5 2 4 5 The 1871 Act revisited

While provisions focusing on the internal procedures of unions had been enacted before (during the process of assimilation discussed in chapter 4 at § 4 3 above) – such as the Trade Union Act of 1871 – the detailed regulation of internal unions affairs was not the focus of this legislation. In this regard, Elias and Ewing state:

> "[The 1971 Act] imposed a detailed system of regulation of internal union affairs which was the complete antithesis to the policy of the 1871 legislation. The Act did not herald the first legislative intervention in trade union affairs, but it was far more comprehensive than any previous law. A variety of statutes, beginning with the Trade Union Act 1871 itself, had imposed certain limited statutory obligations on the unions. These dealt with such matters as the provision of information for members, control over the operation of union mergers and the creation and operation of the political fund. However, the previous legislation was developed in piecemeal fashion, regulating particular problems which required attention. It did not substantially undermine the contractual basis of the union-member relationship. The 1971 Act marked a new phase in that it provided a comprehensive regulation of the relationship between the union and its members, imposing fundamentally new duties on the unions."[727]

Briefly stated, the 1871 Act made provision for the registration of unions by the Registrar of Friendly Societies, and while sections 11 and 12 dealt with the requirements of financial reporting to the trustees of the union – and the punishment for failure to do such or for misconduct in regards to union funds – subsection 14(1) required that the rules of the trade unions "shall contain provisions in respect of the several matters mentioned in the first schedule" of the 1871 Act.[728] This means that

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[722] Sch 4 paras 4-7.
[723] Sch 4 para 8.
[724] Sch 4 para 11.
[725] Sch 4 para 16.
[726] Sch 4 para 18.
[727] Elias & Ewing *Union Democracy* 11-12, [footnotes omitted].
[728] These ranged from a basic requirement that the name of the union and its "place of meeting for business" was to be provided for (as per sch 1 para 1 Trade Union Act 1871), to requiring a clause for the "investment of union funds" and "for an annual or period audit of accounts" – as per sch 1 para 5 of the Trade Union Act 1871. The regulation of the appointment and removal of a "general committee of management, trustee(s), treasurer and other officers" was required (in terms of sch 1 para 4 of the Trade Union Act 1871), as well as the "making, altering, amending or rescinding" of union rules (see

Elias and Ewing quite justifiably remark that the idea of regulating the affairs of trade union through the 1971 IRA was "not in itself a new policy".[729]

However, Schedule 1 of the 1871 Act contained in total six provisions, with only one provision making any direct mention of union-member interaction. This was in paragraph 2 – which required *inter alia* that the conditions under which a member becomes entitled to any union benefits and the fines and forfeitures to be imposed on any member must be provided for within the rules.[730] Thus, it is clear that the provisions introduced by IRA 1971 went far beyond anything that had been attempted before and represent the first serious and detailed endeavour to directly control the internal affairs of British trade unions.[731]

5 2 4 6 The IRA 1971 as a readjustment to internal union affairs

To properly understand the final version of the 1971 Act, further mention must again be made of the Donovan Commission. As explained by Banks, the "third group of major recommendations" made by the Commission pertained to "the protection of the rights of individuals both as union members and employees".[732] Banks offers a variety

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sch 1 para 3 of the Trade Union Act 1871). The right of inspection of the books and member register of the union was also to be provided for "every person having an interest in the funds of the union", in terms of sch 1 para 6 Trade Union Act 1871.

[729] Elias & Ewing *Union Democracy* 12.

[730] The complete section's wording is as follows:

"The whole of the objects for which the trade union is to be established, the purposes for which the funds thereof shall be applicable, and the conditions under which any member may become entitled to any benefit assured thereby, and the fines and forfeitures to be imposed on any member of such trade union".

[731] At this point, brief mention must be made of the legislation promulgated subsequent to 1871, albeit with the proviso being stated at the outset that these too did not demonstrate comprehensive attempts at regulating the internal affairs of the union-member relationship – certainly not to the extent that such could be construed in the light of a "bill of rights". The 1906 Trade Disputes Act and its three sections focused exclusively on removing liability of unions and workers through the conspiracy – and introduced the "golden formula" of union protection. The Trade Union Act of 1913 (at § 4 3 8 above) primarily regulated the use of political funds by unions in response to the *Osborne* judgment of 1911 – including the powers of the Registrar of Friendly Societies in the event of an alleged breach of the political funds' procedures – and the protection of members against being treated adversely by their union for their choice of not contributing towards the fund. The Trade Disputes & Trade Unions Act of 1927 (at 4 3 8 above) essentially addressed issues surrounding strikes, lock-outs and intimidation – with the Trade Disputes & Trade Unions Act of 1946 (at § 4 3 8 above) again touching lightly on the regulation of the political fund. Finally, the two sections of the 1965 Trade Disputes Act, addressed tortious liability arising from acts "in contemplation or furtherance of a trade dispute".

[732] Banks (1969) *RI/IR* 356.

of reasons why the Commission was focused on this aspect.[733] And, despite Banks again emphasising the Commissions' findings that there is "little evidence of any widespread abuse of union power",[734] there was, at the time, a series of high-profile union disputes before the courts (focused on union election impropriety).[735] On juxtaposing this reality with the (potential) impact of the British closed-shop system, it was not surprising for the Commission to find that "the connection between membership of a trade union and employees' livelihoods means that the trade unions cannot be regarded simply as voluntary clubs from the member's point of view".[736]

The Commission accordingly recommended a system involving "two instruments of reform", which would see – firstly – that "all unions should be required to up-date, amend or clarify their internal rules and procedures, particularly with respect to the following issues: admission and disciplinary procedures, disputes between a union and a member, general union elections and the election and authority of shop stewards."[737] Secondly, an independent review body was envisaged – comprising of a lawyer and two trade unionists – with "full powers to call witnesses and obtain evidence in its deliberations" and to be empowered to hear four type of matters, namely: (i) an "unfair imposition of penalties which amount to a substantial injustice"; (ii) where a breach of union rules or a "violation of the principles of natural justice" has occurred; (iii) union election, amalgamation/merger or political fund malpractices; and finally, (iv) "disputes between the Registrar and a union over whether its rules comply with the law".[738]

Whereas the independent review body was to take on an entirely different form in its final version (as discussed below), what remains clear, even from the initial findings and intention of the Donovan Commission, is that a deep-level revision of the statutory

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[733] These include the fact that no "systematic examination" of the internal affairs of unions had been done "for almost a century", and that were the overall recommendations of the Commission (in regards to collective bargaining and union recognition) to have been implemented, this would have seen a *strengthening* of union power – and as such, in carefully balancing "union requirements as social institutions" against individual member rights, the latter needed safeguarding in response to this increased power. See Banks (1969) *RI/IR* 356.

[734] 360-361.

[735] 356.

[736] 357, referencing para 630 of the Commission's Report.

[737] Banks (1969) *RI/IR* 356. The body responsible for ensuring that the union rules "met an acceptable standard on these issues" was to be the newly established Chief Registrar – see Banks (1969) *RI/IR* 357.

[738] 357.

regulation of internal union affairs was to be part and parcel of the new Act. Nevertheless, it would be inaccurate to assume that everything that was introduced by IRA 1971 was disruptive or unprecedented. In this regard, Elias and Ewing make the observation that much of the 1971 Act that focused on internal union rules was indeed "uncontroversial",[739] simply since most of the unions would have had provisions regulating these aspects prior to the 1971 Act in any event (through self-regulation).[740] Having said this, there certainly were elements of IRA 1971 that were to prove more "contentious",[741] especially section 65 and the fact that "registered unions could have been required by the Registrar to amend their rules to comply with section 65 of the Act",[742] as per section 75 of IRA 1971.[743] In this regard, Elias and Ewing say the following:

> "This was the major initiative of the 1971 Act. In what was in historical context a far-reaching development – section 65 established what was in effect a 'bill of rights' for union members… Infringements of the rights to membership and rights of membership were thus protected. This was merely a part of a package which sought to undermine union strength in a variety of ways, notably by rendering the closed shop illegal, and by restricting the circumstances in which unions could lawfully take industrial action. Since the TUC adopted a policy of total opposition to the Act,[744] section

[739] The authors point here to the requirements surrounding "rules which specified the powers and duties of the governing body and its officers, the manner in which rules could be made, altered or revoked, the way in which meetings could be convened and conducted, and the manner in which the organization could be dissolved" [footnotes referencing sch 4 IRA 1971 omitted] – see Elias & Ewing *Union Democracy* 13.

[740] 13.

[741] 13. The authors use the term in relation to – along with what follows below – the requirement in sch 4 para 10 IRA 1971, pertaining to the "obligation on unions to specify any body or official authorized to instruct members to take industrial action". As mentioned, the significance hereof, is to be discussed in § 5 2 4 10 1 below.

[742] Elias & Ewing *Union Democracy* 13.

[743] The relevant wording of the section was as follows:

"[Subs 75(1)] As soon as practicable after issuing to an organisation a certificate of registration under this Act, the registrar shall examine the rules of the organisation; and if on such examination it appears to him that the rules are defective in that– [subs 75(1)(a)] in the case of a trade union, they are in any way inconsistent with the principles set out in section 65 of this Act,… [subs 75(1)(c)] in either case, they do not comply with the requirements set out in Schedule 4 to this Act, the registrar shall serve notice on the organisation, indicating what alterations in the rules are needed for the purpose of remedying the defect."

[744] Elias & Ewing *Union Democracy* 13 explain:

"But despite these potential benefits [of registering], the unions generally refused to register, as part of the TUC boycott of the Act. Those unions which did register were expelled from the TUC".

Engleman & Thomson (1974) *Ind Rel J Econ Soc* 134 place this number at 32 unions, suspended from the TUC for registering in terms of the Act.

65 was rejected wholesale along with most of the Act's other provisions."[745]

In particular, two provisions within section 65 – namely subsection 65(7) and 65(10) – were perceived as problematic in that they sought to undermine organised labour unity during times of industrial action ("just when they needed to be most cohesive").[746] This was brought about by voiding any provisions seeking to compel a member to first exhaust internal remedies before seeking external assistance with regard to union-member disputes.[747]

5 2 4 7 The IRA 1971 and its bill of rights for members

When the IRA 1971 is considered in light of the broader industrial relations environment of Britain at the time, the objectives of the Donovan Commission, the statutory mechanisms implemented in the USA during the previous decade and the relative dearth of statutory provisions in Britain that previously sought to regulate the internal mechanisms of unions, it may be said that, despite the idea of union regulation not being new, the new Act represented the first comprehensive statutory attempt to regulate the internal affairs of trade unions in relation to their members. However, to call the effect of the IRA 1971 as an introduction of a trade union member's bill of rights, is perhaps an overstatement. When IRA 1971 is read in conjunction with its Schedules 4 and 5 we do find a series of rights or entitlements available to union members, with regard to their interaction with trade unions. While not entrenched (in the usual bill of rights sense of the word) and – as will be apparent from the further

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[745] Elias & Ewing *Union Democracy* 13.

[746] 14. Says Rideout (1972) *Anglo-Am L Rev* 46 of this provision:
"The most serious restriction of all is that upon the power to discipline in cases of a refusal to take part in unfettered industrial practices. A union can no longer command the solid support of its members".

[747] Elias & Ewing *Union Democracy* 14 state in this regard:
"So far from showing a preference for the autonomous settlement of membership disputes through the unions' own domestic procedures, the Act positively discouraged it".
See further Rideout (1972) *Anglo-Am L Rev* 46 who says of the impact of this provision:
"The final requirement totally destroys the rule, well known to American jurisprudence, that a member can be required to exhaust his internal remedies before resort to the ordinary courts. English courts have been engaged recently in a severe pruning of this obligation, but the unions have also been energetically improving their disciplinary procedures. It seems unfair that they should be subjected, without a chance to rectify a fault, to the expense and publicity, which is almost inevitably bad publicity, of an action by any disaffected member who can secure legal aid or go to an industrial tribunal" [footnotes omitted].

discussion below – short-lived, IRA 1971 did indeed serve as a turning point in the readjustment of the approach to regulation of the union-member relationship through tabulation of basic rights (along the lines of what had been introduced in the United States).[748] What remains to be considered, is how, and by whom or what, the principles, basic rights and guidelines contained in IRA 1971 were to be interpreted – and it is to this that the study will now turn.

5 2 4 8 The NIRC and the Chief Registrar of Trade Unions and Employer Associations

In order to monitor or adjudicate its application, the 1971 Act saw the creation of new statutory bodies focused on the regulation of organised labour and the broader industrial relations system in Britain. Central was the new NIRC,[749] established in terms of section 99 as "a branch of the High Court, acting as a court of first instance for collective decisions and as a court of appeal from Industrial Tribunals".[750] A further noteworthy addition was the office of the Chief Registrar of Trade Unions and Employer Associations established in terms of section 63 of IRA 1971.[751] Below, these two innovations – inasmuch as they impacted on the internal union-member relationship – are explored.[752]

The approach of the government in adopting the 1971 Act was to allow for both

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[748] Garbarino (1972) *ILRR* 801.

[749] S Deakin & GS Morris *Labour Law* 6 ed (2012) 53 say of the Court:

> "The attitude of the judges, as expressed in particular through the National Industrial Relations Court, was based not so much on the traditional aim of the defence of the common law against the incursions of legislation, as on a corporatist objective of intervening to reduce the costs of strike action and enhance the effectiveness of collective procedures in the 'public interest'".

[750] See Engleman & Thomson (1974) *Ind Rel J Econ Soc* 132. Added to this, was the extension of the ambit of the both the Industrial Tribunals (they could now hear referrals from individuals) and Commission on Industrial Relations (to serve as "investigative agency for the NIRC"), and a newly named Industrial Arbitration Board (what used to be the Industrial Court – presiding over arbitral functions) – see Engleman & Thomson (1974) *Ind Rel J Econ Soc* 132.

[751] The Chief Registrar effectively replaced what had been the former (and long-held) position of the Registrar/Registry of Friendly Societies – whilst expanding the powers of the new office in line with the requirements of the IRA 1971.

[752] The research of Kay "Membership Disputes" in *Studies in Labour* 160, whilst primarily focused on the "settlement of membership disputes in trade unions", also includes an analysis of both the Act and the related NIRC/Industrial Tribunals, and as such serves as a useful entry point into the finer details of the position in 1971 from the perspective of union-member disputes. As a result, Kay will serve as the primary source of the discussion to follow.

industrial tribunals and the NIRC to hold jurisdiction over union membership disputes, with "such jurisdiction being concurrent as between these two bodies and as between either or both of them and the ordinary courts".[753] When this is viewed in light of section 65 of the Act and the effect of section 66, which deemed that "any union, or any official or person acting on behalf of a union, to take or threaten to take any action against any member or other person in contravention of the guiding principles" would amount to an "unfair industrial practice", then the basis for potential intervention becomes clear. Specifically, the "unfair industrial practice" mentioned above was the primary entry point for the potential involvement by either the Registrar, the Commission, or the NIRC with regard to the internal union-member relationship.

5 2 4 9 IRA 1971 statutory procedures for the settlement of membership disputes

At the same time, Kay[754] points out that IRA 1971 created (or, at least added to) the possibility that an "irregularity in a *registered* union could be complained of in no less than seven different ways"[755] – given both a myriad of sections in IRA 1971 and an "action in the ordinary courts".[756] For reasons that will become apparent below, these different procedures require brief examination.

5 2 4 9 1 Procedure 1 – conciliation in respect of sections 81 and 82 of the Act

The first of the statutory procedures, "in the nature of conciliation",[757] saw an application being made to the Registrar to investigate the action complained of.[758]

The action was available to any person who is a member, was a member, or has sought to become a member of an organisation/trade union that is registered in terms of the Act,[759] with the grounds being that the action complained of amounted to either an "unfair industrial action" in terms of section 66 taken against the applicant by the

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[753] This in terms of ss 99-108 IRA 1971, read with the contents of Schedules 3 and 6 IRA 1971.
[754] Kay "Membership Disputes" in *Studies in Labour* 187.
[755] 188, his emphasis. Regarding the options available to *un*registered unions, only procedures five, six and seven (as below), were available to them – Kay "Membership Disputes" in *Studies in Labour* 190.
[756] 188-190 for a succinct overview of these options.
[757] 188.
[758] As per "Application to registrar to investigate" and "Action by registrar on application under s. 81", ss 81 and 82 IRA 1971 respectively – see Kay "Membership Disputes" in *Studies in Labour* 188.
[759] Subsections 81(1) read with 81(2) IRA 1971.

union, or a person acting on the union's behalf, or "constituted a breach of the rules of the organisation".[760]

Subsection 82(4) provided that the Registrar "shall not be required to proceed with any such application if in his opinion it is frivolous or vexatious", and, in terms of subsections 82(2) to (3), the applicant had to have first attempted to exhaust all "adequate internal remedies" available to him in terms of the union's rules and procedures.[761] Furthermore, as explained by Kay, "since the complainant must have actually been 'acted against',[762] claims based on, for example, misapplication of funds, electoral malpractices, breach of authority, etc., would seem to have been excluded".[763]

Where the Registrar proceeded with his investigation, notice of his findings were to be given to both the applicant and the union in question.[764] The "conciliatory approach" underlying this procedure is encapsulated in subsection 82(6), in that should the grounds of the application appear to have been well-founded, the Registrar "shall endeavour to promote a settlement of the matter to which the application relates without its becoming the subject of a complaint to an industrial tribunal".

5 2 4 9 2 Procedure 2 – Registrar to the NIRC by means of section 103 of the Act

The second procedure saw a complaint being lodged at the NIRC by the Registrar.[765] This procedure – regulated by section 103 – followed an unsuccessful settlement of the aforementioned "well-founded complaint" in terms of section 82 above. The qualification to the referral was that the Registrar must have viewed the complaint as one "of such a serious character that it ought to be brought before the" NIRC – and that the matter in question had not already been referred to an industrial tribunal.[766]

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[760] Two exceptions to the "breach of rules" – as contained in subs 81(4) IRA 1971 – was that the breach must not pertain to political funds (which was regulated in terms of the Trade Union Act of 1913) or voting in respects of an amalgamation of transfer of a union.

[761] This is the only example of the statutory procedures that had the exhaustion of internal remedies as a requirement.

[762] In terms of subs 81(3) of the IRA 1971.

[763] Kay "Membership Disputes" in *Studies in Labour* 188.

[764] Subsection 82(5) of the IRA 1971.

[765] As per "Complaint by registrar to Industrial Court in consequence of application under s. 81", in terms of s 103 of the IRA 1971 – see further Kay "Membership Disputes" in *Studies in Labour* 188.

[766] Subsection 103(1)(b) of the IRA 1971.

Upon receipt of the referral, and should the NIRC have agreed that the grounds were well-founded, then the court could – "if it considers that it would be just and equitable to do so"[767] – grant a series of remedies listed in subsection 103(3) of the Act.[768]

5 2 4 9 3 Procedure 3 – Registrar to the Industrial Tribunal by means of sections 108 and 109 of the Act

The third procedure – as per sections 108 and 109[769] – which involved the Registrar directing a complaint to the Industrial Tribunal, was identical to that outlined in the second procedure above, with the exception that the "serious character" requirement, and the *third* remedy that was available in that context (the mandatory order in terms of subsection 103(3)(c)), were absent.[770]

5 2 4 9 4 Procedure 4 – investigation by the Registrar in respect of section 83 of the Act

The fourth option was an investigation initiated by the Registrar in terms of section 83 of the Act, which "empowered the Registrar to act completely on his own initiative".[771] In the words of Kay, where the Registrar "had reason to suspect *either* that there had been a serious breach, or had been persistent breaches of the rules of the union,[772] *or* that there had been a serious contravention or persistent contraventions of the guiding principles,[773] the Registrar was under an *obligation* to

[767] Subsection 103(2).

[768] The remedies include "an order determining the rights of the original applicant and of the trade union" [subs 103(3)(a)]; an award of compensation [subs 103(3)(b)]; or, an order directing the trade union "to refrain from continuing to take that action, and to refrain from taking any other action of a like nature in relation to the original applicant" [subs 103(3)(c) IRA 1971].

[769] As per "Complaint by registrar to industrial tribunal in consequence of application under s.81" and "Determination of complaint under s. 107 or s. 108", ss 108 and 109 IRA 1971 respectively – see further Kay "Membership Disputes" in *Studies in Labour* 188.

[770] See Kay "Membership Disputes" in *Studies in Labour* 188. Therefore, in terms of subss 108(1)(c)-(d), the Registrar did not view the matter to be so serious as to refer it by means of s 103, but nonetheless was of the opinion "that it is a matter in respect of which a complaint ought to be presented to an industrial tribunal". RS Cleary et al (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act – 2001 Cumulative Supplement (covering 1999-2000) 1* 4 ed (2001)

[771] Kay "Membership Disputes" in *Studies in Labour* 189

[772] In terms of subs 83(1)(a) of the IRA 1971. Subsection 83(2) referred, in turn, back to subs 81(4), thereby again excluding breaches pertaining to political funds or union amalgamation voting issues.

[773] As per subs 83(1)(b) of the IRA 1971.

investigate the matter."[774]

Subsection 83(3) provided that, should the investigation have confirmed the infringement(s) as outlined above, the Registrar could again give notice of his conclusions to the union in question and then "endeavour to secure such action or such an undertaking" on the part of the union so as to remedy or mitigate the consequences of that action, or to prevent the continuance or repetition of those breaches or action.[775]

Should this prove to be unsuccessful, the Registrar – in terms of subsection 83(4) – was then empowered, following further notice to the union in question, to refer the matter to the NIRC for further adjudication.[776]

5 2 4 9 5 Procedures 5, 6 and 7 – Complaints by individuals in respect of sections 101 and 107 of the Act, and the courts

Procedures five and six, regulated in terms of sections 101[777] and 107,[778] respectively involved complaints by an individual ("any person") to either the NIRC or an industrial tribunal.

As explained by Kay, the section 101 procedure (an individual complaint to the NIRC) must have involved an "unfair industrial practice" taken directly against the complainant, and saw the same remedies available as under procedure two above.[779]

A complaint in terms of section 107, on the other hand, could see any person eligible to complain to the Registrar in terms of procedure one above, approach an Industrial Tribunal, but only if the same matter had not yet been referred to the Registrar.[780] The grounds for such a complaint stemmed from an "unfair industrial practice" or a breach of the union's rules.[781]

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[774] Kay "Membership Disputes" in *Studies in Labour* 189, [his emphasis].

[775] Subsection 83(3) IRA 1971.

[776] Section 104 regulates the powers of the Court in this regard, in terms of its making an order "directing the trade union … [t]o take such action specified in the order as, in the opinion of the Court, would be appropriate" to "remedy or mitigate the consequences of that action, or to prevent the continuance or repetition of those breaches or action".

[777] As per "Complaint to Industrial Court of unfair industrial practice", s 101 of the IRA 1971 – see further Kay "Membership Disputes" in *Studies in Labour* 189.

[778] As per "Complaint by individual of unfair industrial practice under s. 66 or s. 70, or of breach of rules" – see Kay "Membership Disputes" in *Studies in Labour* 189.

[779] Kay "Membership Disputes" in *Studies in Labour* 189.

[780] Subsections 107(1) read with 107(4) of the IRA 1971.

[781] Subsections 107(3)(a)-(b).

The seventh option is explained as follows by Kay: "Nothing in the Industrial Relations Act prohibited a person from pursuing an action in the ordinary courts founded on a breach of contract or any other conceptual device upon which the courts may be prepared to adjudicate in membership disputes."[782]

5 2 4 10 Analysis – statutory procedures of IRA 1971

The discussion above about the procedures created by the 1971 Act to enforce its vision of the union-member relationship, may be summarised as follows:[783] Procedure 1 involved the Registrar first seeking to settle the matter – following a complaint from a union member that was "not frivolous or vexatious" (and after "adequate internal remedies" had been exhausted). Procedure 2 followed the unsuccessful settlement attempt in procedure 1, and saw the Registrar refer the matter to the NIRC. Procedure 3 saw the Registrar being able to refer less serious complaints to the Industrial Tribunals. Procedure 4 saw the initiative taken by the Registrar, who was obligated to launch his own investigation where there were serious or persistent breaches of the union rules or "guiding principles" – and should the union not undertake to remedy the complaint itself – the Registrar would then refer it to the NIRC. Procedures 5 and 6 saw referrals by individuals to either the NIRC or Industrial Tribunals, while the seventh and final procedure, involved the option of proceeding in the ordinary courts.

In commenting on this state of affairs at the time, Rideout states that the "courses of action now open against a union in respect of defects in its internal affairs is frightening".[784] Similarly, Kay observes that the "wide range of procedures was unfortunate" and argues that a single dispute resolution mechanism "comprising exhaustion, conciliation and determination by [the] industrial tribunal (with appeals as per usual)" would have been more appropriate.[785] While reasoning that procedure 1 "would have been admirable" were it a compulsory mechanism and had operated within an environment not so opposed to registration in terms of the Act, he views procedures 2, 3 and 4 as "wholly objectionable":

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[782] Kay "Membership Disputes" in *Studies in Labour* 189. The interaction between the courts and unions, is discussed in more detail primarily at § 5 3 3 below.

[783] See further Rideout (1971) *MLR* 661-662, for a succinct summary in table form of the options available.

[784] Rideout (1972) *Anglo-Am L Rev* 46.

[785] Kay "Membership Disputes" in *Studies in Labour* 190.

> "Nothing could have been more calculated to stir up or magnify organisational strife than the spectacle of the Registrar (who needed to attract goodwill if he was to be seen as credible for the purposes of [procedure] 1) prolonging and possibly embittering conflict in a manner unwanted by the original disputants. The fact that the Registrar's power to initiate an investigation was expressed in mandatory terms rather than discretionary terms was all the more alarming."[786]

Kay also expresses the view that procedures 5 and 6 "should not really have coexisted". With regard to the final option – that of proceedings in the courts – he reasons that his preference for a unified dispute resolution system should have removed this as a possibility, given that the British judiciary "have shown in the past that their conceptual armoury forms an inadequate basis for the settlement of membership disputes".[787]

The statutory procedures for the settlement of membership complaints are of interest to this study for two reasons: Firstly, it offers a real-world example of a statutory approach to regulating the internal affairs of trade unions. Secondly, it offers a real-world example of the success, or lack thereof, of such an approach. In this regard, while the view of Kay is but one opinion, it is difficult to look past his arguments. It should be borne in mind, however, that any evaluation of the 1971 IRA must be seen against the context of Britain in the 1970s, and the background strife between organised labour, employers and the state, within a particular socio-political-economic milieu that was largely premised on a closed-shop environment. As such, the 1971 IRA was designed with an industrial relations system in mind where a member who fell afoul of his union could very well face unemployment – not just from a particular employer – but potentially from an entire industry.[788] For present purposes, a deeper

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[786] 190.

[787] 190. On the latter point, the author adds further [at 190]:

> "It would, in my view, have been preferable to enact a provision requiring the courts to stay proceedings when the matter was being or could be dealt with by the Registrar and industrial tribunals".

[788] See for example, the facts of the *Lee v Showmen's Guild* case (at § 5 2 2 above) – where the decision of the union to expel the member, resulted in him not being able to perform in any showgrounds across the UK. In this regard, Denning LJ states (at [1952] 2 QB 329 343):

> "It is very different with domestic tribunals which sit in judgement on the members of a trade union or profession. They wield powers as great as, if not greater than, any exercised by the courts of law. They can deprive a man of his livelihood. They can ban him from the trade in which he has spent his life and which is the only trade he knows. They are usually empowered to do this for any breach of the rules, which, be it noted, are rules which they impose and which he has no real opportunity of

evaluation of the procedures involving the Registrar is not immediately called for – the reason being that this was merely the first attempt at empowering an external official with investigative powers into internal union affairs: similar measures were to be introduced, in a much broader measure, in 1988[789] and 1993.[790] An evaluation of the efficacy of those attempts are discussed under the relevant sections below.

5 2 4 10 1 Judicial intervention – *Heaton's Transport*

To say that the 1971 Act was unpopular with British trade unions would be a vast understatement.[791] Engleman and Thomson commenced their article exploring the experience under the IRA 1971 with the following quote from The Times newspaper, which serves as a succinct overview of labour's attitude towards the Act:

> "It is common sense that there ought to be a law which regulates industrial relations, but for such a law to be successful it has to acquire the confidence of the trade union movement. If the operations of such a law become in themselves a source of conflict, or at the worst produce a highly emotional national confrontation between the system of law and the whole of the trade union movement, then the damage must greatly outweigh the benefit to society … Yet the trade union claim is much more than to say that this is a bad Act, it is to say that their affairs, and their affairs alone, cannot be legislated for and that they will not accept any such legislation".[792]

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accepting or rejecting. In theory the powers are based on contract. The man is supposed to have contracted to give them these great powers: but in practice he has no choice in the matter."

[789] See the discussion on CROTUM at § 5 2 7 5 1 below.

[790] See the discussion on CPAUIA at § 5 2 7 8 1 below.

[791] Garbarino (1972) *ILRR* 794, in quoting the former Prime Minister Harold Wilson (then still the leader of the Labour Party) as saying in Parliament (in 1972) of the new Act, that "the [Conservative] government had imported into the British system of industrial relations 'an alien, irrelevant, provocative framework of unrealistic concepts'". See further Engleman & Thomson (1974) *Ind Rel J Econ Soc* 134, who outlines the approach followed by organised labour in the wake of the promulgation as follows:

> "[The TUC] even sponsored two one-day national strikes of protest. But most of all … it set out to prevent unions from registering under the Act. There were a number of reasons for choosing the issue of registration as the key tactic. One was the implication of registration, which threatened to make unions accept a pyramidal structure with power at the top, as opposed to the developing union theory of power vested in the rank and file, with officials merely servicing their needs. A second was a dislike of the concept of a 'state license' as a basis for union rights, instead of the 'social rights' which the labor movement claimed. Thirdly, labor felt that to accept registration would be tantamount to accepting the principles of the Act. A fourth was that the government had made registration voluntary, although the advantages of registering were so great that the Government had not supposed they would be rejected, and hence, noncooperation did not actually result in breaking the law".

[792] Engleman & Thomson (1974) *Ind Rel J Econ Soc* 130 n1 – citing from The Times (London) 22-07-1972. See further AF Bartlett & DR Lowry "Collective Agreements in the United States and Britain:

The main concern of organised labour was section 96 of the Act. This section made it possible for the sequestration of the funds of unions that were not registered in terms of the Act if they were sued for what amounted to unfair industrial action[793] – a state of affairs that essentially reintroduced the legal consequences of the *Taff Vale* judgment.[794]

Furthermore, the concern about the potential consequences of section 96 was exacerbated by the judgment of the House of Lords in *Heaton's Transport (St Helens) v TGWU*[795] where it was ruled that unions could be held responsible for the unauthorised, *unofficial* actions of their shop stewards.[796]

Status and Consequences" (1979) *Utah L Rev* 469 484 n85, who in quoting the eminent British labour law academic K W Wedderburn [The Observer (London) 1-04-1973 at 12] state: "The unrest generated by the Act prompted Professor K. W. Wedderburn to term it '[t]he government's industrial Vietnam'".

[793] R Kidner *Trade Union Law* 1 ed (1979a) 18 states the following:

> "But by far the most significant section was section 96 which in effect provided that an unregistered union should be liable for inducing breach of contract and thus for most cases of strike action. As this section only applied to unregistered unions and as the government had hoped that by inducement or threat all unions would become registered and therefore subject to some degree of control, the unions had the opportunity they needed to fight the Act."

Kidner continues [18-19] to cite a variety of cases heard before the NIRC, where significant fines were handed out to unions for contempt of court, given their steadfast refusal to pay heed to any of the institutions established by the Act, including the NIRC, before stating:

> "Such cases and the depth of resistance shown by some unions showed how the framers of the act had miscalculated. Whether the Act would have survived if sections 96-98 had been omitted is impossible to tell, but it would have had a better chance". [Note to the reader: The first edition of *Trade Union Law* contains a comprehensive introductory chapter, that provides a succinct summary of the main legislative provisions enacted in British labour law from the mid-1970s, back to the "The Ordinance of Labourers" in 1349 [Kidner *Union Law* 2-21 (1 ed)] – which, for the purposes of this study, serves as a useful reference. This introductory chapter has however been excluded from the second edition of *Trade Union Law*. For this reason, any referencing of *Trade Union Law* will be of the second edition, unless otherwise indicated.]

[794] Honeyball *Textbook* 7.

[795] [1973] AC 15; [1972] ICR 308 HL.

[796] Honeyball *Textbook* 7. B Hepple "Union Responsibility for Shop Stewards" (1972) 1 *ILJ* 197 provides an excellent historical overview of the case law surrounding efforts to hold unions liable for the actions of their officers and officials, the detail of which will be discussed more comprehensively in the latter part of this chapter. Both Engleman & Thomson (1974) *Ind Rel J Econ Soc* 138 and Cohen (2008) *Lab Hist* 407 discuss the "Pentonville Five", in reference to the facts surrounding *Midland Cold Storage Ltd. v Turner and Others* [1972] ICR 230, a NIRC decision that ultimately resulted in the temporary imprisonment (and the resultant mass-action that influenced their release) of five shop stewards, for failing to heed an NIRC order to refrain from further participation in the picketing of the Plaintiff. The context to this case, in its following the *Heaton's Transport* lower-court decisions, is of interest in providing a prism through which to view the nature of the interaction between organised labour, employers, the state institutions, and the judiciary during this period. Engleman & Thomson (1974) *Ind*

Despite the judgment being overturned in due course,[797] "the bitterness it engendered continued, and in the last year of the [Conservative] Government the Act was virtually a dead letter."[798]

5 2 4 10 2 Reasons why the IRA 1971 failed

Engleman and Thomson consider why the Act failed in the way that it did,[799] which, given what the Act attempted to do in terms of greater internal union regulation, is of particular interest to this study.

First, and most obvious, was that the "power of the unions to resist [the implications of the Act] was clearly underestimated" by the Conservative Government.[800]

Secondly, the authors point to the failure to "fully appreciate the relationship between the unions and their members and particularly the role of shop stewards and the strength of shop-floor organization as an autonomous force".[801] In essence, the notion – similar to that which is seen in corporate structures – that a top-down

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Rel J Econ Soc 138 state the following:

> "On 21 July, the NIRC found that five of the seven had violated the injunction and ordered that they be jailed. This was the point which the opponents of the Act had warned would bring a total confrontation between the law and the union movement. It did; there was an immediate nationwide dock strike and sympathy strikes by hundreds of thousands of workers in other industries … There appeared to be no doubt that the strike, once underway, would have lasted until the men were released. However, once again the law saved itself with a timely intervention, on this occasion by the House of Lords' decision in the *Heaton's* case. The immediate effect of this decision, reversing the Court of Appeal, was to enable the NIRC to free the dockers after five days in jail on the grounds that the primary means of enforcing the law should be against the funds of the organisations, not against individuals…There can be little doubt that the Midland Cold Storage case was the Armageddon of the Act as far as the extensive use of penal sanctions against individuals were concerned … The problems on the docks were such that a major confrontation was inevitable, but the use of the Act widened the scope of conflict from a single industry to the forces of law versus the labor movement."

[797] See *General Aviation Services (UK) v Transport & General Workers Union* (TGWU) [1975] IC.R. 276; (1975) 119 S.J. 589.

[798] Honeyball *Textbook* 7.

[799] Engleman & Thomson (1974) *Ind Rel J Econ Soc* 152-154.

[800] 152. In this regard, the authors state [at 153]:

> "The Government had presumed that there would be sufficient attractions in the Act to win reluctant cooperation from the unions. But although certainly significant, the greatest benefits in the Act went to the weakest unions and workers, while the greatest threats were directed at those unions and work groups which had the least to gain from it. The powerful left-wing unions with nothing to lose from all-out opposition were then able to use working-class solidarity as a lever to persuade the many reluctant moderate unions, which really had something to gain, not to register."

[801] 153.

hierarchical power structure could be enforced on unions by means of a statutory registration mechanism was fatally flawed.[802] Shop stewards specifically (in the view of the government) militant shop stewards could not simply be controlled by the introduction of external regulation focused at the national, or even regional, level of organised labour. In short, the schism between the leadership of a union (with its elected office bearers, officials and organisers) and the local factory-floor (with its workers and their direct representative, the shop steward was frequently – in real-world terms – far more significant than what was appreciated by the Government. As so clearly stated by the authors:

> "The shop steward gains by holding union credentials, certainly, but this merely establishes his position; his power comes from his constituents and the actions they are willing to take, and his primary allegiance lies there. Ultimately, in fact, he owes little to the union, surely less than the union needs him and his constituents. Thus, the Government's approach, that the union must perform the disciplinary function which the employer was unwilling or unable to do, was likely to alienate the union from its membership."[803]

Thirdly, the vociferous support of employers seeking government action in the initial stages of promulgating the Act did not translate into tangible support when it was enacted – primarily due to the fact that the final version required action on the part of business (through the various statutory mechanisms) to ensure compliance by organised labour.[804]

Fourthly, "the Government misconstrued the nature of public opinion".[805] Despite opinion polls showing the consistently high popularity of the Bill and impending Act, this changed when the actual consequences of the IRA 1971 started to materialise. Particularly in light of the cases discussed above, "public opinion proved to be either ephemeral or impotent".[806] Put differently, "[w]hat is apparently sensible in the abstract

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[802] 153.

[803] 153.

[804] Key to this was the demand by the "Confederation of British Industry" that solely the Registrar prosecute unfair industrial practices and breaking of collective agreements by unions, and that collective agreements "should be enforceable on an industry-wide basis". With the Government not conceding to these requests, employers were required to be far more active in enforcing the provisions of the Act against contravening unions – which they failed to do to the extent that was envisaged by the Government – see Engleman & Thomson (1974) *Ind Rel J Econ Soc* 153.

[805] 154.

[806] 154.

becomes less attractive when applied against real workers"[807] – a particularly important point in the context of industrial relations in general, given the intersection between the law, a worker's livelihood, and the all-too-possible unintended consequences of statutory provisions.

Finally, and given the nature of British society, the authors reason that the Government "underestimated the degree of political support the unions could generate with the Labour Party".[808]

The discussion above therefore tells the tale of an ultimately unsuccessful attempt at the wholesale, statutory regulation of trade unions, with specific provisions – the IRA 1971's "bill of rights" – focusing on internal union affairs. Perhaps the primary reason for this failure was that organised labour was too powerful and (simply put) too organised and was ultimately successful in its opposition to the legislation. But importantly, the failure of the 1971 Act also highlights the dangers and associated risks surrounding such an approach and, in particular, the realities of the relationship between shop stewards and members, on the one hand, and shop stewards and their union, on the other.

In considering this British example to gauge potential lessons for South Africa, the realisation that external regulation targeted at unions on a national/regional level in turn quite possibly requires the union to impose restrictions and prescriptions on its representatives at the shop- or factory-floor level, is important. This is especially so where the interaction between that representative and their members is potentially far removed from the perceptions of that relationship as held by a national union body or government. The shop steward as representative is at the proverbial coal-face and needs to be directly responsible and accountable to the workers who have directly elected that representative into office. Were a scenario to arise that sees inhibitive provisions being imposed on that representative, the risk of alienation between the representative and the union, and by implication, the membership and the union, is all-too-possible.[809] And, when this scenario is viewed against the backdrop of the

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[807] 154.

[808] 154 state further in this regard:

"[T]he Labor Party nonetheless engaged in total opposition to the Bill. In doing so, it moved considerably further to the left and increasingly into the hands of the unions. The unions could, therefore, present their fight not as that of a sectional interest group but as that of a major party and half the nation's voters."

[809] In what can only be regarded as prescient words, considering the author's country of birth – and

insight that "what is sensible in abstract is less attractive in reality", a situation where unions lose the authority over their representatives in the workplace, and potentially, their broader membership, becomes a self-contradictory result of such legislation.

This means that IRA 1971 demonstrates the need to carefully balance the potential regulation of unions to achieve greater accountability with the perceptions of the broader membership, their directly elected representatives and how that regulation might inhibit the functionality and value of continued union membership. In short, a measure that is too-prescriptive might have the unintended consequences of a labour membership no longer seeing the need for organised labour structures, or, – even worse – see a membership acting in the name of a union, but without paying any heed to the instruction or authority of that union's upper leadership structures. The extent to which this impact on possible options in the context of South Africa, will be discussed in greater detail below in chapter 12 below.

This concludes the discussion of IRA 1971 and the important insights it provides for this study. However, the remainder of the 1970s in Britain were to be no less disruptive. If anything, 1971 was but the beginning of a sea change in the role to be fulfilled by unions in Britain, heralded – initially – by what was to transpire a mere three years later.

5 2 5 The Trade Union and Labour Relations Act of 1974

The re-election of the Labour Government in 1974[810] saw the virtual immediate

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what was to happen on 16 August 2012 in the mining town of Marikana – Hepple (1972) *ILJ* 210, in writing about the possible consequences of the (at the time) recent House of Lord's decision in the *Heaton's Transport* case, had this to say about the possible outcomes:

> "One cannot predict what the consequences of all this will be for industrial relations. Will it, as the N.IR.C. suggested, 'produce an orderly system of industrial relations' with 'strong and responsible trade unions' showing 'leadership and courage in full measure' despite the obvious 'short-term dangers'? Or will it, as the Donovan Commission research staff predicted, push shop stewards outside the ambit of the rules, increase their power as centres of dissention beyond the control and influence of union leadership, and make the leadership appear to take the side of management?" [footnotes omitted].

[810] The period of Conservative rule, following their victory in 1970, served as an opportunity to consolidate the differences between Unions and the Labour Party – assisted in no small manner by the shared focus in opposing the various labour relations reforms so introduced. Minkin (1974) *ILRR* 30-35 discusses the background to the changes within the Labour Party leading up to the 1974 General Election, including the formation of the "Liaison Committee" in early 1972 [at 34], which ensured that the views of the TUC (and thereby, unions in general) were injected into the policy decision-making processes of the Labour Party, both with regards to 1971 Act, and "the form, priority, and contents of

repeal of the 1971 Industrial Relations Act. Perhaps surprisingly, it did not herald a return to the former abstentionist or collective *laissez-faire* approach that was prevalent during the mid-twentieth century.[811]

Section 1 of the Trade Union and Labour Relations Act of 1974 ("TULRA 1974")[812] repealed the entire 1971 Act,[813] although the Act did proceed to enact many of the original 1971 features, albeit in modified format.[814]

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the acts that would embody new legislation" [see Minkin (1974) *ILRR* 34]. February 1974 accordingly saw the Labour Party regain power, thanks mainly to it holding the majority of seats in the House of Commons – the difference between it and the Conservative Party, essentially being made up by king-makers holding sway amongst the smaller parties, such as the Liberals and the Scottish Nationalists [see Minkin (1974) *ILRR* 35]. Minkin (1974) *ILRR* 35 further states the following, in regards to Labour's victory: "With the new Labour government facing severe economic problems and a difficult parliamentary situation in 1974, the quality of its association with the unions took on even greater importance than previously. In several ways that relationship had recovered remarkably in the previous three years, and the nature of the election campaign gave it added nourishment. The Conservative government's rigidity in the face of the miners' wage claim, the tone of its attack on Labour party and trade union 'extremism', and its threat of measures to cut social security payments of those on strike, forced the unions and the Labour party into closer identification and unity. The Labour government also had much to offer the unions simply by reversing the industrial relations policy of its predecessor …". With this being said, of worthwhile mention during the period of Conservative Party rule, was the not-insignificant occurrence of the 1973 OPEC Oil Crisis, which further complicated attempts at economic recovery, and even resulted in the drastic decision to call for a "three-day [work] week to conserve fuel" [Cohen (2008) *Lab Hist* 408] – see further Minkin (1974) *ILRR* 31.

[811] Elias et al *Cases & Materials* 13.

[812] Trade Union and Labour Relations Act 1974 (c 52). Kidner *Union Law* 20 (1 ed) explains:

> "The 1974 Act engaged in the dogmatic rejection of much that has gone before it (including such technical issues as rejecting incorporation of trade unions and reviving the trade union functions of the Registrar of Friendly Societies), but the principal effect of the Act is to restore the immunity from legal actions for strikers and expand, by enlarging the definition of trade dispute, the area in which such activity is legitimate".

[813] Including, the abolishment of the NIRC, in terms of s 21 of TULRA 1974. Part III, Schedule 1 (ss 16-25) regulated the extended "jurisdiction and procedure of the industrial tribunals", whereas s 8 effectively restored the position of the pre-1971 Registrar of Friendly Societies (at § 5 2 4 8 above).

[814] Honeyball *Textbook* 7. The authors state the following regarding the 1974 Act:

> "The unfair dismissal provisions were strengthened, and listing of unions continued, although no longer providing the gateway to any significant union rights. The immunity of trade unions and individuals in trade dispute cases broadly returned to the position in 1906, although there was a new restriction on the use by employers of injunctions, and the efficacy of no-strike agreements was limited".

See further Kidner *Union Law* 20 (1 ed), who states:

> "Although section 1 of the 1974 Act simply states 'The Industrial Relations Act 1971 is hereby repealed,' such a statement gives a wholly misleading impression for not only does Schedule 1 to the Act contain 22 pages of provisions re-enacted from the 1971 Act, but it would also be wrong to suggest that the law could return to the simple abstentionist policy that prevailed before 1970."

In this regard, Schedule 1 contained 4 parts, namely: Part I "Code of Practice" [the Secretary of State was required to "maintain a code of practice, containing such practical advice as would be helpful for

Of interest to this study are sections 2, 5 to 7 and 10 to 12 of the Act, which regulated the return to the pre-1971 position with regard to the status of trade unions,[815] the rights of workers as to arbitrary or unreasonable exclusion or expulsion from a trade union,[816] the rules of trade unions,[817] the right to terminate membership,[818] the duty to keep accounting records[819] and present annual returns[820] and the related offences clause.[821]

The rules of unions provision (section 6), when compared to its 1971 predecessor (paragraphs 1-24 of Schedule 4 of IRA 1971), demonstrated an overlap with the 1971 Act with respect to the use of union funds and how these are to be made available to union members,[822] amendments to union rules,[823] the election and appointment of officials and shop stewards,[824] balloting within the unions,[825] the eligibility for membership,[826] and the internal disciplinary procedures between the union and its members.[827]

Where TULRA 1974 and IRA 1971 differed is evident from a comparison of subsections 6(12) to (13) in TULRA 1974 with para 10 of Schedule 4 of IRA 1971. The former saw the addition of two points pertaining to internal disputes not found in the 1971 Act – namely that the rules must prescribe a procedure for settling disputes between a member and the trade union or an officer of the union,[828] along with the requirement that when a hearing/determination in respect of a question or in relation to an offence, appeal or dispute is held or made, then "the rules shall be so framed as

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the purpose of promoting good industrial relations" (subpara 1(1)]; Part II "Unfair Dismissal"; Part III "Jurisdiction and Procedure of Industrial Tribunals"; and, Part IV "Conciliation Officers, and Miscellaneous and Supplementary Provisions". Furthermore, Part I of Schedule 2, again outlined additional provisions regarding the financial obligations of unions in terms of their auditors.

[815] Section 2 of TULRA 1974.

[816] Section 5.

[817] Section 6.

[818] Section 7.

[819] Section 10.

[820] Section 11.

[821] Section 12 – this being of application to a union that "refuses or wilfully neglects to perform a duty imposed on it" in terms of ss 10-11.

[822] Subsections 6(3)-(4) of TULRA 1974 compared to paras 19-20 of the IRA 1971.

[823] Subsection 6(5) of TULRA 1974 compared to para 9 of the IRA 1971.

[824] Subsections 6(6)-(8) of TULRA 1974 compared to paras 4-7 of the IRA 1971.

[825] Subsection 6(9) of TULRA 1974 compared to para 11 of the IRA 1971.

[826] Subsection 6(10) of TULRA 1974 compared to para 14 of the IRA 1971.

[827] Subsection 6(11) of TULRA 1974 compared to paras 16 of the IRA 1971.

[828] Subsection 6(13) of TULRA 1974.

not to depart from, or permit any departure from, *the rules of natural justice*" [my emphasis].[829] The provision in paragraph 10 of IRA 1971, which required union rules to specify the union body and official empowered to issue an instruction that would see the union and its members take industrial action was removed, with no reference thereto in TULRA 1974.[830]

Lastly, sections 13 to 14 of the 1974 Act largely restored trade union immunities to what had been the original 1906 position,[831] by acceptance of protection for "acts in contemplation or furtherance of a trade dispute"[832] and the exclusion of these disputes from tortious liability.

5 2 6 The Social Contract and the Winter of Discontent

The period between 1974 and 1976 saw various legislative enactments[833] that sought to implement the Labour Government's "Social-Contract", which involved a *quid pro quo* arrangement with trade unions aimed at a general wage restraint.[834]

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[829] Subsection 6(13).

[830] See the discussion above, under the "Judicial intervention" section at § 5 2 4 10 1 – for the underlying reason hereto.

[831] The full position was attained two years later, through the 1976 Amendment Act.

[832] Section 13 of the TULRA 1974.

[833] Employment Protection Act 1975 (c 71); Equal Pay Act 1970 (c 41) (Honeyball *Textbook* 8 states that this Act only came into operation in 1975); Sex Discrimination Act 1975 (c 65); Trade Union and Labour Relations (Amendment) Act 1976 (c 7); Race Relations Act 1976 (c 74). Honeyball *Textbook* 8 explains that the result of these enactments was the introduction of various employment protection rights, new industrial relations mechanisms in the form of the new Advisory Conciliation and Arbitration Service ("ACAS") and the Employment Appeal Tribunal ("EAT"), and the transferral of jurisdiction from the Industrial Court/Industrial Arbitration Board to the new Central Arbitration Committee ("CAC") [to be discussed at § 6 3 2 below]. Regarding the 1976 Amendment Act, Kidner *Union Law* 21 (1 ed) states that the close-nature of the 1974 election result, saw the Labour Party only hold the slimmest of a "working majority", which allowed the Conservatives (as opposition) to introduce a variety of measures in the 1974 Act, that were not viewed favourably by Labour – the 1976 Amendment Act was focused on removing these, including *inter alia*:

> "As to membership rights, section 5 of the 1974 Act which provided rights for the union member against arbitrary or unreasonable discrimination was repealed, as was section 6 which provided that a union's rule book must include rules on certain subjects. Finally, the immunity from the law of tort contained in section 13 of the 1974 Act was completely restored".

Regarding the full-restoration of the immunity protection, subs 3(2) of the 1976 Act inserted minor (yet significant) amendments to subss 13(1)(a)-(b) of TULRA 1974, to further include "interference with a contract or performance thereof", either directly or indirectly (inducement), as opposed to it only being limited to a contract *of employment*. See further the discussion on s 6 of the TULRA 1974 at § 5 2 5 above.

[834] Honeyball *Textbook* 8. See further Minkin (1974) *ILRR* 33-35 and WH Fraser *A History of British*

However, these reforms introduced by the Government, successful initially, could not hold off the consequences of the ever-increasing financial turmoil that was wreaking havoc in Britain's economy.[835] This was particularly so with an organised labour movement that was at the height of its powers[836] and which was prepared to demand progressively higher wages despite any agreements in terms of the "Social Contract".[837] When, during the mid-to-late 1970s "[s]o-called catch-up increases and demands for earlier pay rises to be incorporated into basic pay [led] to pay rises of 35 per cent and more",[838] the government responded by imposing "a rigid – and without TUC agreement unworkable – 5 per cent maximum on earnings' increase in the autumn of 1978".[839] The eventual reaction hereto was the so-called "Winter of Discontent", which saw a series of crippling strikes that virtually paralysed Britain between 1978 and 1979.[840] The Labour Government, severely weakened by the effects of the seemingly out of control organised labour movement, was ousted by Margaret Thatcher's Conservative Party in the 1979 general election,[841] with far-

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Trade Unionism 1700-1998 (1999) 230, who describes the essence of the "Social Contract" as follows:

> "The Labour Party had already made it clear that there would be no statutory incomes policy. Instead, what was offered as an answer to rising inflation, the balance of payments crises and anarchic industrial relations was the 'Social Contract', a trade union agreement to curb wage rises to no more than the increase in the retail price index in return for a government commitment to social policies, including improved employee protection".

[835] See Fraser *British Trade Unionism* 230-232.

[836] Fraser *British Trade Unionism* 231 states:

> "It was a time of great union confidence. Not only had they 'their own' government in power, but union membership was reaching peaks never before achieved. After a long period of stability, union density had begun to rise in the late 1960s and, in 1974 for the first time ever, it crossed the 60 per cent mark for men, and the 50 per cent mark overall, and was to continue to rise until 1979. Such a figure was far above what had been achieved in the previous peaks of 1920 and 1948. It encouraged unions to seize the moment."

[837] Fraser *British Trade Unionism* 231 states: "The government delivered [in terms of the "Social Contract"], the unions, on the other hand, could not or would not deliver."

[838] 231.

[839] 233.

[840] Honeyball *Textbook* 8. In an earlier edition, S Honeyball & J Bowers *Textbook on Labour Law* 8 ed (2004) 389 state in this regard:

> "The so-called 'winter of discontent' in 1979, when refuse was left on the streets and cemeteries were unable to inter the dead, left strong images in the public mind. It led, some would say, directly to the fall of the Labour Government and the period of Conservative rule that followed when the power of the unions to operate effectively was severely curtailed."

See further CG Hanson *Taming the Trade Unions: A Guide to the Thatcher Government's Employment Reforms, 1980-1990* (1991) 3-14.

[841] CK Rowley "Toward a Political Economy of British Labor Law" (1984) 51 *U Chic L Rev* 1135 1153 states:

reaching consequences for the future of British industrial relations and trade unions.[842]

5 2 7 Thatcherism and the Conservative Party's assault on organised labour

5 2 7 1 Thatcherism

Regarding the impending impact on unions, Howell states as follows:[843]

> "The eighteen years of Conservative government industrial relations reform saw the most sustained assault on trade unionism among advanced capitalist countries in the postwar period. While there are other cases of severe union decline – France and the United States come to mind – in the last two decades of the twentieth century, none have been so rapid nor so thoroughgoing, and in no other country was the labor movement apparently so strong just prior to decline."[844]

By 1979 there were 13.3 million trade union members in Britain (the highest level ever reached in Britain), translating to a union density level – compared to the total workforce – of 55,4%. By the end of 2001, approximately 4 years after the end of the Conservative Government's reign, union membership had declined by 40% to only 7.6

> "The consequence of this disruption ["the most extensive sequence of strike activity ever witnessed in the United Kingdom"] was the defeat of the Labour Government in May 1979 and the election of a Conservative Government committed to anti-union legislation."

[842] Howell *Trade Unions* 131 state:

> "What began in 1979 as an effort to fence in unions, reduce their capacity to damage the economy, and narrow their strategic options, while freeing the hands of employers, has become an individualized system of industrial relations, based on the absence of collective representation for workers in the majority of the economy and on the collapse of linkages between unions and collective bargaining inside the firm, and unions and collective bargaining outside the firm in what remains of the unionized sector."

See further G Lockwood "Trade Union Governance: The Development of British Conservative Thought" (2005) 10 *J Pol Ideol* 355 363 who states:

> "Another key influence on Conservative Party thinking was the 'Winter of Discontent' in 1978-1979, the events convincing Conservatives that trade unions were too powerful, out of control and failing to act in the national interest… The regulation of trade unions and more specifically, the internal affairs of trade unions therefore emerged as a key issue for the Conservative government elected in 1979 …" [my emphasis].

[843] Howell *Trade Unions* 133.

[844] 133.

million, a density level of below 30% of the (then) current workforce.[845] From this,[846] it becomes clear that the role that unions were to continue playing within the context of British industrial relations was about to be radically altered from 1979 onwards. Central hereto were the influences on the key policies of the Conservative Party.[847] In discussing the work of Hayek,[848] whose approach was one of the primary influences on the Government's thinking, Lockwood states:

> "Hayek, at the vanguard of this New Right thinking, regarded trade unions as a coercive restraint upon the market place. It was posited that their collective strength must be ended if Britain was to rescue itself from economic decline. Moreover, Hayek argued that: The acquisition of privilege has nowhere been as spectacular as in Britain, largely by reason of the Trade Disputes Act 1906. The whole basis of our free society is gravely threatened by the arrogated power of trade unions".[849]

As a result, it is no surprise – also given the events of the late 1970s – that in the mind of the new Conservative Government organised labour was one of the first obstacles to overcome in pursuit of its goals. Auerbach captured this sentiment by stating that "an early priority for the next Conservative government would be to pull up Labour's collectivist laws by its roots, and without hesitation to tackle trade union opposition to industrial and economic policies head on".[850]

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[845] 131. According to the UK Government's Department for Business Innovation and Skills ("BIS"), union density was at 26 per cent in 2012, or an approximate union membership total of 6.5 million. See the BIS Trade Union Membership 2012 report available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299291/bis-13-p77-trade-union-membership-2012-corrrection.pdf> (accessed 13-05-2014). The most recently available figures, from the 2017 period, place union density at 23.2%, or an approximate union membership total of 6.2 million. Private sector union membership sits at approximately 2.7 million, compared to 3.54 million in the public sector. See the "BIS Trade Union Membership Report 2017" (2018) *Department for Business, Energy & Industrial Strategy* <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/712543/TU_membership_bulletin.pdf> (accessed 14-05-2018).

[846] See further in this regard S Vettori "Judicial Protection of Employee Interests in England, Australia and the USA" (2006) 69 *THRHR* 79 80-81 who states: "From 1981 to 2001 the coverage of collectively bargained agreements in England declined from 83% of the workforce to 35% of the workforce."

[847] For a useful analysis of the underlying influences behind the labour policies of the Conservative government, see in general Lockwood (2005) *J Pol Ideol* 355-371.

[848] FA Hayek *The Constitution of Liberty* (1960) 267-284, as per Lockwood (2005) *J Pol Ideol* 356 369 n3.

[849] Lockwood (2005) *J Pol Ideol* 356, [their emphasis; footnotes omitted].

[850] S Auerbach "Mrs Thatcher's Labour Laws: Slouching Towards Utopia?" (1993) 64 *Pol Qrtly* 37 39-40. With this being said, it would be overly simplistic to equate a historical "anti-union" approach to the Conservative Party. Whereas the circumstances highlighted above undeniably brought Thatcher's

5 2 7 2 The Employment Acts of 1980 and 1982

The initial foray by the new Government was the 1980 Employment Act,[851] which restricted the immunities conferred upon trade unions by the 1974 TULRA (and its subsequent 1976 amendment).[852] However, in light of the widely held perception that the 1980 Act did not do enough to remedy the gains made by unions during the latter part of the 1970s,[853] the government expressed its intention to introduce further reform measures, stating that its aim was to "improve the operation of the labour market by providing a fairer and more balanced framework of industrial relations and to curb a number of continuing abuses of trade union power."[854] As a consequence, the Employment Act of 1982 was adopted,[855] the focus of which was on the civil law

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Government to the point where subduing union influence was of primary concern, this was certainly not always the case. The underlying collective methodology applied to British industrial relations during the 1950s and 1960s, was strongly supported by the Conservative Party, and government, when in power. See in this regard Howell *Trade Unions* 93, who states:

> "The Conservative Party's major postwar industrial statement, The Industrial Charter, strongly endorsed collective laissez-faire, and successive Conservative governments until the mid-1960s rejected calls from their own backbenchers for legislative curbs on strikes. The public value of both strong trade unionism and collective bargaining was not questioned in this period. Indeed, in 1951 it was argued that the 'Conservative Party regards the existence of strong and independent trade unions as an essential safeguard of freedom in an industrial society. It must therefore be the purpose of a Conservative government to strengthen and encourage Trade Unions'" [footnotes omitted].

[851] The Employment Act 1980 (c 42). See N Selwyn *Selwyn's Law of Employment* 14 ed (2006a) 604. [Note to the reader: The fourteenth edition of *Selwyn's Law of Employment* contains a succinct summary of the main legislative provisions enacted in British labour law between 1980 and 2006, to be found in Appendix C (604-608) – which, for the purposes of this chapter, serves as a useful reference. This particular Appendix has however been *excluded* from the subsequent editions of Selwyn's. For this reason, any referencing of Selwyn's will be from the most recent edition, unless otherwise indicated.]

[852] Trade Union and Labour Relations (Amendment) Act 1976 (c 7), at § 5 2 6 above. See further CD Drake "The Trade Union and Labour Relations (Amendment) Bill" (1976) 5 *ILJ* 2; Selwyn *Employment* 604 (14 ed). See the discussion at § 5 2 7 3 below, in respects of EA 1982, regarding the restriction on the trade union immunities.

[853] Selwyn *Employment* 604 (14 ed) describes the 1980 Act as focusing on, *inter alia*, "liability in tort for secondary action"; granting powers to the Secretary of State to issue and revoke various codes of practice ("Codes on Picketing and Trade Union Ballots" were issued, "the Code on Closed Shop Agreements and Arrangements" was revoked); where a union membership agreement was in place – a new "right not to be unreasonably excluded or expelled from a trade union" was introduced; "the burden of proof in unfair dismissal cases was neutralised as between the parties"; and "a dismissal for non-membership of a trade union where there was a union membership agreement was to be unfair unless a ballot was held, or if the employee objected to joining on grounds of conscience of deeply held conviction".

[854] Honeyball *Textbook* 9.

[855] The Employment Act 1982 (c 46).

liability of trade unions for the actions of the unions' bodies and/or officials,[856] as well as an increase in the restrictions placed upon the operation of closed-shop agreements[857] and related union recognition clauses and agreements.[858]

EA 1980 and 1982 were the first steps in what was to be a long line of statutory enactments aimed at systematically limiting the perceived powers of unions – essentially by means of steadily decreasing the immunity protection available to them – and thereby compelling changes to union behaviour and processes. They speak further, in the words of Lewis and Simpson, of an "exemplif[ication] of the overall [government] trend towards individualism in labour law policy", an individualism which "sees unions as an illegitimate distortion of the market relations between the employer and the individual employee and as an interference with personal freedom".[859] The extent and means to which this was to impact on organised labour are demonstrated in the discussion below.

5 2 7 3 The EA 1982 and union liability

Despite the long and storied development of trade union and union member protection through immunity, 1982 was to be a pivotal year for union liability in Britain. As mentioned above,[860] the effects of the *Taff Vale* decision were to be largely nullified following the promulgation of the Trade Disputes Act in 1906 with the introduction of the so-called "golden formula" (in section four, which protected union funds, and sections one to three, which set the scope of protection available to union officials).[861] Collins et al explain that whereas "the liability of trade unions in tort was thus largely removed, it would still be possible to sue a trade union for tortious acts outside the

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[856] Rowley (1984) *U Chic L Rev* 1158 confirms the establishment of a maximum damages limit, which was linked *pro rata* to the size (in membership) of the trade union – this being the forerunner of what is presently found in s 22 of the TULRCA (discussed at § 6 4 9 below).

[857] Says R Lewis & B Simpson "Disorganising Industrial Relations: An Analysis of Sections 2-8 and 10-14 of the Employment Act 1982" (1982) 11 *ILJ* 227 239, in discussing the focus of EA 1982 to "not explicitly make closed shops unlawful" but nonetheless "attempts to emasculate them by law" – was predicated upon a government which "regards the closed shop as an unacceptable limitation on individual liberty and as a reinforcement of restrictive practices and the 'monopoly' power of trade unions".

[858] See in this regard Honeyball *Textbook* 9 and Lewis & Simpson (1982) *ILJ* 227-230, by means of sections 3 (read with) 12-13 of the Act.

[859] Lewis & Simpson (1982) *ILJ* 244.

[860] See § 4 3 7 above.

[861] See in this regard H Collins et al *Labour Law* (2012) 666; Deakin & Morris *Labour Law* 1034.

scope of the protections in sections 1-3 of the 1906 Act".[862] Therefore, were the courts to find it necessary to develop the law in such a manner so as to allow union action to be interpreted as falling outside the statutory ambit, liability would again be in the picture.[863] And so it was that during the 1950s and 1960s, with Britain's economic problems as backdrop to an industrial relations reality heavily entrenched within a closed-shop system, these very changes were effected. In this regard, Collins et al state:

> "The period from 1952 to 1969 in particular saw the emergence of new grounds of tortious liability in a period of industrial turbulence as inventive plaintiffs sought to 'get round' the immunities in the 1906 Act … Sure enough, the common law in this period was to advance along two quite different fronts, with developments coming to a spectacular climax in two House of Lords decisions in the mid-1960s."[864]

The two cases spoken of here are *Rookes v Barnard* and *J. & T. Stratford & Son v Lindley* (both mentioned above).[865] The former was responsible for introducing the tort of intimidation in 1964, by virtue of finding that "the union officials did not induce their members to take strike action, but threatened the employer that they would do so unless he dismissed an employee who was not a member of the union": therefore, the liability "was not to the employer, but to the individual employee who was the target of the union's action, even though the contract of employment of the latter had been lawfully terminated in response to the union's threat".[866] The latter (*Stratford v Lindley*) saw the House of Lords find a union liable for "the use of secondary action as a way of putting commercial pressure on employers in a dispute".[867] The result of this, states

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[862] Collins et al *Labour Law* 666.

[863] See in this regard D Howarth "The Autonomy of Labour Law: A Response to Professor Wedderburn" (1988) 17 *ILJ* 11 200, who in his discussion of the collective impact of the Conservative Government's reform (through the introduction of EA 1980 and EA 1982), states how *Lumley v Gye* (at § 4 3 4 above) was again central to questions pertaining to union liability: "Before the Employment Acts of 1980 and 1982, unions and union organisers enjoyed extensive immunity from *Lumley v Gye*, but now it is exceedingly difficult for a union or union organisers to attract the immunity. *Lumley* is once more central to strike law. Furthermore, the main driving force for the expansion of the *Lumley* principle has been the search by employers' lawyers for ways of suing unions or union officials for other forms of industrial action, such as boycotts, picketing, and secondary action" [footnotes omitted].

[864] Collins et al *Labour Law* 666.

[865] See § 5 2 2 above.

[866] N Selwyn *Selwyn's Law of Employment* 16 ed (2011) 666.

[867] 667.

Selwyn, was the gradual undermining of the 1906 Act through "the development of new heads of tortious liability for which there was no protection"[868] – which again necessitated statutory responses from the Labour Government.[869]

Therefore, in the words of Selwyn:

> "Section 14 of TULRA 1974 (which re-enacted provisions dating from the Trade Disputes Act 1906) conferred total legal immunity on trade unions in respect of most actions in tort. This immunity was repealed by the Employment Act 1982,[870] and nowadays a trade union will be liable in tort if the protection of TULR(C)A, s 219 is not available."[871]

Put differently, "[t]rade union liability was restored in 1982".[872] In summary, 1906 saw the Trade Disputes Act introduce various immunities protecting workers and officials from being held liable under tort, in a series of specific instances,[873] encapsulated now within section 219 or the TULRCA (as amended) (and discussed at § 6 4 4 below). Section 4 of the 1906 Act had furthermore introduced a blanket immunity for unions.[874] Whereas the courts began shaping these immunities during the latter half of the twentieth century (either by reducing the protection provided by the immunities in regards to workers and officials, or by expanding the types of available torts applicable to actions involving union officials), the broader immunity enjoyed by unions had survived – until 1982.[875] The 1982 EA introduced (through

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[868] 667.

[869] By way of example, the liability of intimidation, care of *Rookes v Barnard*, was remedied through the Trade Disputes Act of 1965. See further Deakin & Morris *Labour Law* 1035.

[870] As per s 15(1) of the EA 1982.

[871] Selwyn *Employment* 658. The extent and operation of the statutory immunity found in s 219 TULCRA, is discussed in detail in § 6 4 4 below.

[872] Selwyn *Employment* 666, n45. The author states further: "Between 1906 and 1982 (subject to the brief period of the Industrial Relations [Act] 1971 (from 1971 to 1974), legal proceedings for unprotected torts committed in the course of industrial action would typically be brought against the union official directly responsible for giving the instruction to strike" – Selwyn *Employment* 666 n45.

[873] This in terms of ss 1-3 TDA 1906.

[874] Section 4 TDA 1906 stated as follows: [subs 4(1)]

> "An action against a trade union, whether of workmen or masters, or against any members or officials thereof on behalf of themselves and all other members of the trade union in respect of any tortious act alleged to have been committed by or on behalf of the trade union, shall not be entertained by any court"; [subs 4(2)] "Nothing in this section shall affect the liability of a trade union to be sued in the events provided for by the Trades Union Act, 1871, section nine, except in respect of any tortious act committed by or on behalf of the union in contemplation or in furtherance of a trade dispute."

[875] See Anonymous "Industrial Relations Law Commentary: The Employment Act 1982 – Statutory Sick Pay" (1983) 14 *IRJ* 87 90, where is stated:

> "As its final major contribution to a narrowing of traditional legal immunities, s. 15 of the 1982 Act

section 15)[876] what is now found in sections 20 and 21 of the TULRCA (discussed at § 6 4 6 1 below): regulation of the extent to which unions are to be liable in tort for actions taken; how such action is to be attributed to the union; and, how the union is able to repudiate such actions.

5 2 7 4 The Trade Union Act of 1984

1984 saw the Government declare its intention to "give unions back to their members",[877] with this goal forming the underlying rationale of the Trade Union Act.[878]

[now s 20 of the TULRCA] ends the traditional special position of trade unions with regard to immunities. Under s. 14 TULRA [1974] (in a tradition going back to 1906), broadly speaking no action in tort was available against trade unions except where the wrongful act led to personal injury or arose in connection with the use or ownership of property, and was not an act in contemplation or furtherance of a trade dispute … The repeal of s. 14 by the 1982 Act puts these organisations into the same position as individuals, ie they are only protected for acts taken "in contemplation or furtherance of a trade dispute" as redefined in the 1982 Act for the torts specified in TULRA. Actions against individual trade union officials in the past generally ended at the stage of a temporary injunction (where successfully applied for), this being usually sufficient to stop any industrial action the official might be organising. Actions against trade unions are [now] perhaps more likely to carry on to the stage of a full court action and claim for damages."

[876] J Bowers, M Duggan , D Reade & K Apps *The Law of Industrial Action & Trade Union Recognition* (2004) 56 state:

"Section 15 of the Employment Act 1982 was probably the single most important feature of the legislation of the Thatcher Government since it opened the door to mulcting unions in damages where industrial action has been authorized [sic] or endorsed and not thereafter repudiated by the union hierarchy".

Bowers at 56 continue by quoting from the Green Paper entitled "Trade Union Immunities" [Cmnd. 8218 (1981)] that gave rise to the statutory reform, where is said [para 112] "If trade unions were made financially responsible… They could be expected in their own interest to exert greater internal discipline over the officials and members, particularly in respect of unofficial action."

[877] Honeyball *Textbook* 9. The Miners' Strike of 1984 played a major role in this viewpoint. Fraser *British Trade Unionism* 239-243 provides a succinct discussion of the events surrounding the industrial action on the coal mines, and the impact that Thatcher's "defeat" of Arthur Scargill's (NUM) had on the industrial relations of Britain. See further KD Ewing "The Strike, the Courts and the Rule-Books" (1985) 14 *ILJ* 160, Elias & Ewing *Union Democracy* 119-128, VL Allen "The Year-long Miners' Strike, March 1984–March 1985: A Memoir" (2009) 40 *IRJ* 278 and E McKendrick "Trade Unions and Non-Striking Members" (1986) 6 *Legal Stud* 35, who discuss the issues pertaining to the legality (or lack thereof) of the pre-strike ballot which preceded the national strike, and the related civil actions instituted against NUM by its own non-striking members – also discussed in more detail at § 5 3 4 1 below.

[878] Trade Union Act 1984 (c 49). The key influence to this approach can be traced to the Government's Green Paper entitled "Democracy in Trade Unions" [Cmnd. 8778 (1983)], where the plans for an increased focus on internal procedures within trade unions, was initially outlined. S Fredman "The New Rights: Labour Law and Ideology in the Thatcher Years" (1992) 12 *Oxon J Leg Stud* 24 30 says of this focus on trade union democracy by the Government:

"[T]he label 'democracy' has been successfully used to mask legislation which is inimical to collective

The Act resulted in increased judicial involvement in the internal affairs of trade unions by *inter alia*, requiring ballots, firstly, for the election of the Principal Executive Committee ("PEC"), secondly, prior to industrial action for which the union was legally responsible, and lastly, for the maintenance of the union's political fund.[879]

5 2 7 5 The Employment Act of 1988

The Employment Act of 1988 ("1988 EA")[880] introduced further restrictions on various matters pertaining to union functioning,[881] but, importantly, also provided for the formation of the Commissioner for the Rights of Trade Union Members ("CROTUM"), which was specifically aimed at assisting members in instituting quasi-legal proceedings against their own unions.[882]

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interests and workers' rights. This is evidenced not only by the fact that 'democratic' provisions sit side-by-side with legislation which gives expression to the 'free market' by explicitly curbing union's activities. In addition … the provisions themselves militate against collective interests. A second, equally important reason, is pragmatic, extrapolating from the fact that many trade unionists voted for the Conservatives in the 1979 and 1983 elections, policy-makers concluded that trade union members were less militant than the leaders. The insistence on accountability was part of a calculation that this would result in more 'moderation' or acquiescence by unions to government policy."

See in general H Urwin "Democracy and Trade Unions" (1983) 14 *IRJ* 21 21-30, Auerbach (1993) *Pol Qrtly* 37 41-42 and Elias & Ewing *Union Democracy* 138-149.

[879] Honeyball *Textbook* 9; Deakin & Morris *Labour Law* 33. See further Selwyn *Employment* 604 (14 ed).

[880] Employment Act 1988 (c 19).

[881] Honeyball *Textbook* 10 describe these as including regulations pertaining to union elections, ballots required before strike action, and further requirements regarding the daily running of the trade union. Deakin & Morris *Labour Law* 986 state that the Act also introduced "restrictions on the type of conduct for which they [members] could be disciplined by their unions". Selwyn *Employment* 605 (14 ed) explains that the Act, *inter alia*, thereby introduced the notion that members could not be unjustifiably disciplined, that it was automatically unfair to dismiss a worker by reason of him not being a member of a trade union, and that any strike action in order to enforce closed shop agreement would no longer enjoy immunity. B Simpson "The Employment Act 1990 in Context" (1991) 54 *MLR* 418 424 states that "[t]he main objective of EA 1988 was to increase members' statutory rights against their unions".

[882] Honeyball *Textbook* 10. The impact and scope of CROTUM, will be explored in greater detail below. With this being said, by way of brief introduction – E McKendrick "The Rights of Trade Union Members - Part I of the Employment Act 1988" (1988) 17 *ILJ* 141 160 says the following of the newly created Commissioner's functions:

"[T]o assist trade union members who wish to bring proceedings to enforce certain statutory rights against their union… The most remarkable aspect of this innovation is that assistance is only to be provided in relation to actions against the union; no assistance is available where an employee claims that he has been victimised by his employer on the ground of his trade union membership" [footnotes omitted].

As was mentioned in the earlier discussion regarding the role of the Registrar in terms of IRA 1971, the 1988 Act thus saw the introduction of another official tasked with investigating the internal affairs of unions, albeit with a significantly expanded mandate. Given the topic of this study, CROTUM is an understandably important development within the context of not only the British, but – given what could possibly be applicable – the South African industrial relations system. It, therefore, requires scrutiny. CROTUM was in operation for several years (subject also to legislative amendments) during the late 1980s and 1990s. The discussion below will evaluate CROTUM along the lines of this chronology, before returning to the broader sequential examination of the development of the British system.

5 2 7 5 1 Commissioner for the Rights of Trade Union Members

5 2 7 5 1 1 CROTUM origins

The office of the CROTUM was established in terms of section 19 of the 1988 EA.[883] In this regard, Lockwood states that the reasoning underlying its formation was that "the Conservative government believed democracy in trade unions would be hampered if individual members encountered too many practical difficulties when enforcing the rights that they had been granted against their trade unions".[884] Perhaps the most apt description of the justification behind it is found in the 1987 Green Paper that gave rise to CROTUM,[885] where Simpson quotes the following extract:

> "The process of application to the court can be expensive and daunting for the individual. The fact is that at the moment members need to be exceptionally determined and sometimes courageous if they are to embark on the process of any existing route of claiming and enforcing the full rights [against their union] which the law seeks to give them."[886]

Morris explains that the government of the day wanted to establish a "public authority" to assist members "where the issues involved justified it, if individuals might

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[883] G Lockwood "An Epitaph to CROTUM and CPAUIA" (2000) 31 *IRJ* 471 472. Section 19 of the Act [as originally promulgated] states that the office had as its function "to provide assistance to persons" listed in terms of s 20 of the Act. Subsection 19(2) refers to Schedule 1 of the Act, which sets out the particulars of the new Office.

[884] Lockwood (2000) *IRJ* 472, [my emphasis].

[885] "Trade Unions and Their Members" [Cmnd. 95 (1987)] para 6.3.

[886] Simpson (1991) *MLR* 425.

otherwise be deterred from bringing cases to the courts because of their complexity, the financial costs involved or for any other reason."[887]

5 2 7 5 1 2 CROTUM scope in terms of the EA 1988

The primary focus of CROTUM – insofar it relates to who might be assisted by the Commissioner – was initially outlined in section 20 of EA 1988.[888]

Subsections 20(5) and 20(7), read with subsection 20(6), regulated the circumstances under which CROTUM could aid persons as "prospective applicant(s)", primarily by means of reference to other sections of EA 1988,[889] or provisions in other pieces of legislation.[890] Any assistance was subject to specific requirements, dealing with timing in regards to applications to the Certification Officer ("CO")[891] and whether or not it appeared to the Commissioner that the applicant "would (if assisted) have a reasonable prospect" of success.[892]

More specifically, assistance was to be provided by means of "financial assistance to union members who were taking or contemplating legal action against their union *or an official or trustee of his/her union in respect of certain breaches of statutory duties*".[893]

5 2 7 5 1 3 CROTUM scope in terms of the EA 1990

However, a mere two years later, the powers of CROTUM was further expanded by

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[887] D Morris "The Commissioner for the Rights of Trade Union Members – A Framework for the Future?" (1993) 22 *ILJ* 104 105.

[888] This initial scope was duly expanded in 1990, with the promulgation of that year's Employment Act – the details of which will be discussed below.

[889] These include: ss 1, 6, 8(3), 9 and 16 of the 1988 Act, with the latter pertaining to the "Remedy with respect to ballot on use of funds for political purposes" (where said persons may apply to either the Certification Officer or the Court, for a declaration that the ballot process was invalid in terms of the Trade Union Act of 1913 (30 Geo. V c 30)).

[890] Including s 5 of the 1984 Trade Union Act (dealing with "Secret Ballots for Trade Union Elections") and subs 3(1) of the 1913 Trade Union Act ("Restriction on Application of Funds for Certain Political Purposes").

[891] Subsection 20(5)(b).

[892] See subs 20(5)(c).

[893] Lockwood (2000) *IRJ* 471, [my emphasis]. Lockwood explains further that, in terms of s 111 of the TULRCA/s 21 of the EA 1988, the financial assistance, would typically include the costs (if any) of legal advice and representation [where law firms were briefed] – with such costs being recoverable from the party in the event that a costs award was successfully applied for and received.

section 10 of the Employment Act of 1990 ("1990 EA").[894] The additional grounds provided for in terms of the 1990 Act included matters related to, *inter alia*, the appointment/election/removal of a person from office,[895] disciplinary proceedings by the union against the member,[896] the authorising or endorsing of industrial action[897] and, finally, the constitution or proceedings of any committee/conference/other body of the union.[898] In addition to the list of further actions introduced in 1990, subsection 20(7) of EA 1988 already provided for CROTUM assistance in regards to ballots prior to strike action,[899] union elections,[900] the right to inspect a trade union's accounting records,[901] remedies *both* against the use of union funds for "indemnifying unlawful conduct"[902] and the union's trustees for the unlawful use of union property,[903] and finally, ballots on the use of funds for political purposes.[904]

Importantly, CROTUM was run as "independent of Government control and could not be directed by ministers to support or refuse any particular application."[905] As mentioned above, subsection 10(2) of EA 1990[906] outlined the seven grounds upon which CROTUM could offer assistance, "with respect to an alleged breach or threatened breach of the rules of a trade union",[907] subject however to the "precondition"[908] that assistance "could only be granted … if the breach of rules in

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[894] Employment Act 1990 (c 38).
[895] In terms of subs 10(2)(a).
[896] In terms of subs 10(2)(b).
[897] In terms of subs 10(2)(c).
[898] In terms of subs 10(2)(g).
[899] In terms of s 1 of the EA 1988.
[900] In terms of s 5 of the TUA 1984. It might be noticed that both the EA 1988 and EA 1990 refers to trade union elections. The reason appears to be relatively simple – the 1990 Act further expanded on the initial scope of the 1988 Act, which in turn had referred back to s 5 of the 1984 Act. The 1984 Act specifically applied only to the voting and balloting involving the "principal executive committee" of a trade union [defined in terms of subs 1(5) as being "the principal committee of the trade union exercising executive functions, by whatever name it is known"]. In contrast, subs 10(2)(a) EA 1990 simply refers to the appointment or election of a person (or the removal of that person) from "any office" – therefore a broader category of committee, that would function at any number of levels within a modern trade union.
[901] In terms of s 6 of the EA 1988.
[902] In terms of subs 8(3).
[903] In terms of s 9.
[904] In terms of s 16.
[905] Lockwood (2000) *IRJ* 471.
[906] Or subsection 109(2) of the TULRCA (as it became), prior to its repeal in 1999.
[907] Lockwood (2000) *IRJ* 472.
[908] 472, citing subs 110(4) of the TULRCA / subs 10(5) of the EA 1990.

question would have had an effect *on union members other than the applicant*."[909] This additional requirement was implemented in order to prevent spurious claims from individual members who might have had a particular bone to pick with their union and who were merely attempting to cause annoyance in the absence of any legitimate grievances.[910]

5 2 7 5 1 4 The reasons for CROTUM scope extension

But why the expanded scope introduced by EA 1990? Simpson suggests, perhaps somewhat pointedly, that part of the reason lies in CROTUM simply not being busy enough during the period preceding the amendment.[911] In discussing the legislative background leading up to EA 1990, Simpson identified two "differing approaches [as being] evident" in instituting the CROTUM office:[912] firstly, the view that union leadership was unrepresentative of its membership, and secondly, that "union bureaucracies were subject to inadequate controls".[913] As a result, whereas the various provisions introduced by legislation during the 1980s focused on "[increasing] members' statutory rights against their unions",[914] these alone were deemed insufficient. Simply providing a series of legislative "rights" against union leadership or administration did not necessarily translate into an active membership willing to challenge that leadership or administration. This is not to suggest (as indicated above) that such action did not occur,[915] but rather that the Conservative Government wanted to empower members to take action against their unions – since it held as a central tenet to its industrial relations approach that members were not naturally aggressive or desirous of industrial action, but were instead led astray by union leadership that did not reflect the true intention of its members.[916]

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[909] 472, [my emphasis].

[910] Lockwood at 480 speaks of "frivolous and vexatious claims".

[911] Simpson (1991) *MLR* 425.

[912] 424.

[913] 424.

[914] 424 [footnotes omitted].

[915] The eminent example of active membership being the mid-1980s cases involving the National Union of Mineworkers (under the leadership of Arthur Scargill), and Messrs Taylor and Foulstone: *Taylor v NUM (Derbyshire Area) (No 1)* [1984] IRLR 440 [this matter saw follow-up hearings in November and December of 1984] *and Taylor & Foulstone v NUM (Yorkshire Area)* [1984] IRLR 445. See further Morris (1993) *ILJ* 116. These cases are discussed in more detail at § 5 3 4 1 below.

[916] P Fosh et al "Politics, Pragmatism and Ideology: The 'Wellsprings' of Conservative Union Legislation (1979-1992)" (1993) 22 *ILJ* 14 19; Simpson (1991) *MLR* 424–425.

Added to this, Lockwood[917] states that the policy of the Conservative Government was one where direct interference in the internal administration of trade unions was to be avoided in order to prevent the State being perceived as "confrontational" by organised labour, their supporters and "the Labour Party in opposition".[918] One way was to empower union members by means of removing as many potential barriers as possible and, in so doing, "encourag[ing] individual union members to take legal actions against their own unions".[919]

These statements, seen together with the views of Simpson and any evidence or suggestions that CROTUM was not being utilised (to the point that its functions and scope needed to be increased through amendment), calls into question the very belief of the Conservative Government discussed above. Furthermore, it raises questions about what exactly was being done by CROTUM in the fulfilment of its mandate, who was making use of its services and how regularly such services were being requested? As such, the extent to which CROTUM was utilised during the period of its existence needs to be examined.

5 2 7 5 1 5 CROTUM analysis – applications made

Lockwood, in citing Morris,[920] describes the operations of CROTUM as "'characterised by the existence of a large number of enquiries, a relatively low number of applicants, and an even smaller number of assisted applicants'".[921]

Lockwood demonstrates how the applications for assistance made during 1988–1997,[922] increased from 10 (in 1988) to 94 (in 1997), with the peak of applications "resolved" being 15 (out of a total of 50) in 1992, before dwindling to 4 and 2 in the penultimate and final year of CROTUM's operation. Applications that were either

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[917] Graeme Lockwood's article [Lockwood (2000) *IRJ*] is extensively referred to during this section, given how it is one of the very few academic articles to focus, retrospectively, on the work and functions of CROTUM. [The writer also had an opportunity to meet with Dr Lockwood in July 2015, for an informal discussion of his research in the early 2000s on CROTUM, CPAUIA and the CO.] For a particularly detailed account of the work of CROTUM, albeit during the very early stages of the Office, see in general JR Carby-Hall "'The Commissioner for The Rights of Trade Union Members' An Evaluation of Her Work and Achievements" (1992) 34 *Manag L* 4 4-57.

[918] Lockwood (2000) *IRJ* 471.

[919] 471.

[920] Morris (1993) *ILJ* 105.

[921] Lockwood (2000) *IRJ* 473.

[922] 474, Table 1.

described as being "out of scope", or simply categorised as "other" (therefore, neither resolved nor out of scope),[923] saw commensurate increases in their numbers, peaking at 30 and 72 respectively, with noticeable increases towards the end of operations of CROTUM.[924] Lockwood states: "Out of a total number of applications amounting to 550, only 61 cases (11%) were assisted and successfully resolved",[925] a characteristic seemingly explained by the Commissioner at the time as being indicative of the "continuing growth of awareness and understanding of CROTUM's role amongst trade union members".[926]

5 2 7 5 1 6 CROTUM analysis – application types

As far as the nature of the approaches from union members is concerned, Lockwood cites the CROTUM Report for the years 1996/1997 where the Commissioner stated:

> "Many of the trade union members who approach my office are seeking assistance of a sort I cannot give them. Some are seeking advice about a specific point, or a conciliation between themselves and their trade union, while others want me to carry out an investigation into a particular union activity, or act as an arbitrator or ombudsman".[927]

This raises the question about the needs of trade union members during the term of CROTUM as compared with the ambit of Commissioner's terms for providing assistance? In this regard, Lockwood states:

> "The majority of these types of complaint can be categorised as 'representational disputes', where the individual member claims that the union has either denied them representation or has failed to represent them properly. Union members were often indignant that they have paid union subscriptions over many years and are then provided with what they regard as sub standard service at a time of need. These representational disputes were the largest single issue of complaint, yet there is no avenue of recourse via CROTUM."[928]

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[923] 474 describes these as including "cases dropped by the applicant, cases that were [still] under consideration, and cases not assisted".
[924] 474.
[925] 474.
[926] 474, [footnotes omitted] quoting from CROTUM Report 1994/1995.
[927] 474, citing the CROTUM Report 1996/1997.
[928] 474.

This in mind, Lockwood[929] demonstrates how 50%[930] of all applications during 1988-1997 were applications either emanating from the appointment/election/removal of persons from office,[931] disciplinary proceedings by the union,[932] or claims pertaining to irregularities within the union constitution or committees of the union in question.[933] 90 applications, or 16%, fell outside the "scope of the Commissioners Assistance", and were not assisted at all.[934] Put differently, the three primary categories identified above are related to a union's "rule book", which proved to be fertile ground for causes of complaint:

> "[R]ulebooks have provided the main source of complaints because they are often open to interpretation. This often led to the parties developing a different perspective of certain rulebook provisions. The union's view of the rulebook was based on a global picture of the organisation, whereas the member's approach tended to be narrower and individualistic. Significant numbers of claims arose in this category because the rulebooks involved had developed over many years and had been poorly drafted … In particular 1996 and 1997 saw a significant number of complaints which arose from the fact that the member and the union had developed a different understanding of the rule book provision relating to the constitutional proceedings of a committee or conference or other body within the union."[935]

The rule book understandably saw tangible intervention by CROTUM, since it required the Commissioner to actively investigate and interpret the specific provision(s) of the relevant document. But where the rule book was in fact silent with regard to the action/omission being complained of, CROTUM was again forced to turn such applications away, because there was "no specific breach [that] could be identified" for the purposes of assistance.[936]

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[929] 474-475 read with Table 2 at 475.
[930] 49,82% (274 of 550).
[931] Subsection 109(2)(a) of the TULRCA 1992 – 90 in total (16.36%).
[932] Subsection 109(2)(b) – 74 in total (13.45%).
[933] Subsection 109(2)(g) – 110 in total (20%).
[934] Lockwood (2000) *IRJ* 475, Table 2. [Note to the reader: Regarding the totals listed in Table 2, email correspondence with Dr. Lockwood (dated 15 March 2015, on file with the writer) confirmed that an error had been made in the reproduction of Table 2 in the journal article in question – with the sub-total at "Out of Scope of the Commissioners Assistance" not being listed. The total of all the other items is 460, leaving 90 outstanding (to properly balance at 550) – which was supposed to be listed as "Out of Scope".]
[935] Lockwood (2000) *IRJ* 476.
[936] 476. The author states (at 476) that 10% of complaints received by CROTUM fell within this category (no identifiable breach in terms of the rule book).

5 2 7 5 1 7 CROTUM analysis – success or failure?

Opinions on the success or otherwise of CROTUM certainly appear to be divided. Many commentators questioned the underlying motives of the Conservative Government in establishing CROTUM in the first place, particularly during the time it was in operation.[937] As will become clear from the discussion of Commissioner for Protection against Unlawful Industrial Action ("CPAUIA") below, there was also harsh criticism of the perceived wastage of public funding in underwriting CROTUM. Ewing, in quoting the Labour "backbencher", John Healey reports him as saying: "[A] grotesque, ridiculous, irrelevant and scandalous waste of public money".[938]

In his evaluation of the work performed by CROTUM, Lockwood appears to draw conflicting conclusions.[939] He first states that CROTUM "had little direct influence" on unions and ultimately caused "minimal changes to procedure or practice", given how relatively few complaints were ultimately assisted by the Commissioner.[940] To this he adds that "[t]here is little direct evidence that the role of CROTUM caused trade unions to modernise their political structure".[941] However, he then questions whether CROTUM might not have had "a greater indirect impact" due to the latter providing "union members with two specific benefits",[942] namely: (i) That CROTUM did provide members with a recognised or legitimate mechanism through which complaints about their union could be heard; and (ii) That CROTUM "may have acted as a deterrent of abuse" which "may have encouraged marked shifts in trade union behaviour and practice that has seen them putting their house very much in order."[943]

In expanding on these insights – and in addressing the possible reasons for the low number of requests for assistance lodged – Lockwood postulates that either union members did not want to take action against their own unions, or that there was no need *since unions were largely in compliance with their rule books or similar statutory*

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[937] See for instance Simpson (1991) *MLR* 425-426.

[938] KD Ewing "Freedom of Association and the Employment Relations Act 1999" (1999) 28 *ILJ* 283 296 n60. Although, to be fair – with Mr. Healey's stated political affiliation, such criticism is not necessarily unexpected, given the Labour Party's (then) twenty-odd years in Opposition.

[939] See Lockwood (2000) *IRJ* 476.

[940] 476.

[941] 476.

[942] 476.

[943] 476.

requirements, or, finally, that the mere presence of CROTUM might have seen unions and their members resolve any issues internally, thereby negating the further involvement of an outside institution.[944] In support of this latter point, and with reference to the CROTUM 1991/1992 Report,[945] Lockwood cites the efforts to ensure members and unions first make use of internal grievance procedures for the resolution of complaints as being "singularly successful"[946] and emphasises the Commissioner's focus on the *internal* resolution of union-member disputes prior to any involvement by CROTUM.[947] Lockwood argues that "[t]he fact that few cases were assisted could be regarded as extremely satisfactory, since it means disputes were being resolved without the need for the parties to resort to contentious and expensive litigation."[948]

In his analysis of the applications made to CROTUM (based on the volumes per year and the manner in which these matters were referred), Lockwood argues that a noticeable "shift of attitude amongst trade unions and unionists towards CROTUM"[949] could be observed – an acknowledgement of "the concerns that trade unions had about the agency being anti-union were perhaps gradually being allayed."[950] As a result, Lockwood contends that whereas unions and their members were initially reluctant to be associated with "Tory legislation" designed for an (arguably) anti-union purpose, this gradually began to change, so much so that in 1997, "over 55 percent" of members who applied at CROTUM for assistance were referred by their "own" unions.[951] Part of the reason underlying this change in approach can also be gleaned from the use of CROTUM by unions themselves in a more "strategic" manner,[952] with

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[944] 476.

[945] Page 2 of the Report – see Lockwood (2000) *IRJ* 476-477 n18.

[946] 476-477 – the full extract being:

> "I have continued to encourage members to attempt to resolve their complaints by using grievance procedures contained in the rules and constitution of their union, rather than by resorting immediately to litigation. I am pleased to report that this year has been singularly successful, as many complaints have been satisfactorily resolved between the parties without the necessity of any form of legal action".

[947] 477.

[948] 477.

[949] 477.

[950] 477.

[951] 477. Put differently, Lockwood (at 477) states:

> "Whilst trade unions were opposed in principle and ideologically to the legislation, the evidence indicates that trade unions, their officials, and the members themselves ceased to regard CROTUM as a threat to trade unionism."

[952] 477.

Lockwood citing examples of organised labour using the CROTUM mechanism as a means to placate (or even undermine) membership factions within the organisation.[953]

Furthermore, the initial confusion about the powers of CROTUM which led to applications being made in the mistaken belief that the Commissioner could "investigate complaints on their behalf" and references to CROTUM as a "Union Ombudsman"[954] (a role never held by the Commissioner[955]) also raises the question as to the actual needs of trade union members for dispute resolution. In this regard, Lockwood concludes by suggesting (given how "most [trade union] complaints could be dealt with in-house with the operation of better grievance procedures")[956] that the British Government should consider encouraging the organised labour movement in setting up a centralised and "voluntary system of arbitration or an ombudsman".[957] This view was initially espoused by Deakin and Morris[958] as "a more appropriate method of resolving differences between trade unions and their members and prospective members than the highly adversarial means which is currently offered by the legal process".[959] More than a decade later it is clear that that particular suggestion never came to fruition – particularly in light of the increasing role played by the CO (as discussed in more detail at § 6 2 3 7 below).

In 1999 CROTUM was abolished by section 28 of the Employment Relations Act of that year. One is hard pressed to find a British labour relations' academic who would suggest, in retrospect, that CROTUM was a successful initiative. However, to simply dismiss it as an ill-conceived aberration would also, it is submitted, be too much of an oversimplification. Potentially, CROTUM speaks more to what was expected of those

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[953] 477.

[954] 478.

[955] In this regard, Lockwood (2000) *IRJ* 480 states:

"The evidence suggests that many union members sought conciliation between themselves and their union or wished CROTUM to act as an arbitrator or ombudsman on some specific point. The experience of CROTUM is that in some cases trade unions do not have appropriate mechanisms for dealing with the grievances of individual members, and that quite often the member finds himself or herself referred to the source of their complaint."

[956] 480.

[957] 480. Lockwood states further that a "voluntary scheme would not constitute a completely fresh approach to the regulation of the relationship between a trade union and their members" [footnotes omitted] – citing (at n30) the proposal(s) of the Donovan Commission, in regards to a organised labour review body.

[958] S Deakin & GS Morris *Labour Law* 2 ed (1998).

[959] Lockwood (2000) *IRJ* 480.

members who did apply for assistance and were *not* assisted (either due to the dispute falling outside the ambit of the Commissioners' mandate, or due to a misunderstanding of the role of the Office), than to what was *hoped* by the Conservative Government of the day would be the outcome of the Office. And a further question could be posed about what the possible outcomes would have been were CROTUM to have been perceived by organised labour and its members as a *truly* independent Office, as opposed to something that saw its creation in a Green Paper with (purportedly) anti-union initiatives. Related to these remarks are the questions, firstly, why the powers-that-be chose *not* to include the so-called "representational-disputes" in the ambit of CROTUM and, secondly, what the impact thereof would have been if this had been the case. Some of these questions will again be raised in the discussion below of the South African situation.

5 2 7 6 The Employment Acts of 1989 and 1990

Reverting back to the broader discussion of developments during the 1980s and 1990s, 1989 saw the promulgation of another Employment Act,[960] which was far less radical and introduced provisions applying to, *inter alia*, sex discrimination and time off from work for employees involved in union activities.[961] The following year saw the introduction of the 1990 EA,[962] which did introduce more overt reform measures. The most important of these were the abolishment of protection for any secondary strike action,[963] the loss of the right to claim unfair dismissal by anyone participating in unprotected strikes,[964] the extension of liability of unions for the actions of its actors (again, under certain circumstances) to include committees, officials and shop stewards,[965] and the removal of the "remaining vestiges of legal support for the closed shop which, while not rendering the closed shop unlawful, made it virtually impossible to operate."[966]

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[960] Employment Act 1989 (c 38).
[961] Honeyball *Textbook* 10. See further Selwyn *Employment* 605 (14 ed).
[962] Employment Act 1990 (c 38).
[963] Selwyn *Employment* 606 (14 ed).
[964] 606 (14 ed).
[965] Honeyball *Textbook* 10.
[966] 10. The authors state that the Act declared it unlawful for any employers or training agency to refuse to appoint an employee by reason of their not being members of a trade union. For further specific details surrounding the gradual statutory (and related) move towards the virtual banning of the closed shop, see G Pitt *Employment Law* 6 ed (2007) 315-316, and the background to the introduction by the

5 2 7 7 The Trade Union and Labour Relations (Consolidation) Act of 1992

From the above discussion, it is clear that the 1980s and early 1990s saw a host of legislative instruments attempting to re-organise and regulate the British industrial relations system[967] through eight major enactments in all. It is thus understandable that in 1992 a concerted effort was made to rationalise British employment law. The result was the introduction of the Trade Union and Labour Relations (Consolidation) Act ("TULRCA"),[968] which served to consolidate all the new and still existing law applicable to unions and labour relations[969] into one piece of legislation.[970]

5 2 7 8 The Trade Union Reform and Employment Rights Act of 1993

However, in just the following year the Trade Union Reform and Employment Rights Act ("TURERA")[971] was enacted, which, in the words of Bowers,[972] "was clearly controversial and constituted a return by the [John] Major Government to the attack on trade unionism which characterised the Thatcher years."[973] Two noteworthy

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EA 1990, of what is now ss 137-143 of the TULRCA (under Part III "Rights in relation to union membership and activities".

[967] The 1990s – more specifically, 22 November 1990 – also saw the end of the rule for the "Iron Lady", with the resignation of Margaret Thatcher following her unpopular stance regarding, *inter alia*, the so-called "poll tax" and her views of Britain's involvement in the new European monetary system. See in general Brazier (1991) *MLR* 471 471-491.

[968] Trade Union and Labour Relations (Consolidation) Act 1992 (c 52).

[969] According to Selwyn *Employment* 606 (14 ed), these included: "Conspiracy and Protection of Property Act 1875, Trade Union Act 1913, Trade Union (Amalgamations etc) Act 1964, Trade Union and Labour Relations Act 1974, Employment Protection Act 1975, Trade Union and Labour Relations (Amendment) Act 1976, Employment Protection (Consolidation) Act 1978, Trade Union Act 1984, and the Employment Acts of 1980, 1982, 1988, 1989 and 1990."

[970] Selwyn *Employment* 606 (14 ed).

[971] Trade Union Reform and Employment Rights Act 1993 (c 19).

[972] J Bowers *Bowers on Employment Law* 6 ed (2002) 11.

[973] For a concise summary of the major provisions of the Act, see Selwyn *Employment* 606 (14 ed). These included more stringent and far-reaching provisions relating to trade union balloting procedures and the financial affairs of both the union and its officials/leaders. See further Collins et al *Labour Law: Text and Materials* 903 where is said:

> "The major initiative introduced by [TURERA] relates to the union's obligation to give notice of the ballot to the employer (as well as sight of the ballot paper, notice of the ballot result, and notice of when the strike or industrial action is to commence) … Quite apart from the point of principle about mandatory strike ballots being imposed by the State, the complexity of the legislation has been a source of considerable difficulty for trade unions in trying to organise lawful action in accordance with the law. Ballots under the legislation are also very expensive to administer, not only because of

characteristics of the Act were that it was the first major legislative instrument that saw the majority of its provisions influenced by European Community law[974] and it gave rise to the third example of a body focused on internal union affairs, namely the CPAUIA. Whereas CPAUIA and the office of CROTUM were not created by the same statute, they originated from largely the same context and fell ostensibly under the same mandate – albeit focusing on different manifestations of organised labour. Similar to the discussion of CROTUM above, CPAUIA also calls for individual consideration. Note that consideration of CPAUIA concludes the discussion of legislative developments in Britain during the period of readjustment to trade union regulation. In chapter 6, the final phase of readjustment as basis for the current legislative position in Britain will be considered. As far as this chapter is concerned, consideration of CPAUIA will be followed by a discussion of the development of the common law during the period of readjustment.

5 2 7 8 1 Commissioner for Protection against Unlawful Industrial Action

5 2 7 8 1 1 CPAUIA origins

The office of CPAUIA was constituted through TURERA, which inserted section 235B into TULRCA. Lockwood described the key purpose of this office as assisting:

> "[A]ny party who wished to take proceedings on the basis that the supply of goods or services to him as an individual had been prevented or delayed by *unlawful* industrial action or that the quality of the goods of services had been so affected".[975]

Compared to CROTUM, CPAUIA was – by a not-insignificant margin – the far less "successful" of the two, were one to measure "success" by utilisation of the office in terms of its founding objectives. As such, the examination of CPAUIA will be brief, with

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the balloting costs themselves, but also because of the need for expensive legal advice which seems required by unions trying to navigate the dangerous statutory currents."

In addition, an interesting creation of TURERA was the (relatively short-lived) CPAUIA, discussed at § 5 2 7 8 1 below.

[974] Honeyball *Textbook* 11.

[975] Lockwood (2000) *IRJ* 473 [my emphasis], paraphrasing subs 235A(1). Subsection 235B(1), read with subs 235B(2), (as they were then) refers back to subs 235A(1). As evidence of the close relationship between these two Offices, the position of both Commissioners was held by the same individual for the duration of their existence – see Lockwood (2000) *IRJ* 471. Furthermore, both Offices were abolished by the same statute in 1999 – see subss 28(1)(a)-(b) of ERA 1999.

the discussion focusing more on the underlying reasons why it was seldom utilised.

5 2 7 8 1 2 CPAUIA scope

In terms of the mentioned subsection 235B(3), the Commissioner – in deciding whether or not to grant the application (and the extent thereof) – could have regard to, firstly, whether it would be unreasonable not to assist the applicant given the complexity of the case,[976] and secondly, whether the case involved "a matter of substantial public interest or concern".[977] The nature of the assistance to be provided to the applicant was detailed in subsection 235B(6) and involved, *inter alia*, either "making the arrangements for, or for the Commissioner to bear the costs of" advice or assistance by legal professionals, either in the preliminary or incidental steps of the application, or to facilitate a settlement.[978] Note that for assistance no additional requirements had to be met. Anyone could apply, subject to the two considerations outlined above and contained in subsection 235B(3).

But herein lay part of the problem. As explained by Gibbons and Brown, the Commissioner was "there to help individuals to enforce a clear right *which has already been given to them by Parliament …* So, on this basis she is just like the legal aid fund, except that she does not means test applicants".[979] (The right the authors refer to was contained in subsection 235A(1) TULRCA,[980] which provided that the individual complaining of a trade union or other person that so causes industrial action to prevent/delay/reduce the quality of goods or services may apply to the High Court of the Court of Session for an order.[981])

5 2 7 8 1 3 CPAUIA analysis – success or failure?

Based on an analysis of enquiries made during the first two years of the Office (and

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[976] Subsection 235B(3)(a).

[977] Subsection 235B(3)(b).

[978] Subsections 235B(6)(a)-(b).

[979] S Gibbons & D Brown "Research and Reports – Commissioner for Protection Against Unlawful Industrial Action" (1995) 24 *ILJ* 190 193, [my emphasis].

[980] The section is entitled "Industrial action affecting supply of goods or services to an individual" – and is discussed in further detail in the "Industrial action" section at § 6 4 below.

[981] Interestingly, and to provide further context of the possible scope of such a claim, subs 235A(3) states:

> "In determining whether an individual may make an application under this section it is immaterial whether or not the individual is entitled to be supplied with the goods or services in question."

how 57% (80) of the enquiries received in one year (1993-1994) "came from the Law Society exhibition – where the Commissioner had a stand"), the following criticism by Gibbons and Brown is not surprising: "It may be considered by some to be a matter of concern that a public office charged specifically with enforcing a specific right has no real 'clients' because no-one appears to want to use the right".[982] The authors, after comparing CPAUIA to CROTUM (where in excess of half a million GBP had been spent on legal assistance since its establishment in 1989), explain that the Commissioner herself was reported as being concerned about the broad ambit of the right she was tasked to assist with, since a member of the public would not necessarily know whether the industrial action complained of was unlawful, or whether Advisory, Conciliation and Arbitration Service ("ACAS")[983] had already been approached to facilitate a possible settlement of the dispute between trade union and employer.[984] With regard to the criticism of how broadly-framed the jurisdiction of this office was, the example is given of how an individual, being faced with industrial action that disrupts a bus service – and is accordingly expected to walk a "half kilometre" by being forced to alight one bus-stop too soon – "would have a claim under the new right".[985] Given the lack of claims (at the time of their writing), the authors conclude that the "establishment and operation of the Commissioner is a triumph of ideology over pragmatism".[986]

Commenting on the eventual abolishment of CPAUIA (by section 28 of ERA 1999), Ewing says (of both Offices – CROTUM and CPAUIA) that their existence "has been fiercely criticised, and their creation has proved to be among the most foolish of all the labour law initiatives introduced since 1979."[987] Perhaps the most stringent criticism came from the Labour Party:

> "One of the strongest critics was Labour backbencher, John Healey: in Standing Committee he drew attention to the fact that in 1998 CROTUM dealt with '94 calls and 12 applicants, two of which were carried over from the previous year'. That is less than two calls a week: it must clearly be a matter of great excitement when the telephone rings. More seriously, CROTUM absorbed a budget of

[982] Gibbons & Brown (1995) *ILJ* 191.
[983] See § 6 3 2 2 below.
[984] Gibbons & Brown (1995) *ILJ* 191-192.
[985] 192.
[986] 193.
[987] Ewing (1999) *ILJ* 296.

> £247,328 in 1998, calculated to be roughly £2,600 per call and £20,000 per application. But this is value for money compared with CPAUIA, who dealt with two applications in 1998, both of which were withdrawn, at a cost of £37,345 each. Little wonder that the government should conclude that 'these arrangements are inefficient and unnecessary.'"[988]

CPAUIA thus saw a single application in the duration of its lifetime.[989] Even so, whereas the discussion demonstrates that CPAUIA was not utilised nearly as much as the Conservative Government foresaw and that there appears to have been legitimate criticism of the scope of the service being offered, the discussion does not offer much in the line of explaining why so few enquiries and formal applications were brought. Lockwood's view on this is three-fold: Firstly, during the initial stages of the Office's existence, the incidences of industrial action were (relatively speaking) very low – arguably as the effects of the Government's various legislative attempts to regulate lawful industrial action procedures began to manifest.[990] Secondly, "[a]n alternative more likely explanation is that trade unions were far more familiar with the legal provisions and better organised in terms of their own procedures for dealing with industrial action ballots".[991] Finally, he reasons that employers were simply far more inclined to approach the courts in order to obtain injunctions against strikes, thereby removing the need for members of the public having to "challenge the legality of the industrial action".[992]

CPAUIA would appear to have been a doomed initiative that was conceived on the basis of a particular policy position held by the Conservative Party towards the end of the 1980s. It was premised on the belief that industrial action regularly was unlawful, was the cause of massive inconvenience to the greater public and that, were the process to be made simpler and a "people's champion"[993] be made available that could assist the public, there would actually be use of such service and a justifiable public

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[988] 296, this being the same John Healey quoted above (at § 5 2 7 5 1 7) in the discussion regarding CROTUM. Deakin & Morris *Labour Law* 1037 n67 state that by 1998, the Commissioner "had assisted only one application, which did not lead to a court case".

[989] S Hardy *Labour Law and Industrial Relations in Great Britain* 3 ed (2007) 59; Lockwood (2000) *IRJ* 477.

[990] Lockwood (2000) *IRJ* 477.

[991] 478.

[992] 478. Deakin & Morris *Labour Law* 1037 add to this by stating that between 1983 and 1996, "there were 204 separate legal actions against trade unions, of which 169 were applications for an injunction; of those 169 applications, 137 were successful" [footnotes omitted].

[993] Gibbons & Brown (1995) *ILJ* 190.

expenditure on it. However, most commentators were of the opinion that there was never a need for the Office in the first place. But Lockwood's reasoning remains worthy of consideration – at least inasmuch as he raises the question whether, in the absence of stricter legislative controls and the Court's willingness to award injunctions at the behest of employers, the public would have been more inclined to have used such services?

5 3 The common law position in respect of unions in Britain during the period of readjustment

5 3 1 Introduction

This section considers the common law approach to unions in Britain, including aspects such as the legal status of unions, the approach of the British courts to interpreting the union-member contract and judicial intervention in trade union internal governance. Brief mention will also be made of organised labour's attempts to resolve intra-union disputes themselves, with this to serve as an example of a possible model for union-member accountability.

Note that in line with the goal of this chapter, the bulk of the discussion to follow focuses on events of the previous century that culminated in the Thatcherism of the 1980s'. The reason for this is simple: this was the time trade unions were at their strongest and their influence was most keenly felt by individual members, workers, and the British economy or society as a whole. Not surprisingly it was during this time that the judicial reaction to unionism was equally pronounced. Grunfeld, writing during the late 1950s, encapsulated this notion as follows:

> "The new economic power attained by the trade union movement in a period of nearly full employment has stimulated a new anxiety for the position of the individual union member in relation to the collective power of his organisation. But the problem of the relationship between trade unions and the individual is an old one. Again and again, in the past, an individual has suffered hardship, for example, through loss of employment because he has refused to join a trade union or through expulsion from a union because he has refused to stand united with his fellow-unionists in a strike. Such situations have given rise to keenly contested litigation, as the law reports bear witness. But, sympathy with the individual was not undivided. It extended also to the unions in their struggle to attain parity of economic power with the employers. In the last four or five years, however, the opinion of significant sections of the public has veered round to the view that the trade unions have enough, or even more than enough, economic power; and in a number of recent expulsion cases, public

> opinion, as reflected and formulated in the British press, has been strongly and exclusively on the side of the individual concerned. The need to protect the defenceless individual against the powerful union organisation received its strongest legal response …".[994]

Therefore, as the relative power of unions has decreased, so has the need for judicial intervention based on the common law, particularly in light of the multitude of statutory provisions in what is now arguably one of the most highly-regulated organised labour markets in the world.[995]

5 3 2 The status of trade unions

> "Sir R. Reid [interrupting]: The trade unions are not corporations.
> Prime Minister Balfour: I know; I am talking English, not law. (House of Commons, 1904)"[996]

In terms of section 1 of TULRCA, entitled "Meaning of 'trade union'", a union is deemed to be an organisation which consists wholly or mainly of workers and whose principal purposes include the regulation of relations between workers and employers.[997] Regarding the approach to the legal status of unions, Grunfeld explained it as being "characterised in English law as a voluntary, unincorporated association, as opposed to a voluntary, corporate association like a limited liability company".[998] The British approach to unions certainly serves as one of the more unique examples of how historical influences were transferred into a contemporary labour relations system. In this regard, Pitt provides a succinct overview of the reasons why organised labour in the UK remains "unincorporated":

> "When unions were legalised in the nineteen century it was suggested that they should become

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[994] C Grunfeld "Trade Unions and the Individual: A Study of Recent Developments in England" (1958) 7 *J Pub Law* 289 289.

[995] Says Collins et al *Labour Law* 533 in this regard:
> "There is less need for intervention of this kind today, given the changing political climate and the changing political climate of British trade unionism. It is not possible to overlook the fact that trade power and influence are much less significant now than they were in the 1960s and 1970s, or that legislation has largely taken the law in many of the directions that the courts were straining towards in these earlier decisions: with Parliament now in the driving seat the judges can relax and enjoy the scenery; they may even sometimes apply the brakes".

[996] Anonymous "Unions as Juridical Persons" (1957) 66 *Yale LJ* 712 712 n1.

[997] Text as paraphrased from the actual wording of subs 1(a) of the TULRCA – see further subs 1(b) for reference to union federations/affiliations.

[998] Grunfeld (1958) *J Pub Law* 291.

> corporate bodies like companies. It was suggested again by the Donovan Commission in 1968. On both occasions it was strongly resisted by the unions themselves. It has been argued that a corporate model would be inappropriate for trade unions because they are not 'top-down' hierarchical organisations, as companies are. In a trade union, it is said, policy is decided by the members, and that drives the people at the top, you are ultimately accountable to and under the control of their members. This is only true up to a point: in most unions the officials are usually the people with the time and the information to initiate policy and, as in companies, they have the greatest control over communication with the members, and thus have considerable opportunities to persuade them to their point of view. However, a very good reason for resisting corporate status used to be that the internal affairs of companies are subject to a high degree of regulation and public scrutiny. Trade unions, as stated already, are suspicious of the law and would rather not have it meddling in their internal affairs. In the 1990s [and onwards], however, a good deal of regulation was introduced".[999]

Therefore, the interplay between the common law position – and that of statutory development – lies at the heart of understanding the status and legal nature of unions in Britain. Deakin and Morris describe it as follows:

> "At common law the legal nature of trade unions is based on an association of individuals bound together by a contract of membership which regulates the relationship between those members. Although this remains their legal basis, in reality they are subject to a complex overlay of statutory provisions which modify the common law position in most important areas" [1000]

The authors place the "significant features"[1001] (through statutory modification of the common law) of the status of unions into three categories: Firstly, statutory intervention[1002] has provided trade unions in Britain with "many of the attributes of incorporated bodies",[1003] this despite them not being incorporated. These include: (a.) The capacity to make and enter into contracts;[1004] (b.) To be able to sue and be sued

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[999] M Pittard "Reflections on the Commission's Legacy in Legislated Minimum Standards" (2011) 53 *JIR* 698 318.

[1000] Deakin & Morris *Labour Law* 807, [footnotes omitted].

[1001] 808.

[1002] 808 n230 cite subss 10(1)-(2) of the TULRCA, which states:

> "(1) A trade union is not a body corporate but – (a) it is capable of making contracts; (b) it is capable of suing and being sued in its own name, whether in proceedings relating to property or founded on contract of tort or any other cause of action; and (c) proceedings for an offence alleged to have been committed by it or on its behalf may be brought against it in its own name. (2) A trade union shall not be treated as if it were a body corporate except to the extent authorised by the provisions of this Part."

[1003] Deakin & Morris *Labour Law* 808.

[1004] In terms of subs 10(1)(a) of the TULRCA. See further Deakin & Morris *Labour Law* 808.

("whether in proceedings relating to property or founded on contract or tort or any other cause of action");[1005] (c.) Their being open to criminal prosecution;[1006] and finally, (d.) That judgments, awards and orders may be enforced against certain of the property held in trust for the union.[1007] Secondly, statutory protection is provided that absolves unions from the common law doctrine of restraint of trade.[1008] Third, since 1982 and the Employment Act of that year, trade unions have been potentially liable in tort for their actions, but now statutory limitations are imposed regarding the amount of damages that can be claimed from trade unions (in terms of section 22 of TULRCA).[1009]

5 3 3 The union-member contract

"A trade union is constituted by an association of individuals bound together by a contract of membership and the courts have jurisdiction to enforce this contract at the suit of union members."[1010]

This quotation sets the stage for an examination of the legal basis of the contract of membership, or union constitution[1011] in Britain during the years preceding the phase of legislative regulatory involvement.[1012] Prior to the passing of the Industrial

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[1005] In terms of subs 10(1)(b) of the TULRCA. See further Deakin & Morris *Labour Law* 808.

[1006] In terms of subs 10(1)(c) of the TULRCA. See further Deakin & Morris *Labour Law* 808.

[1007] See Deakin & Morris *Labour Law* 808 n232, which references subs 12(2) read with s 23 of the TULRCA – the latter for the definition of "protected property". Regarding the question of union property, says Selwyn *Employment* 617:

> "As, however, it [the union] has no 'legal' existence, property must be held by its trustees, and any judgment, order or award shall be enforced against the property held by the trustees." The author points out further [at 618] that s 10 TULRCA has resulted in the British courts finding that a union, "not having a legal personality, could not therefore sue for libel in respect of its reputation, for s 10 states that a trade union shall not be 'or treated as if it were', a body corporate, and hence the claimant trade union did not have the personality which could be protected by an action for defamation" – in reference to *Electrical, Electronic Telecommunications and Plumbing Union v Times Newspapers* [1980] QB 585; [1980] 1 All ER 1097; [1980] 3 WLR 98.

See further R Upex et al *Labour Law* 2 ed (2006) 362, in this regard.

[1008] In terms of s 11 of the TULRCA.

[1009] The possible implications, and background hereto, is discussed at § 6 4 9 below.

[1010] Deakin & Morris *Labour Law* 985. See also B Hepple & S Fredman *Labour Law and Industrial Relations in Great Britain* 2 ed (1992) 227.

[1011] Deakin & Morris *Labour Law* 987.

[1012] IT Smith & A Baker *Smith & Wood's Employment Law* 10 ed (2010) 600 state:

> "In recent years the significance of union rules as a source of control of union activity has tended to be overshadowed by the legislative activity in this area, with a plethora of statutory provisions striking ever deeper into the structure and organization of institutions which were previously regarded as

Relations Act in 1971, the common law served as the primary means through which union conduct and affairs were regulated, with statutory intervention being reserved for the more public aspects of unionism, such as political activities and mergers.[1013] As discussed above, the 1971 Act saw a shift from the traditional non-interventionist approach, although "even then its provisions were largely concerned with requiring unions to have rules on particular matters rather than requiring them to take a specific form".[1014] The period between 1974 and 1979 saw a return to the pre-1971 position,[1015] but various legislative enactments were passed in the following years that served to gradually increase the statutory controls imposed on trade unions (this despite the best efforts of the Labour Party).[1016] Following further extension and amendments to the original provisions of the Trade Union Act of 1984, the short-lived CROTUM was created in 1988, which was empowered to assist individuals who wished to institute legal proceedings against their unions. The enactment of TULRCA in 1992 was the next major legislative attempt to facilitate the regulation and control of

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autonomous." With this being said, the authors [Smith & Baker *Employment* 600] opine that "the common law on union rules and judicial intervention is still of importance, first because common law actions may still have a considerable impact… and, secondly, because the statutory provisions for the most part build upon the common law foundations rather than replacing it."

[1013] Hepple & Fredman *Industrial Relations* 716 n2 explain that the courts initially viewed property rights as the basis of judicial intervention in the relationship, with the contractual basis only being established as late as 1952 in *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329 (discussed at § 5 3 3 2 below). See in this regard Elias & Ewing *Union Democracy* 23-25; R Kidner *Trade Union Law* 2 ed (1983) 16.

[1014] Deakin & Morris *Labour Law* 985. Elias & Ewing *Union Democracy* 11-12 state that the 1971 Act "imposed a detailed system of regulation of internal union affairs which was the complete antithesis to the policy of the 1871 legislation". See further L Wedderburn "Labour Law and the Individual in Post-Industrial Societies*"* in KW Wedderburn et al (eds) *Labour Law in the Post-Industrial Era: Essays in Honour of Hugo Sinzheimer* (1994) 13 20, who states the following: "Judicial interventionism in the 1960s threatened to upset the balance apparently forged in the preceding century… The new legislative threat was expressed in a repressive Act of 1971 which appeared to try to cast aside the 'attitude of abstention which was the outstanding virtue of British law'. More generally, this was a moment when the British middle class upon whose 'acquiescence' the balance had rested, began to return to its earlier hostility against trade unions" [footnotes omitted].

[1015] As discussed above (§ 5 2 5), the Labour Party (having returned to power) passed the pro-labour TULRA in 1974. However, the EA 1982 repealed many of the provisions contained in the 1974 Act and served to restore the position advocating increased union accountability that was first established with the Industrial Relations Act of 1971. One example of this statutory readjustment, was the repeal of s 14 of the TULRA, by subs 15(1) of the 1982 Act, which eliminated the principle limiting liability in tort to union officials only, and not the union, as originally introduced by the Trade Disputes Act in 1906. See Kidner *Union Law* 161 and Kidner *Union Law* 161 n32.

[1016] Elias & Ewing *Union Democracy* 11.

union affairs and today (as amended) remains the cornerstone when considering trade union matters.

While the reasons for legislative intervention were numerous,[1017] one central theme remained constant: The need for statutory enforcement of democracy within the union structure was founded on recognition of the importance of accurate representation by union leaders and officials, the protection of members' rights, and the proper accountability for the use of union power.[1018] This was so particularly in light of modern trade unions' privileges and immunities (and the role that they fulfil within the broader society).[1019] But what remains to be considered in greater detail, was the underlying reason for *judicial* intervention based on common law principles prior to legislative intervention – in short, what justification(s) was put forward by British courts that resulted in the union-member relationship being increasingly considered?

5 3 3 1 The reasons underlying judicial intervention

One method to promote union member protection was by means of regulating the union constitution[1020] (or rule book, as it is frequently referred to) and by implication, the contract of membership. The reason for this was simple – the union constitution remains the basis of the relationship between the union and its member.[1021] But what

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[1017] Wedderburn "Individual" in *Post-Industrial* 20-21.

[1018] Deakin & Morris *Labour Law* 986. C Barrow *Industrial Relations Law* 2 ed (2002) 112 states: "The Conservative Government elected in 1979 believed that intervention in the internal democratic process of trade unions was justified for several reasons. Most importantly, not all trade unions maintained the system of direct elections to senior trade union positions favoured by the new administration. There was also, at this time, heavy media and Government criticism of the militant leadership of many unions. It was thought that the existing common law was too weak to prevent these and representative 'union barons' from manipulating the rule book to retain power at the highest levels of the union. Therefore, legislation was necessary in order to give effective control of the union back to its membership and to establish a minimum standard of democracy" [footnotes omitted].

[1019] See Deakin & Morris *Labour Law* 985–986 (barring the application of a specific statutory provision).

[1020] Deakin & Morris *Labour Law* 987.

[1021] See Collins et al *Labour Law* 491 who cite *Goring v British Actors Equity Association* [1987] IRLR 122 in confirmation of the function of the rule book and state the following:

> "The starting point [of the law being used to regulate the government and administration of trade unions] is the rule-book which is enforceable in the courts as a contract between the trade union and individuals". Smith & Baker *Employment* 600 add in this regard: "Traditionally the main source of legal control of internal union affairs has been through the union's rule book, which is both the constitution of the union, defining and delimiting the powers enjoyed by the union, its officers and officials, and also the basis of the contract of membership which exists between the union and its members."

was it that changed, if anything, that so sharply brought union member protection into the focus of the courts from the 1950s onwards? The answer to this question lies, as always, across a broad swathe of internal and external influences.[1022] First and foremost of these would be the range of political and socio-economic changes that were taking place across Britain at the time – highlighted and addressed in the opening sections of this chapter. It goes without saying that whereas judicial systems strive towards objectivity, impartiality and neutrality, they cannot (nor, arguably, should they) remain completely unaffected by the occurrences and attitudes present within the broader society – particularly in a field as "human" as industrial relations. The continued dominance of British trade unions, fostered in no small part by the high prevalence (then) of closed-shop agreements, meant that were a member to fall afoul of his/her union, the effects would be far-reaching and significant.[1023] In short, the power of British trade unions, mixed in with the depressed economic conditions of post-war Britain and the vulnerability of a trade union member against the collective might of employer, union and economy alike, saw a tipping point reached and a judicial system becoming more focused on natural law and public policy in order to protect the rights of individual trade union members.[1024]

[1022] With due acknowledgement of attempts at summarising such a multitudinous topic running the risk of over-simplification.

[1023] As explained by RW Rideout "Responsible Self-Government in British Trade Unions" (1967) 5 *BJIR* 74 74:

> "Relative to the enormous industrial, social and political power that they possess, the responsibility of British trade unions has very few parallels."

In commenting from a more contemporary timeframe, and in exploring the underlying reasons for the statutory intervention, Deakin & Morris *Labour Law* 1022 state:

> "In relation to access to union membership, in the past the closed shop has constituted the most powerful argument for constraining unions' capacity to act autonomously, given that denial of union membership could reduce or remove completely the access of the individual to the labour market."

With this being said, the point needs to be emphasised that the drastic consequences facing an individual upon being expelled from their union, was by no means new. In the 1923 decision of *Blackall v National Union of Foundry Workers of G.B. and Ireland* [(1923) 39 T.L.R. 431] – as cited by C Grunfeld *Modern Trade Union Law* (1966) 179 – Coleridge J is quoted as saying of the effect of expulsion, that it amounts to "a sentence of industrial death".

[1024] Elias & Ewing *Union Democracy* 268, in exploring the differing approaches to theories of union democracy – specifically the distinction between the "lawyer" [in which can be included, it is submitted, the judicial/legal discipline in its entirety] and the "social scientist" – state as follows:

> "Generally they [lawyers] have not been so concerned to develop a comprehensive theory of union democracy but have focused on certain aspects of it only. Their special concern has been with the individual, an almost instinctive response, perhaps, of their training in the traditions of the common law. *It is the cry of individual oppression to which they are most carefully attuned*. Consequently,

Kidner, in speaking on this point in 1976, said:

> "The conflict between individual freedom and the collective interest of a trade union will be felt most acutely in relation to matters such as the closed shop and internal union discipline, although as will be seen the problem manifests itself elsewhere. Selznick[1025] has pointed out that 'in recent years we have seen a transition from pre-occupation with freedom *of* association to a concern for freedom *in* associations. This renewed awareness stems from a realisation that the private organisations can be more oppressive than the state'."[1026]

The courts accordingly re-entered the realm of internal union-member relations after a prolonged absence. The impact thereof was to resonate throughout British industrial relations and, arguably, still does.

5 3 3 2 The contractual starting point – Lee v Showmen's Guild

One of the key actors in shaping this area of the law through several highly-significant decisions in which he presided was Lord Denning (Denning, MR).[1027] Elias

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> they have stressed the rights and guarantees which will secure that the individual union member is fairly treated by his or her union. This approach lays stress upon a different relationship within the union, that between the individual member and the organization. The lawyer then emphasizes member protection from abuse of power by the union, whereas the social scientist emphasizes member control" [my emphasis; footnotes omitted].

See further Smith & Baker *Employment* 602; Deakin & Morris *Labour Law* 985, 1021-1022.

[1025] Selznick P, P Nonet & H Vollmer *Law, Society, and Industrial Justice* (1969) 38 – see R Kidner "The Individual and the Collective Interest in Trade Union Law" (1976) 5 *ILJ* 90 90 n4.

[1026] Kidner (1976) *ILJ* 90 [their emphasis; footnotes omitted]. Kidner (1976) *ILJ* 90-91 continues by stating:

> "In attempting to resolve such problems the courts have found themselves in a difficulty produced by their earlier attempts to regulate the activities of trade unions. In order to protect not only the interests of capital but also the interests of dissenting workers against the demands of unions, the courts adopted the dogma of freedom of contract, which prohibited any control of the way in which the capitalist or the worker disposed of or dealt with his 'property' – including his ability to work. However, they did not realise that individual freedom necessarily included the freedom to organise – the freedom to surrender that individual freedom. Thus while through political pressures at the turn of the century laissez-faire ideas gave way in industrial relations to acceptance of the right to collective security, the courts had firmly founded their common law control of the relationship of the individual to his association and freedom of contract. Encouraged by the rules formulated for social clubs the courts attempted to assert their neutrality in union membership cases, thus accepting the voluntary nature of membership and rejecting that it conferred a status worthy of protection. After a period of abstentionism, the courts and the legislature have again returned to the problem of the conflict between the collective and the individual interest" [footnotes omitted].

[1027] Baron Alfred Thompson Denning served as "Master of the Rolls" – the President of the Civil Division of the Court of Appeal and Head of Civil Justice – from 1962 until his retirement in 1982. By way of

and Ewing have this to say:

> "Although the germ of the contract basis of jurisdiction appeared early this century, it was not until the Court of Appeal decision in Lee v Showmen's Guild of Great Britain[1028] that the courts finally retraced the steps from the false trail laid by Lord Jessel MR,[1029] and established jurisdiction firmly on contract. Denning LJ led the way".[1030]

The authors quote from Denning's judgment in the *Lee* case[1031] where it was said:

> "[T]he power of this court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by committee in breach of contract, this court will grant a declaration that their action is ultra vires. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his; or to protect him in his right to earn a livelihood… But it will not grant an injunction to give a member the right to enter a social club unless they are proprietary rights attached to it, because it is too personal to be specifically enforced… That is, I think, the only relevance of rights of property in this connexion. It goes to the form of remedy, not to the right".[1032]

The proprietary (or property) rights being spoken of here was a necessary requirement (brought about through judgments like *Rigby*) through which the English courts sought the means to exercise their jurisdiction in protecting members' interests, but this was only possible (prior to Denning LJ and the *Lee* decision and the entry point via contract) if there were property rights at stake *vis-à-vis* the union.[1033]

While the approach of Denning in the *Lee* case certainly brought the use of a contract theory as the basis to find jurisdiction in internal union affairs to the forefront, many more judicial interpretations were required before an "overdue recognition of the contractual nexus" could be broadly accepted.[1034] So whereas the move towards a

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example, the prominent cases during the 1950s to 1970s highlighted above, that heralded the new era of judicial intervention in the UK, included *Lee v Showmen's Guild* (1952); *Bonsor v Musician's Union* (1956); *Faramus v FAA* (1963); *Rookes v Barnard* (1964); *Stratford v Lindley* (1965); *Torquay Hotel v Cousins* (1969); *Edwards v SOGAT* (1971); *Breen v AEU* (1971) *Midland's Cold Storage v Turner* (1972); *Heaton's Transport v TGWU* (1973); and *General Aviation Services v TGWU* (1975). Only two of these (namely *Rookes v Barnard* and *Midland's Cold Storage v Turner*) saw a bench on which Denning LJ/MR was *not* presiding.

[1028] 1952 2 QB 329.

[1029] In *Rigby v Connol* (1880) 14 Ch. D 482.

[1030] Elias & Ewing *Union Democracy* 24.

[1031] Lee v Showmen's Guild of Great Britain 341-342.

[1032] Elias & Ewing *Union Democracy* 24 n17.

[1033] Elias & Ewing *Union Democracy* 23. See further Kidner *Union Law* 4-5.

[1034] See in this regard Elias & Ewing *Union Democracy* 24-25; Deakin & Morris *Labour Law* 985.

contractual basis for judicial intervention in internal union affairs was introduced in the *Lee* case,[1035] the process also spoke to the changing of the tides in the ebb and flow of judicial intervention within British industrial relations and trade unions in general.[1036] Lynk, in his exposition of the relevance and importance of the *Lee* case (albeit from a comparative UK/Canada perspective), says of the decision handed down by the Court of Appeal that the "judges set about to rewrite the common law on the standards of natural justice in domestic trade union proceedings" and that "[i]n a landmark decision, the court, led by Lord Denning, reversed seventy years of judicial abstinence and ruled that the courts would now take a much more interventionist role in supervising trade

[1035] The case dealt with the expulsion of a member from a trade union, which, due to the presence of a closed-shop agreement, resulted in loss of employment by the plaintiff ("as a showman on fairgrounds in the United Kingdom controlled by the trade union" [at 329]). As pointed out by Collins et al *Text and Materials* 718, closed-shop agreements within the context of the British labour market have all but disappeared, due to the dramatic changes that have occurred within the trade union field itself, as brought about by the intervention of legislative control measures during the last two decades. See in this regard, s 137 of the TULRCA ("Refusal of employment on grounds related to union membership"), which, when introduced in 1992, effectively outlawed the closed-shop agreement, as it is unlawful to treat union membership as a pre-requisite for employment purposes. [For a historical perspective of the gradual decline in closed-shop agreements within British labour relations, see S Dunn "The Law and the Decline of the Closed Shop in the 1980s" in P Fosh & C Littler (eds) *Industrial Relations and the Law in the 1980's: Issues and Future Trends* (1985) 82 82-86, 97-98, 111-114; L Dickens "Deregulation and Employment Rights in Great Britain" in R Rogowski & T Wilthagen (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (1994) 225 225-238]. As discussed above, at the time of *Lee* though, the impact of being expelled from a trade union was drastic. The plaintiff claimed that the procedure resulting in his expulsion contained irregularities, in that local union committee who presided over the complaint of "unfair competition" levelled against him – in which he was found guilty of contravening Rule 15 (c) and consequently fined – had erred in their application of the rule [*Lee* at 331-332]. The *court a quo* agreed, finding that the Committee had acted *ultra vires* in their actions against the Plaintiff [*Lee* 332] [For further discussion regarding the *ultra vires* doctrine, see in general Elias & Ewing *Union Democracy* 97-102; and J Reid "Dismissal of the Paid Union Official" (1968) 31 *MLR* 214 214-218, in her discussion of the *Taylor v National Union of Seaman* case [1967] 1 All ER 767, involving the dismissal of a union official by his union]. The Union appealed, and the matter was heard before Somervell LJ, Romer LJ and Denning LJ, who in a unanimous decision agreed that the union committee had misinterpreted Rule 15(c), and incorrectly imposed the fine resulting in the subsequent expulsion.

[1036] RW Rideout "The Content of Trade Union Disciplinary Rules" (1965) 3 *BJIR* 153 153 says the following in this regard:

> "To those [branch officials of trade unions] who appreciate that the law changes by way of legislation but have difficulty in comprehending the power of the courts to make changes, it is often impossible to explain that the very fact of a change in attitude in the courts implies a change in the law… It is probable that few union officials realized that the attitude was changing in respect of membership until the post-war series of decisions such as *Lee v. Showmen's Guild*, *Abbott v. Sullivan* [[1952] 1 K.B. 189; [1956] AC 104; [1955] 3 WLR 788] and *Bonsor v. Musicians' Union*" [footnotes omitted].

union affairs."[1037]

In demonstration of this new willingness of the courts to enter into this, Denning LJ said as follows:

> "The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied. Outside the regular courts of this country, no set of men can sit in judgment on their fellows excepts so far as Parliament authorises it or the parties agree to it. The jurisdiction of the committee of the Showmen's Guild is contained in a written set of rules to which all the members subscribe. This set of rules contains the contract between the members and is just as much subject to the jurisdiction of these courts as any other contract . … They [the parties to the contract – *in casu* the union and its members] can, indeed, make the tribunal [union committee] the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law. They cannot prevent its decisions being examined by the courts. If parties should seek, by agreement, to take the law out of the hands of the courts and put it into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void".[1038]

With Denning LJ outlining the expanded boundaries of the court's common law jurisdiction in internal union affairs, the question that was posed was to what extent would the courts examine the decisions of internal union committees on points of law?[1039] This was answered through the Court examining the significant impact of trade unions upon members of a trade or profession,[1040] given the possibility of them "depriv[ing] a man of his livelihood" and "ban[ning] him from the trade in which he has spent his life and which is the only trade he knows".[1041] It was here that Denning LJ focused intently on the contract between the union and its member.

His point of departure was that the committees/tribunals responsible for the interpretation and enforcement of unions' rules and procedures – empowered as they were to act on any breach of them – were rules that were *imposed* upon the members, with the latter having "no real opportunity of accepting or rejecting" them.[1042] In what

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[1037] M Lynk "Denning's Revenge: Judicial Formalism and the Application of Procedural Fairness to Internal Union Hearings" (1997) 23 *QU LJ* 115 118. Lynk (1997) *QU LJ* 118 adds further: "The [Lee] decision not only firmly established the primacy of judicial control over the internal affairs of trade unions, it also introduced, through the doctrine of natural justice, a degree of legal formalism into the administration of trade union government that courts".

[1038] *Lee* 341, 342.

[1039] 343.

[1040] 343.

[1041] 343.

[1042] 343.

was to be the precursor for his increasingly held view, to be developed over the course of later judgments[1043] (culminating in *Cheall v APEX*,[1044] to be discussed at § 5 3 3 3), Denning MR reasoned that power held by the union over that of the member, was "in theory" based on contract: "The [member] is supposed to have contracted to give them these powers; but in practice [the member] has no choice in the matter … [the member] has to submit to the rules promulgated by the committee[/union]".[1045]

[1043] See for instance Denning MR's dissenting judgment in *Faramus v Film Artistes' Association* [1963] 2 QB 527, where he opined, in consideration of the "bylaws" of unions [at 540]:

> "They were held to be bad if they were repugnant to general law. In particular if they were in unreasonable restraint of trade. Just as in the case of contracts, so also in the case of trade associations, an unreasonable restraint of trade was held to be contrary to public policy and, therefore, void. If a man bound himself by a contract, it was *voluntary* restraint. If he was bound by a by-law, it was an *involuntary* restraint. In either case, however, the law was clearly established that, in all restraints of trade, when nothing more 'appears, the law presumes them bad'" (his emphasis).

This was followed by Denning MR's finding in *Edwards v Society of Graphical and Allied Trades* [1971] Ch 354 376 (the facts involved a member's expulsion from his union – due to an administrative error on the part of the union – and the member's damages claim due to loss of past and future employment), where Denning MR states:

> "I do not think this trade union, or any other trade union, can give itself by its rules an unfettered discretion to expel a man or to withdraw his membership. The reason lies in the man's right to work. This is now fully recognised by law. It is a right which is of especial importance when a trade union operates a 'closed shop' or '100 per cent membership': for that means that no man can become employed or remain in employment with a firm unless he is a member of the union. If his union card is withdrawn, he has to leave the employment. He is deprived of his livelihood. The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules, nor in the enforcement of them. The law has means at its disposal. A trade union exists to protect the right of each one of its members to earn his living and to take advantage of all that goes with it. It is the very purpose of its being. If the union should assume to make a rule which destroys that right or puts it in jeopardy – or is a gratuitous and oppressive interference with it - then the union exceeds its powers. The rule is ultra vires and invalid. Thus if the union should make a rule purporting to give itself uncontrolled discretion to expel a member without hearing him, that rule would be bad. No union can stipulate for a power to expel a man unheard."

Furthermore, his minority ruling in *Breen v AEU* [1971] 2 QB 175 190, as quoted by Smith & Baker *Employment* 601-602 (in their discussion of Denning's approach), where is said "Trade unions are not above the law, but subject to it. Their rules are said to be a contract between the members and the union. So be it … But the rules are in reality more than a contract. They are legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the courts just as much as a code laid down by Parliament itself".

[1044] *Cheall v Association of Professional Executive Clerical and Computer Staff* [1982] ICR 543, [1983] QB 126; [1983] IRLR 215, [1983] AC 180.

[1045] *Lee* 343.

5 3 3 3 Contract theories – the "fiction" of intervention

As a consequence, the courts would be prepared to examine decisions taken by unions in order to ensure that the law was correctly applied, inclusive of the question whether the rules of the union were correctly interpreted.[1046] Given the potentially serious ramifications that expulsion from a union could hold for an employee, it could only be permitted if the union-member contract, "on its true construction", provides that competency to the union in question.[1047] The key aspect of this approach was the *theory* surrounding the union-member contract and its apparent one-sidedness, as first put forward by Denning LJ in the *Lee* case. It was this theory that was, somewhat controversially, to permeate through so many of the key industrial relations' cases that made their way through the various courts of Britain during the height of trade union power – and it was this theory that was gradually to be seen as a "fiction".[1048]

[1046] 343.

[1047] 344. Denning LJ, in response to the argument put forward by the Counsel of the union – namely that it was for the union committee to "construe the rules, and that, so long as [the committee] put an honest construction on them, their construction was binding on the members, even though it was a wrong construction" – said further:

> "I cannot agree with that contention. The rules are the contract between the members. The committee cannot extend their jurisdiction by giving a wrong interpretation to the contract, no matter how honest they may be. They have only such jurisdiction as the contract on its true interpretation confers on them, not what they think it confers. The scope of their jurisdiction is a matter for the courts, and not for the parties, let alone for one of them" [*Lee* 344].

[1048] Elias & Ewing *Union Democracy* 25. It must be noted that Denning LJ himself referred to the fiction, in his judgment in *Cheall v APEX*, where he states:

> "Times out of number I have protested at the notion that the rules of a trade union constitute a contract between the member and the trade union. It is simply not true. *It is a fiction*. Often enough nowadays a man is compelled to join a trade union so as to be able to earn his living. He signs an application form which purports to bind him to the rules. But he hardly ever reads them. Or if he did, he would not understand them. They are dictated to him. He has no choice but to obey. To hold them to be a contract is far more a fiction than in the common standard form of consumer contract … The man is not even told, 'Take it or leave it.' He is told, 'You've got no choice. You must sign.'… Putting aside fiction and coming to the truth, it is this: The rules of a trade union are nothing more nor less than by-laws. They are binding on all the members whether they like them or not. Everyone has to sign on the dotted line. No member is allowed to strike out a single word or to make any exception to them. Being by-laws they are only binding so far as they are reasonable and certain" – see *Cheall v APEX* 543 555-556 [my emphasis].

It must however be mentioned that *Cheall v APEX* was overturned on appeal before the House of Lords [*Cheall Respondent v Association of Professional Executive Clerical and Computer Staff Appellants* [1983] 2 AC 180]. The crux of the House of Lords decisions, as per Diplock LJ, was focused on the validity of the Bridlington Principles (discussed at § 5 3 6 below), and how it amounted to a permissible agreement between unions – and did not need to allow for representation by an individual member. The matter then survived a further unsuccessful appeal to the European Commission of Human Rights

The basis for suggesting that a "fiction" allowed judicial intervention, becomes apparent when the union membership contract is analysed in light of modern contract forms.[1049] It is argued that trade unions' contracts of membership did *not* reflect traditional contractual ideologies. While the individual might have had the option of deciding whether or not to join a specific union,[1050] he or she would not have had the option of bargaining over the specific terms of the membership contract.[1051] There is seldom any chance of "middle ground" where the member could join *and* determine

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[*Cheall v United Kingdom* (1986) 8 EHRR CD 74] – where it was held [para 10] to involve "the act of a private body" and as such, "cannot engage the responsibility of the respondent Government". The decision of House of Lords (in similar fashion to what had transpired in *Faramus v FAA*) that saw a Denning verdict again overruled, sees Barrow *Industrial Relations* 72-73 – in his discussion of Denning's approach under the heading "The rule book and the bylaw theory" – summarise Lord Diplock's (House of Lords) unanimous judgment in *Cheall v APEX* as follows:

> "Diplock further rejected the whole notion of the bylaw thesis by saying that remedies designed for use in administrative law could not be evoked to control union decisions where the relationship between the union and the membership was clearly based on contract" [Barrow *Industrial Relations* 73].

However, the apparent definitive nature of this statement, is contextualised by Diplock's conclusion from the *Cheall* judgment, where he said:

> "But I know of no existing rule of public policy that would prevent trade unions from entering into arrangements with one another which they consider to be in the interests of their members in promoting order in industrial relations and enhancing their members' bargaining power with their employers; nor do I think it a permissible exercise of your Lordships' judicial power to create a new rule of public policy to that effect. If this is to be done at all it must be done by Parliament. Different considerations might apply if the effect of Cheall's expulsion from A.P.E.X. were to have put his job in jeopardy, either because of the existence of a closed shop or for some other reason. But this is not the case ... My human sympathies are with Mr. Cheall, but I am not in a position to indulge them; for I am left in no doubt that upon all the points that have been so ingeniously argued, the law is against him and that accordingly this appeal must be allowed and the judgment of Bingham J. restored" [*Cheall v APEX* 191].

See further Collins et al *Labour Law* 519-520.

[1049] The nexus for the discussion surrounding the "fiction" that is to follow, is primarily referenced from that of Elias & Ewing *Union Democracy* 23-61 (as found within their second chapter on the "Contract of Membership"), which remains widely recognised as the seminal work on this topic (and the broader analysis of trade unions in Britain during the mid-1980s).

[1050] To a large extent, this freedom of choice would have depended on the presence (or not) of a closed- (or agency) shop agreement, as considered by Denning MR in *Cheall v APEX* [1982] IRLR 362, see in general KD Ewing "Judicial Control of Union Rule-Book – Expulsion of Member" (1983) 42 *Camb LJ* 207 207-209, and Elias & Ewing *Union Democracy* 26, 260-267. As mentioned above (at § 5 3 3 2), s 137 of the TULRCA has all but put an end to the "closed-shop" concept.

[1051] As succinctly put by Rideout (1967) *BJIR* 79:

> "Once the rules [of the trade union] have been adopted they will normally constitute the terms of the contract between the union… and each member. As he joins he will be deemed to have accepted them. If he does not wish to accept them he will not be permitted to join."

his own conditions of contract.[1052] As stated by Grunfeld:

> "On his application being accepted, the applicant becomes a new member of the union, or, in legal terms, a new party to the contract of association, and he is bound by the rules and due amendments of them, whether or not he reads them all or personally approves of them. In other words, the trade union rule book is a type of imposed standard contract, or contract of adhesion, exemplifying not the classical function of contract as the overt expression of consent by parties to be bound by certain known, negotiated terms, but rather its more recently evolved function of providing a quasi-legislative code to which the newcomer accedes and under which the affairs of an institution like a trade union may be run and regulated."[1053]

Similarly, Selznick reasons that union members entered into what amounted to a "contract of adherence", "which involves a continuing relationship of terms dictated by the union and by which the members are bound whether they approve of them or not".[1054] Elias and Ewing furthermore make the point, given the organised labour environment at the time, that a member "will often have no knowledge of the terms at all" – and that despite statutory requirements that the rule book "shall at the request of any person" be so provided[1055] – "in practice a proportion of the members will not receive a rule book at all".[1056]

However, despite the evident imbalance in the scope and extent of bargaining power between unions and their members, Elias and Ewing reason that the contract of membership should not be simplistically equated with standard form contracts.[1057] An important distinction revolves around the fact that the terms and conditions imposed by the union are not "oppressive standards inflicted upon members by powerful and self-interested union officials".[1058] Furthermore, it must be kept in mind that a union's terms of contract are mostly designed to serve the needs of the union as a whole and to benefit all the members through facilitation of the union's daily

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[1052] Elias & Ewing *Union Democracy* 260-267.
[1053] C Grunfeld "British Report" (1964) 18 *Rut L Rev* 343 347.
[1054] P Selznick et al *Law, Society, and Industrial Justice* (1969) 53, as quoted in Elias & Ewing *Union Democracy* 26.
[1055] This is in terms of s 27 of the TULRCA.
[1056] Elias & Ewing *Union Democracy* 26.
[1057] 26 reason that whilst a future-member does not get to choose or negotiate about the wording and content of the clauses in the membership contract, the latter can still not be equated to a standard form contract, simply because of the union's unique relationship with its members, which is completely unlike any other potential relationship between, for example, future business partners.
[1058] Elias & Ewing *Union Democracy* 26.

functioning and scope of operations. In addition, while the specific manner of operation differs from union to union, what remains constant is that members – given acknowledgement to the related theories of union democracy – essentially determine the terms of the union constitution. They elect the officials and these officials, as delegates from the various local branches, formed part of the General Council or Congress that annually had opportunity to amend or introduce specific terms that were of concern to the general membership.[1059] While not attempting to deny the considerable influence that the senior structures of a trade union and their full-time officers might wield,[1060] any changes or new terms still have to receive a reasonable level of acceptance within the broad, general membership.[1061] Finally, the authors raise an additional important point, namely that the same persons responsible for drawing up the terms and conditions of the contract are also bound by them, a characteristic that is absent from standard form consumer contracts.[1062]

Initially then, the point of departure was that a contract exists between the union and member, which can only be enforced at the behest of either of these parties. Therefore, the jurisdiction of the courts was initially limited to granting relief only when one of these parties asserted their rights in terms of the contract. No outsiders were seen to have any legal interest in internal union affairs and in this manner the principle of union autonomy was reasonably assured.[1063]

With the contract as basis, Elias and Ewing argue that the British courts therefore adopted three main approaches to control internal union affairs:[1064] (i) The judicial

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[1059] 26.

[1060] Collins et al *Labour Law* 502.

[1061] Elias & Ewing *Union Democracy* 27.

[1062] 27.

[1063] 27. However, even then, the possibility for what has been described as the "Trojan Horse", was recognised. Elias & Ewing *Union Democracy* 27 (quoting O Kahn-Freund "Trade Unions, the Law and Society" (1970) 33 *MLR* 241 266 in reference to his "trauma of the Trojan Horse") explains this as arising where an employer or other third-party group influences a member to institute an action against his/her union, often by means of financial assistance being offered by the former, in the hope that this will inhibit union effectiveness. Within the contemporary British system, there is of course nothing unusual regarding a claim by outsiders of having interests in the internal operation of unions, in light of the myriad of statutory measures presently part of the system including, *inter alia*: statutory bodies such as CROTUM and CPAUIA, statutory provisions pertaining to industrial action balloting, election and political fund voting, not to mention the TULRCA provisions that have specifically imbedded the rights of outsiders to take action (such as s 235A).

[1064] Elias & Ewing *Union Democracy* 27.

interpretation of the terms of contract (as mentioned earlier);[1065] (ii) The addition of terms under the guise of the "implied terms" doctrine;[1066] and, finally, (iii) The annulment of contractual provisions that were deemed to be contrary to public policy.[1067]

5 3 3 4 The imperative of the union constitution

Writing in 1964, Grunfeld stated (about what is still the legal position in Britain today):

> "That the rule book, the constitution of the trade union, occupies a central position of legal importance in the government and administration of British trade unions is apparent…it defines the administrative apparatus of the union, lays down the rules for the selection of candidates for union office and the conduct of elections, defines the procedure for meetings, confers its totality of powers on union officials and committees, determines the sources of union income, defines the qualifications for the receipt of benefits, lays down the rights of individual members in the general government of the union and in their relations with officials and other members, and provides for any other aspect of union government and administration. Subject to certain reservations, it should be stressed that

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[1065] Here, as per Elias & Ewing *Union Democracy* 28, *Lee v Showmen's Guild* serves as example.

[1066] As per Elias & Ewing *Union Democracy* 30, the *Bourne v Colodense* decision (discussed in more detail at § 5 3 3 5 below), serves as example here. Furthermore, Deakin & Morris *Labour Law* 989 make reference [at 989 n22] to *AB v CD* [2001] IRLR 808, where the High Court was obliged to consider past practices in terms of elections in the National Union of Rail, Maritime and Transport Workers Union (RMT), so as to add to its Rule 13(1), given an election tie between officials vying for union office.

[1067] Elias & Ewing *Union Democracy* 36-37 cite *Cheall v APEX* (at § 5 3 3 2 above) as example hereof, but the arguments put forward in terms of *Faramus v FAA* and *Edwards v SOGAT* (also at § 5 3 3 2 above), could no doubt be added as a further example. Regarding the traditional hesitancy of the British judiciary in meddling too directly in the contractual relationship between the union and its members, one of the key "devices" that was utilised, is the so-called mercantile-law derived *Foss v Harbottle* rule [1843] 2 Hare 461, which, in the words of Smith & Baker *Employment* 607 involves the following requirements:

> "(1) [T]he proper claimant in such a case is the [union] itself, not an individual member and (2) that if the alleged wrong is something which might be ratified by a simple majority vote of the members, no individual member may maintain an action in respect of that matter, the logic being that if the majority decide to ratify the wrong, there is nothing left to complain of, whereas if the majority do not ratify the wrong, there is then no reason why the [union] itself should not sue."

Says Collins et al *Labour Law* 503-504 of its use:

> "This is a difficult issue: on the one hand the rule in *Foss* v. *Harbottle* undermines the desire to ensure that trade unions are governed in accordance with their rules; on the other hand, it gives effect to the equally compelling principle of autonomy in trade union government. But, for all its latter potential, in practice it is the pull of the former that usually prevails".

Regarding the *Foss v Harbottle* rule, see further Elias & Ewing *Union Democracy* 112-119, 131-132 and Kidner *Union Law* 23-24

union officials and committees are able in law to exercise only those powers that are defined in the rule book and only in the manner so defined. If there is no rule, there is no power."[1068]

As is evident from the above, the key to unpacking the union-member relationship remains one of considering the contract that arises between the parties, premised as it is upon the constitution/rule book. This membership contract comes into existence when individuals become members of a trade union, sign the various forms allowing for the deduction of membership fees and agree to comply and be bound by the union constitution.[1069] Deakin and Morris state that the scope of application of the constitution is generally broad in nature and includes aspects such as the rights and obligations of the individual union members, the powers and structure of the various bodies and committees within the union, the purposes for which union funds can be expended and the powers and scope of union officials.[1070]

Regarding this point, Kidner states that "the duties owed by officials to members depend on the rule book and no duty will be imposed without a rule, and where a duty does exist the content of that duty is determined by the rule book".[1071] Importantly, however, he makes further reference to *Oddy v TSSA*[1072] and an unsuccessful claim by a trade union member who relied on one of the objects clauses of the union, namely "to improve the conditions and protect the interests of its members".[1073] In this case, the NIRC found that despite the claimant's lack of promotion (and his union's unwillingness to progress his complaint),[1074] the provision in question was not a "'rule' which would found an action".[1075]

[1068] Grunfeld (1964) *Rut L Rev* 356-357, [footnotes omitted].

[1069] Deakin & Morris *Labour Law* 987. See further Grunfeld (1964) *Rut L Rev* 346-347 where is stated: "Since the trade union rests on a contract of association, becoming a union member involves, in law, becoming a party to the contract of association that constitutes the union. The normal method of joining a union is by filling in and signing an application form which contains a statement that the applicant agrees to be bound by both the existing rules of the union and future amendments duly passed under the rules."

[1070] Deakin & Morris *Labour Law* 987-988. See further Collins et al *Text and Materials* 659; Hepple & Fredman *Industrial Relations* 223.

[1071] Kidner *Union Law* 20, [footnotes omitted].

[1072] Oddy v Transport Salaried Staffs Association [1973] ICR 524 – as per Kidner *Union Law* 20 n38.

[1073] As per *Oddy v TSSA* 528 – with the argument being that failure to comply in terms of this alleged rule, fell foul of subs 107(3)(b) IRA 1971.

[1074] As per *Oddy v TSSA* 526.

[1075] The NIRC was in agreement with the original finding of the Industrial Tribunal, where was said, *inter alia*, the following:

"If the [employee] is correct, then his principle would mean that the tribunal would have to investigate,

The union's rule book will ordinarily set out the particular terms of the contract and may vary considerably in the degree of detail that it specifies.[1076] And, at risk of stating the obvious, it is the trade unions' themselves that are responsible for drafting and amending their own constitution/rule books.[1077]

5 3 3 5 Custom, practice, express and implied terms

Regardless of the comprehensiveness (or otherwise) of the constitution,[1078] its conditions and regulations can be further supplemented by implied terms as well as the customs and practice of the union in question.[1079] In this regard, reference may be made directly to the words of Wilberforce LJ in *Heaton's Transport*, where it is said:

> "The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by parliamentary draftsmen. Courts of law must resist the temptation to

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for example, every complaint of slackness or delay in dealing with everyday correspondence as not protecting the interests of the members and this, we feel, was not the intention of Parliament when enacting these provisions" – as per *Oddy v TSSA* 529.

[1076] Hepple & Fredman *Industrial Relations* 230.

[1077] Smith & Baker *Employment* 600. The authors do address the obvious exception to this general approach, as arising where statute requires specific provisions to be incorporated into the trade union membership contract – for example, the "right to terminate membership on giving reasonable notice and complying with any reasonable conditions", being implied in such contracts by virtue of s 69 of the TULRCA [Smith & Baker *Employment* 600].

[1078] Smith & Baker *Employment* 601 state in this regard:

"While union rules have a vital role as the union's constitution, regulating the union's powers and duties towards its members, there may not in practice be drafted with the clarity of a legal or Parliamentary document, particularly as many rules may be of long-standing and may have been subject to periodic amendments."

[1079] Deakin & Morris *Labour Law* 988. See also Kidner *Union Law* 4. Kidner *Union Law* 16 discusses the *Heaton's Transport* case, which saw the House of Lords reason that custom and practice may supplement the terms and conditions of the rule book. The effect is that the rule book can no longer be regarded as the exclusive constitutional code, but if there is sufficiently strong evidence, it can be supplemented by custom and practice and the common understanding of members. See further Kidner *Union Law* 18. Smith & Baker *Employment* 601 on this point, state:

"[P]rimarily in the context of rules setting up the general running and constitution of the union, the courts have recognized that they should not expect legal precision and so may have to take a broad approach to the construction, looking for the general intent and purpose of the provisions in question; this approach may allow a court to take the bare rules, as in Heaton's Transport, where the question of the scope of the authority of a shop steward in a particular union was considered by the House of Lords in the light of customary arrangements, the union's rules being unclear on that point". Importantly, Smith & Baker *Employment* 601 n231 make the point that since vicarious liability of unions (considered in *Heaton's Transport*) "is now governed by statute", where legislation does not regulate the acts involved, the aforementioned rules as set out by the House of Lords still apply.

> construe them as if they were; for that is not how they would be understood by the members who are the parties to the agreement of which the terms, or some of them, are set out in the rule book, nor how they would be, and in fact were, understood by the experienced members of the court. Furthermore, it is not to be assumed, as in the case of a commercial contract which has been reduced into writing, that all the terms of the agreement are to be found in the rule book alone: particularly as respects the discretion conferred by the members upon committees or officials of the union as to the way in which they may act on the union's behalf."[1080]

The court made a further observation about how union members should understand the content and operation of their unions' rules. In quoting from the TUC's Handbook on the IRA 1971, the court stated:

> "Trade union government does not however rely solely on what is written down in the rule book. It also depends upon custom and practice, by procedures which have developed over the years and which, although well understood by those who operate them, are not formally set out in the rules. Custom and practice may operate either by modifying a union's rules as they operate in practice, or by compensating for the absence of formal rules. Furthermore, the procedures which custom and practice lays down very often vary from workplace to workplace within the same industry, and even within different branches of the same union."[1081]

This in mind, the court found as follows with regard to the question whether the union could be held liable for the actions of its shop stewards on the basis that authority was conferred on them by the union: "[i]f authority to take a particular type of action is not excluded by the rules, and if such authority is reasonably to be implied from custom and practice, such authority will continue to exist until unequivocally withdrawn."[1082] The court also noted that while "custom and practice may moderate the operation of a rule it cannot entitle a union to act in conflict with it".[1083]

The approach in *Heaton's Transport* did give rise to interesting interpretations in

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[1080] *Heaton's Transport (St Helens) v TGWU* [1973] AC 15 100G-101B.

[1081] 101B-D.

[1082] 101F. The House of Lords, in the judgment handed down by Wilberforce LJ, accordingly overturned the Court of Appeal's judgment, as per Denning MR, Buckley LJ and Roskill LJ – who had ruled in favour of the TGWU, concluding (for differing reasons) that the shop stewards in question had acted of their own accord, without the express or implied authority from their union. Says Hepple (1972) *ILJ* 209 of this outcome:

> "The vagaries of the law have already been illustrated by the unanimous reversal [by the House of Lords] of a unanimous decision of the Court of Appeal."

[1083] Deakin & Morris *Labour Law* 988 n21, cite two cases in support of this view: *Porter v NUJ* [1980] IRLR 404 and *Taylor v NUM* [1985] IRLR 99.

subsequent court decisions, none the least of which was the Court of Appeal's finding in *Bourne v Colodense Ltd*.[1084] The result saw Wedderburn reason that the court in essence constructed "a new contract between the member and his union, and compel him to enforce it at the behest of the employers in their favour".[1085] In this case, following an unsuccessful action against an employer, a costs order was made[1086] and, as explained by Kidner, "[t]he costs were not paid and the employers mounted this action to appoint a receiver to take over the worker's rights against his union, claiming that there was a contract between the worker and the union that the union would indemnify him for any costs awarded against."[1087] With reference to *Heaton's Transport*[1088] and the objects clause of the union itself,[1089] Lawton J accepted that whereas the union (NATSOPA[1090]) had not expressly told the employee (Bourne) that the union would indemnify him against any costs which he might be ordered to pay,[1091] there was nonetheless "an understanding, amounting in law to a contract, that the union would discharge any liability for costs which the plaintiff might incur".[1092] To date,

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[1084] *Bourne v Colodense Ltd* [1985] IC.R. 291; [1985] IR.L.R. 339 CA (Civ Div).

[1085] L Wedderburn *The Worker and the Law* 3 ed (1986) 747.

[1086] The facts, briefly stated, were that a group of members, with the assistance of their union, saw a 42-day trial against their employer for the alleged use of toxic substances in the workplace – which the members and union lost – resulting in a costs order that totalled £79,000.

[1087] R Kidner "Trade Union Law - Implied Contracts between Members and Unions: Bourne v. Colodense Ltd." (1985) 14 *ILJ* 124 124.

[1088] The key application was that an attempt must be made to construe the union rules as the members would, and to not assume "that all terms of the agreement between the members and the union are to be found in the rule book" – see *Bourne v Colodense Ltd* [1985] IC.R. 291; [1985] IR.L.R. 339 CA (Civ Div) 299.

[1089] See *Bourne v Colodense Ltd* [1985] IC.R. 291; [1985] IR.L.R. 339 CA (Civ Div) 299, where the following is stated:

> "The objects of the union are set out in rule 2. The general effect is for the union to try to look after the interests of the members at work, in sickness, in old age, and in adversity. One circumstance of adversity is when a member requires legal advice. This is specifically dealt with in rule 2(1)(g). The material part is in these terms: 'To provide legal advice to members for themselves, their wives and children … Legal advice also to be made available to some members' wives up to three months after death of member for the purpose of clearing up members' affairs, and assistance to members instituting legal proceedings in connection with matters pertaining to their employment or securing compensation for them for injury by accidents.' In my judgement, members would construe this rule as meaning that the union would stand by them if they had to institute legal proceedings to secure compensation for injury by accident – and standing by them would not mean deserting them when faced with an order for the payment of costs".

[1090] The National Society of Operative Printers Graphical and Media Personnel.

[1091] *Bourne v Colodense Ltd* [1985] IC.R. 291; [1985] IR.L.R. 339 CA (Civ Div) 299.

[1092] 299.

this case has still not served as precedent for any subsequent matters involving unions,[1093] but it does demonstrate the extent to which the British judiciary was prepared to protect workers/members (and employers for that matter) against any perceived unfairness involving organised labour.

It may be said, therefore, that a whole host of judicial rules and practices pertaining to the interpretation of contractual clauses have developed within the British common law system through their case law, a development also of relevance for purposes of this study.[1094] This is so because the South African legal system has (also understandably) developed its *own* rules and procedures with regard to interpreting internal rules of South African unions (discussed in more detail in chapters 11 and 12 below). What remains to be considered in the remainder of this section, are further examples of intervention by the British courts in the internal functioning of organised labour – and the dynamic of the union-member relationship.

5 3 4 Judicial intervention in trade union internal governance

5 3 4 1 Members against unions

As is to be expected, the British courts have been required to intervene in the internal affairs of trade unions on numerous occasions and for numerous reasons. But, says Grunfeld in this regard:

> "While it is true that the powers of union officials are exhausted by the provisions of the rule book, it is not true that the union rules exhaust the rights of the individual member against his officials. The general law does nothing to supplement the rule book powers of union officials vis-à-vis members, but members' rule book rights are powerfully reinforced by doctrines of 'natural justice' and public policy, as well as by certain aspects of the law of tort".[1095]

[1093] At the time of writing, the most recent decision citing *Colodense* was a 2014 commercial court matter, *Cruz City 1 Mauritius Holdings v Unitech Ltd* [2014] EWHC 3131 (Comm); [2015] 1 All ER (Comm) 336; [2015] 1 B.C.L.C. 377; [2014] Bus. L.R. D25; QBD.

[1094] See in general Deakin & Morris *Labour Law* 988-992 – and their reference to the "implied term", "interpreting the scope and application of union rules" and "striking out on public policy grounds" approaches; Kidner *Union Law* 18-19 – and his analysis of *Heaton's Transport* et al; Elias & Ewing *Union Democracy* 96-110 – discussing the *ultra vires* rule, implying powers, intepreting the rule book and (the relatively rare) *intra vires* breaches; Hepple & Fredman *Industrial Relations* 230-232 – discussing "reasonable interpretation" and public policy considerations to supplement the rules; and finally, Smith & Baker *Employment* 600-602 – analysing the implications of *Heaton's Transport*, and the Denning approach.

[1095] Grunfeld (1964) *Rut L Rev* 357.

For example, since the rule book has a contractual effect, the member may sue the union should the latter be in breach of it.[1096] The classic manifestation of this possibility was the series of cases involving the British National Union of Mineworkers (NUM) during the height of the coalminers' strike in the mid-1980s.[1097] The NUM matters involved various actions taken by union members on the basis of the alleged non-compliance by the union with its own (national and local) internal rules and procedures in (initially) calling for strike action against the National Coal Board, followed by an attempt to use union funds for the purposes of "strike pay" [contributions to striking workers, in lieu of their wages], and (furthermore) attempting to amend its internal (national) rules to allow for expulsion of those members who refused to join the strike.[1098]

Hopkins v NUS (National Union of Seamen)[1099] in turn involved a member challenging the union over alleged non-compliance with union rules in attempts to levy a member fee to financially assist the embattled NUM, following the significant costs (to the point of sequestration) that had arisen in the aforementioned court actions. The central point was that the national call for the strike by NUM had failed to comply, in specific geographical areas/instances, with specific internal national and local union rules. Upon being challenged, the strike was held to be unlawful.[1100] While these events, involving as they did members acting against the actions and decisions of their own unions, were certainly not unique, they were notable when viewed against the particular political and societal backdrop of the mid-1980s Britain. As discussed above,

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[1096] Kidner *Union Law* 19; Deakin & Morris *Labour Law* 988. Says Pitt *Employment* 334-335 in this regard:

> "The contract of membership confers to some extent the right to have the business of the union run in accordance with the rules, but as with the enforcement of most contracts, this right is essentially negative: it is a right to restrain action in breach of contract or to sue for breach of contract rather than a right positively to insist on the conduct provided for in the rule being carried out."

[1097] Specifically, *Taylor & Foulstone v NUM (Yorkshire Area)* [1985] IRLR 445; *Taylor v NUM (Derbyshire Area) (No. 1)* [1984] IRLR 440; *Taylor v NUM (Derbyshire Area) (No. 2)* [1985] IRLR 65; *Taylor v NUM (Derbyshire Area) (No. 3)* [1985] IRLR 99; *Clarke v Chadburn (No. 2)* (1984) and *Hopkins v NUS* (1985).

[1098] As per *Clarke v Chadburn (No. 2)* [1984] IRLR 350, [1985] 1 WLR 78.

[1099] *Hopkins v NUS* [1985] IRLR 157, [1985] ICR 268.

[1100] As succinctly put by Ewing (1985) *ILJ*, in his excellent analysis of the case law surrounding the so-called "great mining strike" – the unlawfulness meant that any instructions to union members to lay down their tools was unlawful; as was the use of union funds to further support the strike; and similarly, any attempts at expelling members for their non-support [Ewing (1985) *ILJ* 170].

if ever the British Government needed further affirmation of their attempts to "give the unions back to its members", these cases provided ample support. They furthermore underlined the role of the judiciary, here used as a tool to enforce compliance with the letter of the (internal union) law. The irony, after decades of union autonomy – built in no small part on the refrain of "we can manage our own affairs equally as well as any judicial mechanism"[1101] – was no doubt a bitter pill to swallow for one of Britain's most powerful unions.

There are further examples of proceedings involving members taking issue with their unions from a wide range of union activities. Smith and Baker[1102] provide a useful overview of matters involving irregularities committed by union leadership involving, *inter alia*, the holding of meetings;[1103] the right to appeal decisions of domestic union tribunals;[1104] the use of union funds;[1105] the amendment or alteration of union rules;[1106]

[1101] See in general the discussion by Rideout (1967) *BJIR* 74 74-86, where he commences his article by quoting from Grunfeld's evidence before the Donovan Commission:

> "'The unions should not be told when to hold elections or how to hold them. Let them go on as they have done in the past, improving their own procedures under various non-legal pressures. The capacity for responsible self-government lies at the root of the strength of trade unions in this country."

However, presciently, the author continues in the very next line with the following:

> "There exists behind this proposition, however, a number of assumptions which may well be called in question. Relative to the enormous industrial, social and political power that they possess, the responsibility of British trade unions has very few parallels. The question one must ask, however, is whether this is guaranteed. That is to say, does it exist because the leaders have so far been 'responsible' men, or is such responsibility inherent in the structure of the unions?" [Rideout (1967) *BJIR* 74].

With that being said, as indication of how dramatic the change in fortunes for organised labour in Britain was to be, inasmuch as it being inconceivable that unions were to forego this autonomy a mere decade later, Rideout (1967) *BJIR* 78 states further:

> "It is surely asking too much of its leaders to expect them to maintain a satisfactory system of responsible self-government, unless they are either compelled to do so by vigilance membership or are assisted in doing so by workable rules of government. There is, of course, one other method – outside *compulsion* – self-defeating and contrary to the whole sense of British industrial relationships and thus, fortunately, unlikely to be adopted."

[1102] Smith & Baker *Employment* 604.

[1103] *MacLelland v National Union of Journalists* [1975] ICR 116 – as per Smith & Baker *Employment* 604 n250.

[1104] *Hiles v Amalgamated Society of Woodworkers* [1968] Ch 440, [1967] 3 All ER 70; *Braithwaite v Electrical, Electronic & Telecommunications Union* [1969] 2 All ER 859, CA; *Loosely v National Union of Teachers* [1988] IRLR 157, CA – as per Smith & Baker *Employment* 604 n252.

[1105] *Drake v Morgan* [1978] ICR 56; *Thomas v NUM (South Wales Area)* [1985] 2 All ER 1, [1985] IRLR 136, [1985] 2 WLR 1081, [1986] Ch 20 – as per Smith & Baker *Employment* 604 n254.

[1106] *Taylor & Foulstone v NUM* and *Clarke v Chadburn* (a § 5 3 4 1 above) – as per Smith & Baker *Employment* 604 n255.

and, the procedures surrounding union elections.[1107]

A final point to be made, as explained by Pitt,[1108] is that there is now – under TULRCA (following the promulgation of EA 1999) – the matter of the "parallel jurisdiction to the Certification Officer for certain kinds of breach of union rules", key of which is the alleged breach or threatened breach of union rules in relation to the constitution or proceedings of any executive committee or decision-making meeting.[1109] A union member is accordingly afforded the option of either approaching the CO *or* the courts with such a claim – discussed in more detail in § 6 3 2 7 and § 6 3 2 8 below.[1110]

5 3 4 2 The internal disciplinary rules of unions

With regard to enforcement of broader membership rights, internal union disciplinary procedures were also to see a spate of decisions that served to clarify what was to be done where claims based on non-compliance with rule books had been brought. In the words of Collins et al:

> "In such cases, to adapt a dictum well known to administrative lawyers, the common law will supply the omission of the rule-book. This will be done principally by the rules of natural justice, which will be readily applied even if the legal basis for the application in the context of the contract of membership is by no means clear. Thus, they will often be described as implied terms of the contract of membership, though they seem to have a mandatory quality. Natural justice requires a union 'to conduct its disciplinary processes in accordance with the judicially recognised principles of fairness', and there is no suggestion that a union may displace these 'implied duties' by an express term. The rules of natural justice will thus be implied where there are no formal disciplinary procedures in the union rule-book, or where there are omissions in the formal disciplinary procedures."[1111]

In light of the above, brief mention may be made of Collins et al's summary of those cases where these "principles of natural justice" were enforced.[1112] Principles enforced by the courts include the right to be informed of the case against the member in

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[1107] *Brown v Amalgamated Union of Engineering Workers and Another* [1976] ICR 147; *Douglas v Graphical Paper and Media Union* [1995] IRLR 426; *Warrington v MSF* (D/94/0I), CO – as per Smith & Baker *Employment* 604 n256.

[1108] Pitt *Employment* 338.

[1109] This in terms of s 108A of the TULRCA.

[1110] See Smith & Baker *Employment* 603 for further information in this regard.

[1111] Collins et al *Labour Law* 525.

[1112] 525-526.

question;[1113] the right to be provided with the opportunity to be heard/respond;[1114] the right to be objectively tried in terms of a union process free from bias;[1115] the right to examine witnesses or evidence, or "an oral hearing";[1116] and, the right to be represented in such disciplinary proceedings (including legal representation).[1117]

5 3 4 3 Exhaustion of internal remedies

Related hereto, is a broader question as to *when* courts should get involved? In other words, to what extent should members and their unions first be required or allowed to remedy the alleged complaint internally? By way of example: larger unions frequently allow for appeal procedures, particularly where the complaint was initially heard at the shop-floor level and there often is the involvement of regional and provincial levels of the union structure before the national level is involved (where the apex decision is made). In their discussion on this point, Collins et al focus firstly on the *White v Kuzych* matter,[1118] where it was held that "where there is an express obligation of this kind, the member would be bound to exhaust internal remedies before instituting legal proceedings".[1119] In terms of subsection 63(2) TULRCA (as discussed in more detail in chapter 6 below), the courts are compelled to get involved where there is "undue delay (or more than six months)… regardless of the rules of the union".[1120] Furthermore, *Lawlor v Union of Post Office Workers*[1121] serves as confirmation that the courts are not prepared to accept an option to appeal to the next annual General Conference of a union as an acceptable form of timeous, internal

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[1113] The example provided here is *Annamunthodo v Oilfield Workers' Trade Union* [1961] AC 945 and *Stevenson v URTU* [1977] ICR 893.

[1114] As per *Radford v NATSOPA* [1972] ICR 484.

[1115] *Roebuck v National Union of Mineworkers (Yorkshire Area) (No. 2)* [1978] ICR 676. Regarding this matter, which involved Arthur Scargill (who was to become president of NUM in 1982) – the infamous leader during the Great Strikes of the mid-1980s, see Collins et al *Labour Law* 526, who state of *Roebuck* as being "a textbook example of practice to be avoided".

[1116] With *Payne v Electrical Trades' Union The Times*, 14 April 1960 being offered as example.

[1117] As per *Walker v Amalgamated Union of Engineering and Foundry Workers* 1969 SLT 150. See further Deakin & Morris *Labour Law* 997-999 for similar examples, most being the same as highlighted here, regarding the common law position in respects to union membership and discipline.

[1118] [1951] AC 598. Collins et al *Labour Law* 534 n189 furthermore refer to *Radford v Natsopa* again, as additional support to this approach. See further RW Rideout "The Implied Requirement of the Exhaustion of Internal Remedies" (1965) 28 *MLR* 351.

[1119] Collins et al *Labour Law* 534.

[1120] 534.

[1121] [1965] Ch 712, [1965] 2 WLR 579.

remedy.[1122] All of this, however, does not amount to an unqualified "duty of judicial intervention", with *Longley v NUJ*[1123] providing that only in exceptional circumstances should a court intervene *prior to* the complaint having been heard by a domestic tribunal within the union.[1124]

5 3 5 Trade union liability for advice

Selwyn states as follows:

> "Membership of a trade union confers certain rights and privileges on the members, and they are entitled to damages if these are not forthcoming. If the rules provide that members shall be entitled to legal advice, then a union which fails to provide that advice, or negligently provides incorrect advice, may be sued for the loss which flows from that breach. The tremendous increase in the statutory rights of employees is bound to throw an additional burden on trade union officials, who now need to be as familiar with those rights as management. Thus it is submitted that if a trade union fails to apply for a protective award in appropriate circumstances, or negligently delays the presentation of a claim to an employment tribunal so that it becomes out of time, the agreed member will have a right of action against that union for damages."[1125]

The above sets out the approach of contemporary British law, but is by no means new. Selwyn makes reference to the *Buckley v National Union of General and Municipal Workers* case,[1126] first highlighted by Nock in his 1968 article examining the *Buckley* and *Cross v British Iron, Steel & Kindred Trades Association* judgments[1127] (the bench hearing the latter matter included Denning MR, and Diplock, LJ).[1128] Both matters saw members suing their unions for not proceeding in good time with their claims. In *Buckley* only local and regional union officials were involved, while *Cross* concerned the conduct of the union's national branch who referred the matter to a firm of solicitors. Nock states that "[b]oth plaintiffs claimed against their respective unions for breach of contract in failing to provide correct legal advice and in not informing the plaintiffs of the relevant limitation period in sufficient time for them to obtain legal

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[1122] Collins et al *Labour Law* 534.
[1123] [1987] IRLR 109.
[1124] Collins et al *Labour Law* 534.
[1125] Selwyn *Employment* 626.
[1126] 626 – citing *Buckley v National Union of General and Municipal Workers* [1967] 3 All ER 767.
[1127] RS Nock "Trade Unions, Advice and Limitation" (1968) 31 *MLR* 456.
[1128] *Cross v British Iron, Steel & Kindred Trades Association* [1967] 1 WLR 494, CA (Salmon LJ being the third judge on the Bench).

advice elsewhere".[1129]

Briefly stated, the court *a quo* in *Cross* found that whereas the attorney "had not fallen short of the standard of care demanded… [it nonetheless] *held that the duty owed by the union to its members under the rules was that of a solicitor to his client* and that it had failed in their duty in not pursuing the claim" – and accordingly awarded the plaintiff £200 in damages.[1130] On appeal, the court examined the argument put forward by the plaintiff, who relied on the particular rule that made provision for legal assistance from the union (and claiming this to be an express term of the union-member contract) and also on the argument that "it was a further term of the contract that such legal assistance as the union might be called on to give pursuant to the express terms should be given with that degree of care, skill and diligence usually exercised by a solicitor in relation to the affairs of his client".[1131]

After examining the union rules, Denning MR, concluded that, while the attorney was paid by the union, the "relationship of solicitor and client would be between the solicitor and the member".[1132] Furthermore, given what had transpired, both union and solicitor had, in fact, fulfilled their duties – albeit not to the satisfaction of the plaintiff and what the plaintiff wanted to hear (of his having a claim against the employer).[1133] In support of the judgment by Denning MR, Diplock LJ stated: "If, on that material, advice is given by a qualified lawyer that it discloses no cause of complaint and that advice is transmitted to the member and he acquiesces in it at the time, in my view the duty of the union under the rules to the member is at an end".[1134] Of interest is that both Diplock LJ and Salmon LJJ raised the question whether or not the union fulfils its duty merely upon instructing an attorney that the union "reasonably suppose[s] to be one of reasonable skill and competence", as opposed to warranting "to the member

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[1129] Nock (1968) *MLR* 456.

[1130] *Cross v British Iron, Steel & Kindred Trades Association* [1967] 1 WLR 495C, [my emphasis].

[1131] 496A. Coupled hereto, the plaintiff argued at 498C that since he had lost his "chance of claiming against his employers at common law – having lost that chance, he is entitled to damages".

[1132] 499H.

[1133] 501A-B. Here the court held:

> "I do not see that they were any further obligations on them [the union and attorney]. It is true that two years later [the plaintiff] raise the matter again, but there was a no duty on them to say to him: 'Be careful to issue a writ or the Statute of Limitations will run'. They had already fulfilled their duty when they had provided legal assistance and it was adverse to the claim. In the circumstances it seems to me the union were no breach of their duty".

[1134] 501H.

that the advice will in fact be given with reasonable skill and competence".[1135] Neither judge thought it necessary to reach any final decision upon the particular question.[1136]

In *Buckley*, Nield J also found in favour of the union. Having considered the applicable internal rules and the circumstances that caused Ms Buckley to suffer her fall and injury, the court found that the union did have "certain obligations to the plaintiff under the contract … and that the second defendant [the union official] had a duty of care towards her at common law". [1137] However, the court also found that the plaintiff had failed to show "some prospect of success in the action".[1138] In short, once the union official had informed the plaintiff, "after proper enquiry and exercising the skill and care required",[1139] that she had no claim – and that the union was justified in this belief – there was no breach and therefore no possibility of action against the union.

More current than the cases from the late 1960s discussed above is an Employment Tribunal ("ET") matter that was to find its way to the civil courts – that of *Friend v Institute of Professional Managers and Specialists (IPMS)*.[1140]

The facts of the case are briefly as follows: The applicant was a member of the IPMS and was employed by the British Civil Aviation Authority as a Safety Inspector. He was dismissed following a long-standing dispute between himself and his employer, during which time he was assisted and advised by the trade union. The union instructed lawyers to represent the employee at the ET, where he was successful on procedural grounds, but not with regard to his claim for compensation (it was found that his own actions contributed to his dismissal). He appealed to the Employment Appeal Tribunal ("EAT"), but was unsuccessful.[1141] The applicant then instituted a separate claim against both the lawyers and his trade union, the latter for, *inter alia*, appointing legal counsel who failed in their task of competently representing him.[1142] The action against the lawyers and the writ against the union were both struck

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[1135] 502A.

[1136] In concluding his judgment, Salmon LJ made the following remark at 503F:
"There are undoubtably cases in which a union's handling of its members' claim is deserving of criticism and sometimes severe criticism. But this, in my view, is not such a case".

[1137] *Buckley v National Union of General and Municipal Workers* [1967] 3 All ER 773D.

[1138] 774F.

[1139] 774G-H.

[1140] [1999] IRLR 173.

[1141] As per *Friend v Civil Aviation Authority (No.1)* [1998] IRLR 253.

[1142] The plaintiff's case as explained by the Court [*Friend v IPMS* 174 para 14] was based on the following grounds: "The substance of the case is (a) that the defendants in acting and advising in the plaintiff's dispute with the CAA [Civil Aviation Authority] owed him a duty of care… in contract and in

out and the claim was dismissed.

Friend appealed, this time to the High Court, Queen's Bench Division where the appeal was again dismissed.[1143] The High Court ruled that while it is true that a trade union has a duty in tort to use ordinary skill and care in advising and/or acting for a member in an employment dispute, once the lawyers were so engaged, any prior duty that might have rested upon the union fell away and was replaced by the expertise of the legal professionals.[1144] Of obvious importance was this duty "to use ordinary skill and care".[1145] As in the earlier cases discussed above, here too the court focused on the possibility of success of the plaintiff's claim – finding this to be unlikely (given his conduct)[1146] and absolving the union and its attorney's from their duty.

Final mention must be made of a 2006 decision, that of *Brunsdon v Pattinson & Brewer (A Firm), RMT*.[1147] To date, this remains the only matter involving a union that cites *Friend v IPMS* as authority.[1148] The basis of the claim – with the trial before the Court only being concerned with the issue of liability[1149] – was that the failure to observe the time limit (of submitting his ET claim) was due to the negligence and/or breach of duty of the firm of attorneys involved, and/or his union (National Union of Rail, Maritime and Transport Workers Union ("RMT")). Unlike the previous matters, Royce J did find RMT "negligent and/or in breach of duty".[1150] The judge initially considered the liability of the firm of attorneys and emphasised that had they been required/expected to proceed with the claimant's dismissal claim (which on the facts

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tort; (b) that they acted in breach of that duty in the respects set out in paragraph 15 – which all consist of omissions to advise or to act in various respects in the plaintiff's best interest; and (c) that these breaches caused the plaintiff the loss alleged in paragraph 16, by denying him (i) reinstatement; (ii) 'adequate statutory compensation where applicable'; and 'damages and remedy for victimization in common law'".

[1143] Leave to Appeal to the (then) Court of Appeal was also dismissed.

[1144] *Friend v IPMS* 174 para 16.

[1145] Para 15 states:

> "There is no difficulty about [the fact that the union owed the plaintiff a duty of care], as a broad statement of principle, at least as regards a duty in tort: a trade union advising and/or acting for a member in an employment dispute must in ordinary circumstances be obliged to use ordinary skill and care".

[1146] *Friend v IPMS* 175 para 17-19 and 176 para 29.

[1147] *Michael Brunsdon v Pattinson and Brewer (A Firm), The National Union of Rail, Maritime and Transport Workers* [2006] EWHC 1562 (QB).

[1148] To date, it has not been subsequently used as authority in any further matters.

[1149] *Michael Brunsdon v Pattinson and Brewer (A Firm), The National Union of Rail, Maritime and Transport Workers* [2006] EWHC 1562 (QB) para 4.

[1150] Para 41.

was not the case), then – in light of *Friend v IPMS* – RMT's duty towards the plaintiff would have fallen away.[1151] On the facts, however, given that the member had informed his union representative of his dismissal and that he was aggrieved by it, the union should have advised him to complete the ET1 form timeously in order to initiate proceedings in the ET, or to appeal his dismissal.[1152] This failure saw the union found to have been negligent/having breached its duty to the claimant. Since only the liability issue was before the Court, no award of damages was made.

Brundson serves as a simple yet clear example of the very real existence of a legal duty to act appropriately (and with "ordinary skill and care") between that of a union and its members. The extent to which this approach should serve as a possible guideline for South Africa is explored in more detail in the chapters to follow.

5 3 6 Inter-union disputes – a possible model as an alternative to legislation and the courts?

In 1924, the first version of what was to become known as the "Bridlington Principles"[1153] was adopted by the TUC.[1154] While the Principles are, broadly speaking, designed to "minimise disputes between affiliated unions and to provide procedures for resolving such disputes as do arise",[1155] the Principles are not only to be viewed, again, in the context of the closed-shop agreement environment that dominated the British labour relations system, but also as a potential model of self-regulation of the relationship between members and their unions outside the courts.

The basis for agreement between the various unions that made up the TUC was the "general 'no poaching' obligation" which required unions to refrain from – in terms of Principle 5 (as it was then) – "recruiting groups of workers where another union has a majority and negotiating rights".[1156] Principle 6 (as it was then) required that the affiliated unions were not to accept any new members without first enquiring about "current or recent membership of any other union" and Principle 2 (as it was then) required enquiries to be made from such other union "as to whether the applicant has

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[1151] Para 32.

[1152] Para 41.

[1153] So named after the Bridlington Congress, held in 1939, where the 1924 proposals were formalised – see B Simpson "The TUC's Bridlington Principles and the Law" (1983) 46 *MLR* 635 635.

[1154] 635. To date, the TUC is still the largest trade union federation in Britain.

[1155] 635.

[1156] 635-636.

resigned, is clear on the books or under discipline, and whether there are other reasons why he or she should not be accepted" in the new union.[1157]

The regulation and control of membership transfers and the related-competition between unions in a closed-shop system were of utmost importance for the greater part of the twentieth century. The TUC brought about an independent, self-regulated mechanism – technically voluntary, but enforceable as between members of the TUC – through the TUC's Disputes Committee.[1158] Driven by their focus on union autonomy and (as discussed above) by their distrust of the judiciary and government, British trade unions sought the means to monitor and regulate themselves internally and *inter se* without the need for external interference.[1159]

These principles are now encapsulated in the TUC's Disputes Principles and Procedures ("TUC Principles"), with the most recent edition being that of 2016.[1160] Its preface states as follows:

"These principles, procedures and accompanying paragraphs together form a TUC code of practice that is accepted by all affiliate organisations as a binding commitment for the continued affiliation to the TUC. This is not intended by such organisations or

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[1157] 636.

[1158] See § 5 3 6 below.

[1159] One mechanism through which this was attempted, in light of the effects of loss of union membership in the closed-shop environment, was that of the TUC's so-called "Independent Review Committee". As explained by KD Ewing & WM Rees "The TUC Independent Review Committee and the Closed Shop" (1981) 10 *ILJ* 84 84, the 3-person committee had a narrow mandate, and was specifically seen "as a safe-guard in the context of the closed shop", by hearing appeals from individuals who were dismissed, or threatened with dismissal, or refused membership in a closed-shop employment context. Furthermore, the committee "was established by the TUC in April 1976 as an alternative to the legal control of trade union internal affairs" [at 84]. Briefly stated, the "standard of review" imposed by the Committee, was based on 4 principles, namely (i) ensuring that the "law of the union" had been followed; (ii) ensuring that the union actually "acted strictly in terms of its rules"; (iii) ensuring compliance with the broader principles of "natural justice" by considering the "ordinary" British law, and measuring the union's rules against such; and finally (iv) measuring the union's conduct against a "general standard of reasonableness and fairness" – see Ewing & Rees (1981) *ILJ* 85. Whilst attempts at confirming the formal timespan of the Committee have proved fruitless, as mentioned by Ewing & Rees (1981) *ILJ* 98, given the introduction of sections 4 and 5 of EA 1980 (now s 174 of the TULRCA), which effectively made it unlawful to unreasonably exclude or expel a member from their union, it does not appear as if the Committee would have continued to function long into the 1980s, given the reduced need for it. With that being said, Ewing & Rees (1981) *ILJ* do provide insight into some 20-odd cases brought before the Committee, over a timespan of approximately five years.

[1160] See Trades Union Congress "TUC Disputes Principles and Procedures: 2016 Edition" (2016) *Trades Union Congress* <https://www.tuc.org.uk/sites/default/files/DPP_2016.pdf> (accessed 13-05-2017).

by the TUC to be a legally enforceable contract. The principles, the notes and the regulations should be read together as ever and equal status and validity."[1161]

The TUC Principles' guidebook, spanning 44 pages, is divided into four sections, with the first outlining the TUC code of practice, which is stated to incorporate the principles governing relations between unions. The second section outlines procedures pertaining to disputes between employers and unions, with the third section outlining the expected compliance with decisions and TUC rules 12, 13 and 14. The fourth and final section provides a narrative background to the development of the Bridlington Principles into the contemporary TUC Principles.

The first section of the TUC Principles' guidebook starts off with Principle 1, entitled "Co-operation and the prevention of disputes", which has at its core the notion that "all affiliates have a responsibility to build positive inter-union relations and unions are actively encouraged to work together at a sectoral, organisational and/or workplace level".[1162] Principle 2, entitled "Membership", focuses on preventing the undermining of collective bargaining structures by means of an agreed regulation procedure surrounding the movement of members between affiliates.[1163] Principle 3, entitled "Organisation and recognition", outlines the expected behaviour and associated restrictions upon affiliate unions with regard to organising activities involving members of other unions.[1164] Principle 4 regulates "inter-union disputes and industrial action", with the requirement that "no official or unauthorised stoppage of work or action short of a strike will take place before the TUC has had time to examine the issue".[1165]

[1161] Trades Union Congress *TUC Principles* 7.

[1162] Trades Union Congress *TUC Principles* 8. Key aspects pertaining to the principle include that "[u]nions should make every effort to establish joint working arrangements that prevent and, where necessary, resolve my agreement problems that arise between themselves", that members and officials of unions should remain aware of the arrangements and the importance of following the agreed procedures, and that each affiliate union will nominate a senior union official to take responsibility for the inter—union relations – Trades Union Congress *TUC Principles* 8.

[1163] Trades Union Congress *TUC Principles* 10. Furthermore, in terms of this principle 2, "[a]ll affiliates of the TUC except as a binding commitment to their continued affiliation to the TUC that they will not knowingly and actively seek to take into membership existing all 'recent' members of another union" – thereby retaining to a large extent the initial focus of the Principles [Trades Union Congress *TUC Principles* 10].

[1164] Trades Union Congress *TUC Principles* 12. See further the explanatory notes to principle 3, as per Trades Union Congress *TUC Principles* 13-14.

[1165] Trades Union Congress *TUC Principles* 15. Furthermore, the principle states that the "union or unions concerned are under an obligation to take immediate and active steps to get their members to resume normal working" [Trades Union Congress *TUC Principles* 15].

Should a dispute arise between affiliate unions, the TUC regulations, listed under Regulations A to S, apply.[1166] In terms of Regulation D, once the General Secretary has confirmed that all reasonable efforts have been made to settle the dispute[1167] without success, the matter may be referred to the Disputes Committee.[1168] Regulation G outlines the composition of the committee,[1169] with Regulations H to S outlining the various procedural aspects of implementing the dispute procedure.[1170] In particular, Regulation R states as follows: "The basic approach of the Disputes Committee will be to seek to obtain an agreed settlement, whether of a permanent or an interim character, which is acceptable to all the disputants; and the Disputes Committee may at any time make such recommendations as it sees fit".[1171] Furthermore, separate guidance is provided with regard to the applicable time limits involving the dispute, including for instance an eight-week window period to allow for the initial attempts at resolving the dispute prior to the involvement of the Disputes Committee.[1172]

Interestingly, in section 2 of the TUC Principles ("Disputes between employers and unions") and in addition to the requirements outlined in terms of Principle 4, affiliated

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[1166] See Trades Union Congress *TUC Principles* 17-22.

[1167] As per Regulations D-E, Trades Union Congress *TUC Principles* 18.

[1168] Trades Union Congress *TUC Principles* 18.

[1169] "A Disputes Committee will consist of no fewer than three persons appointed by or under the authority of the general secretary, being members of a panel comprising current and former General Council members, general secretaries and senior union officials of affiliated organisations and other respected persons. The general secretary may appoint a legally qualified person to chair the Disputes Committee. No person who has an interest in the dispute, or whose union has an interest in the dispute, will be appointed as a member of a Disputes Committee and the affiliated organisations party to a Disputes Committee hearing will be notified of the members of the committee prior to the date of the hearing" – Trades Union Congress *TUC Principles* 19.

[1170] By way of example, in terms of Regulation Q, the Committee will "investigate the causes and circumstances of the dispute and will give to the disputants a full opportunity to submit factual information and to present their views to the Disputes Committee". Further hereto, the Committee is empowered to discuss the dispute with any applicable local union or management representatives, and the Committee "will otherwise conduct its proceedings in such manner as it sees fit" – Trades Union Congress *TUC Principles* 21.

[1171] The remainder of the regulation continues with the words:

> "In deciding the dispute, the Disputes Committee will have general regard to the interests of the trade union movement and to the declared principles or declared policy of Congress but will in particular be guided by the Code of Practice that includes the Principles Governing Relations Between Unions, as amended by the General Council and adopted by the Congress from time to time" – Trades Union Congress *TUC Principles* 22.

See the further guidance outlined under the heading "The role of the TUC Disputes Committees in disputes between affiliated organisations", as per Trades Union Congress *TUC Principles* 24-25.

[1172] Trades Union Congress *TUC Principles* 22-23.

unions "have the obligation to notify the TUC of any dispute, constitutional or unconstitutional, authorised or unauthorised, between a union and an employer, that involves directly or indirectly large bodies of workers, or that, if protracted, may have serious consequences".[1173] The intention behind this requirement is to allow for the maximum opportunity for the involvement of the TUC (and even the possible assistance of ACAS) in order to bring about the settlement of the dispute.[1174] This points to the procedural burden placed on unions with regard to organising industrial action (discussed below).

The third section of the TUC Principles regulates compliance with TUC Rules 12 to 14 and to ensure that affiliates "abide by decisions of the General Council and Disputes Committees". Rule 12 applies to industrial disputes, Rule 13 to disputes between affiliated organisations and Rule 14 to that of the conduct of affiliated organisations. Of relevance to this study, is the wording of Rule 14(a), which states as follows:

> "If at any time there appears to the General Council to be justification for an investigation into the conduct of any affiliated organisation on the ground that the activities of such organisation may be detrimental to the interests of the trade union movement or contrary to the declared principles or declared policy of the Congress, the General Council will summon such organisation to appear by duly appointed representatives before them or before such committee as the General Council considers appropriate in order that such activities may be investigated. In the event of the organisation failing to attend, the investigation will proceed in its absence."[1175]

In terms of Rule 14(b), read with Rule 14(c), following the investigation and should it appear to be necessary, the union(s) in question will be asked to present their case before the General Council. Should the union be found to have engaged in conduct in breach of Rule 14(a), it may be directed to "discontinue" the conduct immediately and refrain from engaging in similar action in the future.[1176] Should the union in question refuse to comply, it will face possible suspension from membership of the Congress until the next Annual Congress[1177] and subject to a right of appeal to that next Annual

[1173] Trades Union Congress *TUC Principles* 27.
[1174] See Trades Union Congress *TUC Principles* 27-28.
[1175] Trades Union Congress *TUC Principles* 33, [my emphasis].
[1176] Trades Union Congress *TUC Principles* 33.
[1177] As per Rule 14(c) – Trades Union Congress *TUC Principles* 33.

Congress.[1178]

Research and commentary on the Bridlington Principles reached its zenith during the mid-1970s and 1980s[1179] at least until the significant legislative changes that were to forever diminish the consequences of the closed-shop and the organisational powers of unions.[1180]

Given the changes brought about through statute as discussed above little direct benefit is to be had examining the cases that sought to obtain clarification on the TUC's Principles. Too much has changed from the stage when those cases were considered to the current system in Britain. Rather, the value of this brief overview of an organised-labour constructed mechanism lies in the fact that it has operated in parallel to existing judicial and statutory structures for almost a century. Deakin and Morris, in their consideration of a possible framework for regulation of union political activities, state:

> "This may constitute a more appropriate method of resolving differences between trade unions and their members and prospective members than the highly adversarial means which is currently offered by the legal process". [1181]

It furthermore speaks of a mechanism based on a seemingly broad discretion – in terms of its Rule 14 procedure – which certainly suggests one theoretical basis for intervention in instances where unions are acting with impropriety towards their members. It is therefore not so much the *how or why* of such a mechanism, but the *if* of whether it should be used. In this sense, it is yet another example of a possible model that could bring about internal union accountability, but in the absence of external involvement – and will accordingly be evaluated in that sense in further chapters.

[1178] As per Rule 14(h) – Trades Union Congress *TUC Principles* 34.

[1179] See in general PJ Kalis "Recent Cases – Trade Union Law: The Bridlington Principles and the Awards of the T.U.C. Disputes Committee" (1976) 5 *ILJ* 246 246-249; Kalis (1977) *ILJ* 19 19-34; Kalis (1978) *BJIR* 41 41-51 and Ball (1980) *ILJ* 13 13-27.

[1180] See in general B Simpson "Individualism Versus Collectivism: An Evaluation of Section 14 of the Trade Union Reform and Employment Rights Act 1993" (1993) 22 *ILJ* 181 189-193, and Selwyn *Employment* 589, who succinctly explains the impact of s 174 of the TULRCA – providing a worker with the right to join whichever union he pleases – which effectively negated the original key purpose of Bridlington.

[1181] *Deakin & Morris Labour Law* 1025.

5 3 7 Common law conclusion

The discussion of the development of common law principles demonstrates – across several decades – the ebb and flow of a British labour relations system that saw the power of organised labour (and the effects thereof in the context of statutory immunities and protections) being offset by judicial intervention until legislative intervention was to have the final say. But, at risk of stating the obvious, Britain serves as an example of a judiciary responding to the real-world effect of organised labour on the interests of workers, employees and members. In other words, where unions' collective power threatens to offset the balance within the overall industrial relations system, one institution able to respond is the courts. The extent to which this should remain the case, or whether an alternative option – non-judicial – could be introduced in order to bring about improved union-member accountability will be explored in more detail in the concluding chapters below.

5 4 Conclusion

This chapter focused on the period of readjustment to the regulation of trade unions in Britain in the second half of the previous century, based, as it was, on a combination of three developments: the increased legislative intervention in trade union regulation in general and the regulation of trade union accountability specifically; the development of the common law as a basis for ensuring trade union accountability; and continued attempts at self-regulation by the trade union movement itself. This in mind, perhaps the three important topics discussed in this chapter are the following: (i) The way in which the IRA 1971 endeavoured to regulate trade unions and trade union accountability (ii) The offices of CROTUM/CPAUIA, instituted during the 1980s as two examples of administrative tribunals tasked with ensuring trade union accountability and, finally, (iii) The development of the common law as a basis for ensuring trade union accountability, which development largely preceded legislative intervention in the internal functioning of trade unions.

At the same time, given the detail included in this chapter, there are also a whole range of smaller, yet important, aspects relating to trade union accountability that deserve to be emphasised. These smaller aspects will be addressed first, before returning to the three broader topics identified above.

The first aspect that should be emphasised, is the economic tension that eventually

gave rise to the IRA 1971 (and development of the common law). Central to this was the apparent incompatibility between the Government's economic approach (deemed to be necessary for the purposes of the economic recovery of Britain) and the (largely) voluntarist nature of the British industrial relations system. In order to implement economic reforms, the state felt it necessary to become increasingly involved in the labour relations system – and in particular, in the affairs of organised labour – given the influence and control of organised labour. As such, the period of readjustment was triggered by a fundamental change in the entire ideological perception of the British labour relations system, a change which caused significant disruption across broader society.

This influence and control of unions that led to readjustment was largely based on the widespread predominance of the closed-shop mechanism in the British industrial relations system. One consequence of this influence is that it facilitated the creation of an atmosphere that would also allow the judiciary to again enter the proverbial fray on the part of the individual worker. Of main concern in many of the key cases examined in this chapter was the individual trade union member, or minority grouping of workers who risked significant adverse effects to their running afoul of their union. Simultaneously, the judiciary was becoming increasingly prepared, in light of the economic conditions that were besetting Britain at the time, to scrutinise organised labour's role in industrial action. In short, one lesson to be learnt from the British experience is that once unions become too powerful, or once they have too big a perceived impact on the economy of a country, they are more likely to face a direct counterbalance to their influence through (sometimes creative) judicial intervention.

The reaction to trade union dominance, of course, was not only to be seen in the courts. The Trade Disputes Act of 1965 serves as the first legislative example illuminating this point. As such, the chapter already demonstrates, in its discussion of the ebb and flow of judicial and legislative responses to trade unions, the tightly woven interaction between the state, legislation, the judiciary, and trade unions. Closely related to all of this were political developments, primarily the Labour Party losing the 1970 general elections on the back of its "In Place of Strife" policy – a result that was one of the key reasons for the ushering in of IRA 1971 by the Conservative party government. While the interrelationship between politics and labour is a feature of most societies (also the other jurisdictions considered in this study), the predominance of this interaction is certainly one of the features of Britain.

In this regard, the chapter showed that despite the Donovan Commission concluding that the overwhelming majority of trade unions were in complete compliance with expected procedures and constraints and therefore not in need of wholesale regulation, it was the political environment (influenced, in turn, and in no small part, by the socio-economic environment) that resulted in those recommendations mostly being ignored through the introduction of wholesale changes in the early 1970s.

Importantly, the late-1970s also saw pronounced growth in union membership and density, with the levels reached in 1979 never to be seen again. British unions were as powerful as they had ever been and by some accounts were the most influential in the entire world. Despite this, the 1980s saw a radical reversal of trade union fortunes after the arrival of Margaret Thatcher, off the back of the so-called "Winter of Discontent". One lesson from this is that despite the seemingly unassailable power and influence of the trade unions, they were virtually destroyed in the space of approximately ten years, solely through the use of statutory regulation. Despite organised labour's seemingly powerful economic weapons, it is of little consequence when compared to what can be mustered by a determined government.

The Conservative Party's continued opposition to unions during the course of the 1980s and 1990s also shows how government policy may be shaped to effect long-term changes to a labour relations system. In this regard, some of these policies – and their manifestations through various statutes – are particularly noteworthy. For instance, the dismantling of the closed-shop mechanism, the statutory introduction of union and union-official liability for industrial action (under specific, yet broad, circumstances) and the rapid increase in ballot- and strike-associated technicalities/complexities, are all indicators of an approach based on individualism as opposed to collectivism – premised on the broad slogan/statement of "giving unions back to their members".

In addition to these insights, the chapter also considered three important topics, namely IRA 1971, CROTUM/CPAUIA, and the development of the common law.

The takeaway from IRA 1971 is four-fold: (i) It offers the first example (also in comparative context) of a statute focusing in some detail on the internal affairs of unions; (ii) It is illustrative of aspects from American labour law (as a comparative jurisdiction in this study), being duly imported into the British system; (iii) It offers insight into possible enforcement mechanisms for the purposes of union

accountability; and lastly, (iv) It offers, through examination of why it failed, lessons for possible future statutory implementation of union accountability provisions.

IRA 1971 was an example of legislation intended to compel unions to assert more control over their members in the hopes of countering high levels of unofficial industrial action. This was to be effected via the registration of unions (under threat of potential sequestration, were an unregistered union to be sued for industrial action). Innovative examples to ensure accountability certainly were present in the Act. One example would be the power of the Secretary/Minister of Labour to call for a compulsory ballot to be held amongst the particular workers associated with the industrial action (or proposed action) in question, where doubt existed as to the actual intention of the workers in their decision to participate in the action. Another example is found in the provisions which prohibited any arbitrary or unreasonable discrimination against trade union members in the course of exercising the rights available to them as members in terms of the Act. These examples formed part of a broader "bill of rights" ostensibly protecting the member against his own union.

Concerning the enforcement mechanisms, mention must first be made of section 66 of the Act which provided the basis for intervention. In terms of this section, where a trade union official was deemed to be acting contrary to the "guiding principles" of the Act, it would amount to an unfair industrial practice that could be addressed (subject to specific procedures) by the different institutions. The Act sought to create direct accountability on the part of the union or its officials, accountability that was not necessarily subject to an application by an aggrieved member. One such example was the possibility to investigate a union/official at the sole initiative of the Registrar on the grounds of "serious and persistent breaches".

The first lesson from IRA 1971's failure is that the immediate effect of the Act, and the reaction thereto by organised labour, had a profound impact on the broader society in Britain – in the "near total collapse of civility" referenced above. As such, it is worth emphasising the point that there are certain areas of society that are essential and fundamentally core to the very fabric of society – arguably, work and labour constitute one of these areas. Extensive upheaval and disruption in these areas – also through legal intervention – can have drastic and potentially long-term effects for a country.

Perhaps the most important lesson to be taken from the IRA 1971 is in the failure of the British legislature to appreciate the nature of the relationship between, on the one hand, trade union members and their shop stewards on the factory-floor and, on

the other hand, between the shop stewards and the union. A shop steward frequently owes more allegiance to the members than to the union. The attempt to coerce, by means of statutory intervention, a union to exercise greater control over its membership through its shop stewards was shown to be a comprehensive failure. The institution of increasingly rigid controls over a trade union must be done in a particularly nuanced and sensitive manner. If not, it will (at best) not have any impact at all, or (at worst) see a breakdown in authority and control between the upper echelons of the trade union and the shop floor's general membership.

There are primarily two lessons to be learnt from the experience with CROTUM and CPAUIA: (i) These offices serve as a cautionary illustration of how important it is for a Government who wishes to institute a centralised, statutory body to facilitate internal union accountability, to carefully frame the jurisdiction of those offices; and (ii) These offices, despite justified criticism of their existence and functioning, nonetheless provide a useful example of a centralised, statutory body with which to facilitate internal union accountability.

If regard is had to the first point raised above, it must be reiterated that – over the lifetime of its existence – CPAUIA saw a *single* application brought before it. While not necessarily faring much better, it remains clear that the idea behind CROTUM was not necessarily completely flawed – as is also evidenced to an extent (as will be evident from the discussion in chapter 6) by subsequent iterations of this office.

As far as its use as an example is concerned, it has to be borne in mind that CROTUM not only originated in a very different time and context to what might exist today, but was also premised on union leadership not truly representing the needs of their members (and allegedly usurping that authority for own gains). This being the case, the point of departure behind CROTUM, namely that it *is* often particularly challenging and complex for a union member to hold their union to account, does seem to hold water. It must also be acknowledged that CROTUM did have as a requirement that the matter referred to it was of equal application to other trade union members (an added safeguard against frivolous and vexatious applications).

Despite the low use of CROTUM, it would appear that more of its services would have been utilised had its mandate included the processing of so-called “representation disputes” (that is, where the member felt aggrieved at the quality of service provided by the union), or to be allowed to fulfil the role of conciliator or “ombudsman” for trade unions and their members. Furthermore, it must be

acknowledged that towards the end of its term, unions themselves were referring members to CROTUM as a means to appease factional dispute within their unions – given that the dispute would be resolved by an external, independent functionary. In this sense, CROTUM's existence might have silently compelled unions to become more efficient, responsive and compliant with internal and external procedures or regulations. From this, it is clear that CROTUM remains important as an example to be considered in subsequent chapters.

Lastly, there are a series of important lessons to be learnt from the development and application of British common law to aspects of the relationship between trade unions and their members. The activity of the British courts raises important questions for the potential application of similar principles in at least the following areas: (i) The willingness of the courts to assist individual members/workers in order to offset the potentially serious consequences of their membership being terminated (as a result of the closed-shop mechanism); (ii) The judicial creativity, based on different interpretations (and underlying fictions) imputed to the union constitution as a contract, in order to facilitate judicial intervention; (iii) The undeniable centrality of the union constitution in the government and administration of unions; (iv) The interpretation by the British courts of the internal rules and procedures of unions; (v) trade union liability for advice/services to its members; and, finally, (vi) the potential of self-regulation as an alternative to use of the courts to ensure trade union accountability.

All in all, this lengthy chapter described a period of 40 or so years of intense readjustment in the regulation of trade unions and their accountability in Britain through a combination of common law and legislation. As such, this period already provides important examples and lessons for any consideration of the proper regulation of trade union accountability. Simultaneously, it provides important context for the discussion of the current approach to trade union regulation in Britain described in chapter 6.

CHAPTER SIX: THE CURRENT REGULATION OF TRADE UNIONS AND TRADE UNION ACCOUNTABILITY IN BRITAIN

> "Over the last 30 to 40 years union membership levels, though healthy in some parts of Europe, have fallen across much of the world, especially in the many Anglophone countries. For example, membership has nearly halved in Britain since 1979, with density under 23% by 2016 compared to 32% in 1995. Similarly, dramatic declines have occurred in Australia, New Zealand and the US. Although membership and density levels are not the *sine qua non* for union power and influence *vis-à-vis* employers, government and political parties, they do represent the fundamentals of key power resources for their construction and exercise. Yet, surveys from these same countries show nearly half of workers, young and old, express a desire for membership. However, workers have encountered difficulties in exercising their right to join a union for a variety of factors."[1182]

6 1 Introduction

Chapters 3 and 4 provided a historical perspective on the regulation of trade unions and trade union accountability in Britain. Those chapters showed that the regulation of trade unions and their accountability lies at the interface of socio-economic and political forces at play in society over time, the varying degrees of power harnessed by different institutions (including trade unions) in society, the ideological viewpoints underlying different approaches to the appropriate roles of institutions in society as well as the nature, possibility and availability of both common law and legislation to provide the means for legal intervention in the affairs of trade unions. These chapters also provided a number of historical examples and insights into the regulation of trade unions and their accountability.

This in mind, the purpose of this chapter is to examine the current regulation of trade unions in Britain. Broadly speaking, this chapter will show that the current regulation of trade unions in Britain as well as the changing nature of the British economy and labour market and the associated legal framework illustrate the extent to which contemporary unions have had to adjust both their internal procedures and service-offerings to members in order to continue functioning within the contemporary industrial relations system. The highly complex and regulatory nature of the British system and the ability of their trade unions to function within that system, will serve as

[1182] M Harcourt et al "A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation" (2019) 48 *ILJ* 66 66-67, [footnotes omitted; their emphasis].

an example of what is possible in terms of the professionalisation of trade unions. Despite the complex and administrative burdens imposed on British trade unions, they continue to operate. The discussion will also see examination of different external statutory bodies and their roles in the oversight of the internal procedures of unions – in so doing affording the opportunity to analyse the viability of the current British approach.

In particular, the chapter will commence with a consideration of the "new dispensation", implemented by a series of governments following the transition from the Thatcher Government's Conservative Party (and its immediate successors) to the "New Labour" of the mid-1990s onwards. Included in this discussion, through examination of the various legislative measures introduced during this time, is a brief consideration of the changing nature of the unions themselves and the industrial-economic system they find themselves in.

Hereafter, the focus will turn to the current legislative regulation of unions in Britain – with TULRCA as the primary mechanism regulating the promotion of collective bargaining, the activities of trade unions and the representation of trade union members. This discussion will also serve as a comparative example for the remaining comparative jurisdictions considered in this dissertation.

This will be followed by a discussion of the different statutory bodies involved in the oversight of trade unions. In particular, this chapter will address the various statutory conciliation and arbitration mechanisms present in Britain before turning to a consideration of the ETs. Thereafter, the important Office of the CO will be examined in detail before briefly considering the role of the civil courts in exercising continued oversight over the affairs of trade unions. (In this regard, it should be noted that the discussion of the common law basis on which courts may intervene in union activities was discussed in chapter 5.) This chapter will conclude with an examination of the regulation and complexities surrounding industrial action in Britain, seen from the perspective of both unions and their members. Although not specifically considered in earlier chapters, the point was made that it is during industrial action (especially unlawful industrial action) that the relationships between trade unions and society and also between trade unions and their members are brought into sharpest relief and the need for legal intervention in the affairs of a trade union often seems most compelling. This in mind, it is necessary to consider the regulation of industrial action and the implications this may have on union accountability in some detail.

6 2 The new dispensation

6 2 1 New Labour and the final legislative response

This section will provide a chronological discussion of legislative developments where chapter 5 left off. The discussion will depart from the mid-1990s which not only was the turning point between Conservative Party rule and a "new" era of Labour Party governance, but which also constituted the basis for the current regulation of trade unions.

1996 saw the promulgation of both the Employment Tribunals Act ("ETA 1996")[1183] (which sought to bring about additional consolidation of legislation pertaining to the employment tribunal and EAT)[1184] and the Employment Rights Act ("ERA 1996").[1185] In May 1997, and in a particularly one-sided victory,[1186] the Labour Party came to power, thereby ending 18 years of Conservative rule. In commenting on the legislative and socio-economic measures introduced by the previous two Conservative Governments, Fredman encapsulates their approach as follows:

> "The Neoliberal Policy of the Thatcher and Major regimes propelled labour law in an entirely new direction, clearly mapped and unflinchingly realised. In pursuing an individualistic free market ideology, hostile to state intervention or regulation, neoliberalism deliberately distanced itself from its social democratic predecessor, with its emphasis on an interventionist state and collectivism."[1187]

[1183] Employment Tribunals Act 1996 (c 17) – originally enacted as the Industrial Tribunals Act 1996.

[1184] Both Tribunals will be discussed in greater detail at § 6 3 2 4 and § 6 3 2 5 below.

[1185] Employment Rights Act 1996 (c 18). This act primarily served to consolidate all the main statutory provisions on individual employment law, including those provisions which were formerly contained in, *inter alia*, the Employment Protection (Consolidation) Act 1978 (c 44) and the Wages Act 1986 (c 48). As such, the Act is the point of departure in terms of all labour related laws as applicable to the individual worker, in the context of the British system – and regulates, *inter alia*, matters pertaining to unfair dismissal, dismissal notice periods, maternity (parenting) rights and redundancies.

[1186] See M Wickham-Jones "From Reformism to Resignation and Remedialism? Labour's Trajectory Through British Politics" (2003) 15 *J Policy Hist* 26 26, for a general discussion regarding the underlying reasons for "New" Labour's successful emergence in 1997. See further HD Clarke et al "Tory Trends: Party Identification and the Dynamics of Conservative Support since 1992" (1997) 27 *B J Pol S* 299 302-303, who briefly outline the extent of "the Conservative Collapse" – flowing in part from the economic disaster of the so-called "Black Wednesday" of September 1992 – and the impact it had on the Party's support between 1992 (being the previous Election year) and 1995. Wickham-Jones (2003) *J Policy Hist* 31,41-42 explain the repercussions on "electoral perceptions" of the 16 September 1992 financial meltdown.

[1187] S Fredman "The Ideology of New Labour Law" in C Barnard et al (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) 9.

The victory in 1997 of what was to become known as "New Labour" heralded what was termed "The Third Way" – an ideological policy that was independent from both the Labour Party of the 1970s and before, and the Conservatives of the 1980s and early 1990s – "neither hostage to an untrammelled free market nor overwhelmed by a 'stultifying' welfare state."[1188]

The first major enactment of specific application to organised labour by the new government was the Employment Relations Act of 1999 ("ERA 1999"),[1189] which was to serve as the "legislative centrepiece" of New Labour's reform of Britain's employment law.[1190] The most important provisions of the Act included introduction of a new statutory framework for collective bargaining, ballot procedure changes and increased union member protection, particularly for those participating in official

[1188] 9. Fredman precedes her analysis of the Third Way by identifying "four principles [that] emerged as the salient distinguishing characteristics" of the policy: "(i) the facilitative state; (ii) civic responsibility; (iii) equality of opportunity; (iv) community and democracy" – Fredman "Ideology" in *Future of Labour Law* 10. See further T Novitz "A Revised Role for Trade Unions as Designed by New Labour: The Representation Pyramid and 'Partnership'" (2002) 29 *J Law Soc* 487, for a perspective on what "New" Labour saw as the function of trade unions within the British industrial relations system. Briefly stated, in the words of W Brown "International Review: Industrial Relations in Britain under New Labour, 1997-2010: A Post Mortem" (2011) 53 *JIR* 402 404, Tony Blair's New Labour was "specifically aimed at erasing any memories that the party was influenced by trade unions" – and that it "was to be (and it remained) 'business-friendly'." Regarding the absence of a Labour government, and the effect on organised labour, Brown (2011) *JIR* 403 states as follows:

> "The period between the departure of the previous Labour government in 1979 and the return of New Labour in 1997 had been disastrous for organized labour. The proportion of employees in trade union membership tumbled from 56 to 31 percent … Politically the picture for trade unions was even bleaker. The influence of their leadership upon government policy, hitherto very substantial, collapsed to non existent."

[1189] Employment Relations Act of 1999 (c 26). A year prior saw the promulgation of the Employment Rights (Dispute Resolution) Act 1998 (c 8) ("ERDRA 1998"), which had a significant impact on ACAS, the ET and related dispute-resolution aspects.

[1190] For a detailed discussion surrounding the underlying theories pertaining to the new approach, in taking their point of departure from Labour's White Paper policy document "Fairness at Work", see P Smith & G Morton "New Labour's Reform of Britain's Employment Law: The Devil is Not Only in the Detail But in the Values and Policy Too" (2001) 39 *BJIR* 119.

industrial action.[1191] Furthermore, both CROTUM and the CPAUIA were abolished[1192] and the right of an employee to be accompanied in disciplinary proceedings was introduced.[1193] The re-election of Tony Blair's Labour Party saw the central labour relations legislation of its second term enacted as the 2002 Employment Act,[1194] the core of which was aimed at reforming the employment tribunals system.[1195] The Employment Relations Act followed in 2004 ("ERA 2004"),[1196] which amended various aspects pertaining to statutory union recognition procedures,[1197] industrial action[1198] and union membership.[1199] 2005 saw the introduction of the Trade Union

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[1191] N Selwyn *Selwyn's Law of Employment* 14 ed (2006a) 607 (14 ed). See further D Nash "Recent Industrial Relations Developments in the United Kingdom: Continuity and Change under New Labour 1997-2005" (2006) 48 *JIR* 401 406 who states:

> "The most significant provision of the act was that which dealt with statutory union recognition. ERA 1999 provided a procedure by which unions could attain recognition from an employer for the purposes of collective bargaining (over pay, hours and holiday entitlements), even in the face of employer opposition. This effectively sought to reverse the provisions of Conservative legislation of the 1980s and early 1990s whereby the decision to bargain collectively with a trade union was given to the employer, irrespective of the level of union membership and support. Whilst undoubtedly signifying a break with the past, the terms of the recognition procedure fell well below what unions had hoped for …".

Regarding the other provisions of the Act, Nash (2006) *JIR* 406 further avers that union members who undertook official industrial action were protected from dismissal for the first eight weeks of such action, and any preferential treatment given by employers to employees on the basis of them being non-union members, was also outlawed.

[1192] See G Lockwood "An Epitaph to CROTUM and CPAUIA" (2000) 31 *IRJ* 471 471, who further explains that s 28 of the Act, "grant[ed] the Certification Officer (CO) new powers to hear complaints for which CROTUM was initially empowered to provide assistance for actions in the High Court." The role of the Certification Officer is discussed in more detail below, at § 6 3 2 7.

[1193] Selwyn *Employment* 607 (14 ed).

[1194] Employment Act 2002 (c 22).

[1195] C Howell *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (2005) 184-185 states that the goal of the Act was to reduce the number of cases dealt with in terms of the tribunal system – by means of creating minimum statutory internal procedures within the workplace, covering issues pertaining to dismissal and grievances, by means of making the procedures an implied term of the employment contract. Persons seeking relief via the tribunal system would only be entitled to such if they had already completed the internal procedures. For a more detailed discussion of the consequences of the Act, see B Hepple & GS Morris "The Employment Act 2002 and the Crisis of Individual Employment Rights" (2002) 31 *ILJ* 245 245. See further R Undy "New Labour and New Unionism, 1997-2001: But is it the Same Old Story?" (2002) 24 *Emp Rel* 638, regarding the impact of New Labour in the preceding period on that of unions in Britain.

[1196] Employment Relations Act 2004 (c 24). See further AL Bogg "Employment Relations Act 2004: Another False Dawn for Collectivism?" (2005) 34 *ILJ* 72 72.

[1197] See in particular Part 1, ss 1-21.

[1198] See Deakin & Morris *Labour Law* 1146-1148 who discuss the extension (by the 2004 Act) to 12 weeks of the protected period with regards to industrial action.

[1199] Selwyn *Employment* 608 (14 ed). Selwyn *Employment* 599 furthermore explains how the 2004 Act

Modernisation Fund ("UMF"), which involved "providing grants (eventually there were 67, totalling over £7m) to unions to help them make better use of IT, improve communications, enhance activist training and so on."[1200]

In 2007, Gordon Brown was installed as the new leader of the Labour Party.[1201] The following year, the Employment Act of 2008[1202] was promulgated. This Act had as some of its most far-reaching provisions the repeal of the statutory dispute resolution procedures (introduced in terms of the 2002 Employment Act and its related Regulations)[1203] and bringing British trade union law in line with the European Convention on Human Rights,[1204] specifically the judgment of the European Court of Human Rights in *ASLEF v United Kingdom*.[1205]

Despite the legislation introduced by the Labour Government in the 2000s, the relationship between trade unions and government was an uneasy one. In the words of Nowak:

"To the disappointment of many in the movement, New Labour never really embraced trade unions,

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inserted introduced new provisions (s144A and s145B) in response to the decision reached in *Wilson v United Kingdom* ([2002] IRLR 568; 13 BHRC 39, [2002] All ER (D) 35 (Jul), ECtHR), which sought to prohibit "'sweetener payments' [made by an employer to its employees] as an inducement to workers not to belong to trade unions", since the European Court of Human Rights found such payments to be in contravention of Article 11 of the European Convention. See further Selwyn *Employment* 37 for a discussion on Article 11 in the context of British labour law.

[1200] Brown (2011) *JIR* 406. The UMF followed the so-called Warwick Accord, in light of the Labour Party's need for union financial support for the 2005 elections, where "New Labour politicians agreed to a shopping list of union policy demands" – Brown (2011) *JIR* 411. The impact of the Fund, in the context of the changing role of unions, is discussed in the following section.

[1201] For a further overview of the interplay between New Labour under Blair and British Trade Unions, see T Quinn "New Labour and the Trade Unions in Britain" (2010) 20 *J Elec Pub Op & Par* 357.

[1202] Employment Act 2008 (c 24). For a discussion of the key components of the Act, see in general: A Sanders "Part One of the Employment Act 2008: 'Better' Dispute Resolution?" (2009) 38 *ILJ* 30 30-49; KD Ewing "Employment Act 2008: Implementing the ASLEF Decision – A Victory for the BNP?" (2009) 38 *ILJ* 50 50-57; B Simpson "The Employment Act 2008's Amendments to the National Minimum Wage Legislation" (2009) 38 *ILJ* 57 57-64; M Wynn "Regulating Rogues? Employment Agency Enforcement and Sections 15–18 of the Employment Act 2008" (2009) 38 *ILJ* 64 64-72. Essentially, being a mere 22 pages in length, the Act focused on minor amendments to various statutory dispute resolution procedures – in light of requirements surrounding various applicable Codes of Practice (ss 1-7), national minimum wage requirements (ss 8-14) and employment agencies (ss 15-17).

[1203] Employment Act 2002 (Dispute Resolution) Regulations 2004 (No. 752). See Sanders (2009) *ILJ* 30 n2.

[1204] See in particular s19 of the Act, entitled "Exclusion or expulsion from trade union for membership of a political party".

[1205] ASLEF v United Kingdom (2007) 45 EHRR 34; (2007) 36 ILJ 425. See Ewing (2009) *ILJ* 50.

collective bargaining or social partnership. In a memorable turn of phrase, former TUC General Secretary John Monks suggested some New Labour figures saw unions as 'embarrassing elderly relatives'. Despite being in power for 13 years, Labour left much of the Conservative's negative industrial relations architecture intact."[1206]

Brown states that "[n]either Blair, nor his successor as Prime Minister, Gordon Brown, were close to trade unions or understood them".[1207]

6 2 2 Towards a duty of service?

In examining the impact of New Labour's term of government (from 1997 to 2010)[1208] on organised labour, Brown makes the point that "despite a government that was broadly sympathetic to, and financially dependent upon, trade unions, and which had passed substantial legislation in 1999 to encourage employers to give them recognition",[1209] union density continued its downward movement in both the private and public sectors.[1210] Significant changes had accordingly manifested within the British industrial relations system and broader society, in terms of the role being fulfilled by unions.

Brown reasons that both in the context of "voice" (referring essentially to "how employees have the means to express themselves to management")[1211] and in the context of the overall collective bargaining system in Britain,[1212] the external perception (on the part of employers and workers) of unions, had markedly changed.

[1206] P Nowak "The Past and Future of Trade Unionism" (2015) 37 *Emp Rel* 683

[1207] Brown (2011) *JIR* 411. The author reasons further (at 411), regarding Ed Milliband – the Labour Party successor to Brown – that "there is no reason to suppose him [Milliband] to be in any way different" either.

[1208] See the discussion in the following section regarding developments from 2010 onwards.

[1209] Brown (2011) *JIR* 409.

[1210] An insightful example of the levels of decline, is offered by Nowak (2015) *Emp Rel* 684, who states: "Perhaps a better way to illustrate the dramatic extent of change is to analyse what has happened to one of Britain's greatest unions, the National Union of Mineworkers, over the period. In the mid-1960s, it represented over half a million miners and was a potent political force – as Edward Heath was to discover to his cost in 1974. But today [+/- 2015], the union represents fewer than 2,000 members and is engaged in a struggle to keep open Britain's few remaining deep pits."

[1211] Brown (2011) *JIR* 409. See further A Bogg & T Novitz "Investigating Voice at Work" (2011) 33 *Comp Lab L & Pol'y J* 323 326-332 for a historical examination of the term in the context of the British system, and in general – A Bogg & T Novitz (eds) *Voices at Work: Continuity & Change in the Common Law World* (2014), for an excellent overview of the "voice" field of research in industrial relations.

[1212] Brown (2011) *JIR* 411 ascribes the decline as owing "far more to the intensification of competition in the wider economic environment than to any governmental action".

In short, unions were no longer considered the "default" instrument through which worker and employment issues were necessarily to be addressed. In this regard, the "expression of worker discontent has largely been individualized".[1213]

However, just as the behaviour towards trade unions had changed, so too had the behaviour of the trade unions themselves changed.[1214] Part of the explanation for this lies in the fact that unions in Britain were increasingly far removed from their historical origins. Gall, speaking in broad terms about the identity of British labour organisations, declared that "[m]ost unions are no longer *trade* unions, nor even unions of *trades*"[1215] and adds the following to explain:

> "The majority of union members are members of general unions which straddle both the public and private sectors. The only sizeable unions which maintain a distinctive identity are those for teachers, nurses and doctors. The decline in this form of identity has left something of a void given that it has not been replaced by new and alternative forms of identity and perspective like social movement unionism or social democratic unionism. Consequently, the cohesiveness and effectiveness of unions as collective organisations has been undermined."[1216]

These remarks may furthermore be considered in light of the apparent "decline in the perceived influence of trade unions at workplaces". This decline in influence was evidenced by the dramatic decline in industrial action and a union-focused approach on "consultation and information exchange" rather than negotiation in the context of employment issues[1217] along with an overall decrease in the "wage effect of unions".[1218] The end result was that unions were in need of changing both themselves and their offering in order to remain sustainable in an ever-changing socio-economic environment. This change was not necessarily self-directed. In this regard, Collins et al wrote in 2005:

> "Since 1980, the position has changed radically, with far-reaching legislation prescribing a high level of regulation not only of the way in which trade unions are governed, but also of the rights and duties

[1213] 409.
[1214] 410.
[1215] G Gall "Unions in Britain: Merely on the Margins or on the Cusp of a Comeback?" (2012) 23 *Manag Revue* 323 334.
[1216] 334.
[1217] 410.
[1218] 410.

> of trade union members: more of the former, and less of the latter. In this respect, public policy has comprehensively changed: trade unions are now regulated bodies, to be structured and organised on the basis of a template prescribed by the state… The template is one which reflects to some extent the earlier drawings made by the courts, embracing a notion of democracy through membership participation… and embracing also a notion of membership whereby the member need not accept the contractual obligations of membership which he or she is free to accept or reject at will."[1219]

The authors make the point that the shift in public policy is indicative of a change in perception on the part of the government about the role of trade unions within the contemporary economic system.[1220] This view may be compared with that of Ewing, who in the mid-2000s described what was being seen as the "changing nature of trade unionism" and that the "great spate of labour legislation in [this] period has simultaneously indicated and disguised a number of great changes whereby the State has sought both to repress certain core functions of trade unionism and to direct trade union purpose in a number of new directions".[1221] Consequently, the argument put forward is that the various legislative measures implemented during the 1990s to 2000s were designed to bring about two profound changes: Firstly, that unions become more responsive and accountable to the needs and interests of their members and, secondly, a fundamental change in the core features that define and "change the nature of the relationship between the members and the union".[1222] Thus, Collins et al remark that the ultimate vision of legislation, also that introduced by New Labour, is one where "trade unions [are not seen] so much as sources of power, promoting social change by collective action; but more as sources of advice, providing services to autonomous individual actors in the labour market".[1223] The authors assert that this vision of union regulation "is reflected to some extent in the choice that members now have regarding their participation within collective decisions in which they wish to participate" in terms of section 174 of TULRCA. In this regard, the authors point to the

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[1219] Collins et al *Labour Law: Text and Materials* 718.

[1220] 720. Says KD Ewing "The Function of Trade Unions" (2005) 34 *ILJ* 1 2 in this regard:
"[T]he trade union function is changing and the trade unions themselves are being compelled by government to accept their changing role in the contemporary economy … We are witnessing the emergence of a new supply side trade unionism, with the functions of trade unions being determined in Whitehall rather than in the workplace."

[1221] Ewing (2005) *ILJ* 1.

[1222] Collins et al *Text and Materials* 720.

[1223] 720. See further Ewing (2005) *ILJ* 3-4, in outlining this new "service function" of British unions.

views espoused in Parliament upon the introduction of section 174 TULRCA, where it was said that "'unions should be about attracting members and providing services for them' … and [that] workers should be free to move from one union where 'another union offers them better insurance deals'".[1224]

Accordingly, the suggestion at the midpoint of the 2000s was of a new union movement that would see members not necessarily concerned with the manner of union governance or the content and implications of collective agreements, but who would seek to hold unions accountable should they offer poor levels, or an insufficient variety, of services. Seen in this light, the trade union could no longer be considered as a mechanism through which combined labour could exercise its collective power to facilitate the improvement of working conditions, but would rather be seen as an association offering "a wide range of services including… commercial services unrelated to work, whether it be discount car insurance or free legal advice".[1225] Thus, what was envisaged was a scenario where prospective members would partake in "union-shopping" in an effort to join a trade union that could offer the best services and rewards in light of a particular individual employee's requirements.

Brief mention may also again be made of the UMF, which was one of the policies implemented by New Labour in 2005 in efforts to improve relations between the party and organised labour. While the Fund was not without controversy, with some critics seeing it as a "government 'back hander' to the unions",[1226] or a further attempt by the state at "explicitly shap[ing] the operations and functions of trade unions in line with wider economic and political objectives",[1227] its focus on, *inter alia,* assisting unions in improving communications, internal training and the use of IT, "brought substantial

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[1224] Collins et al *Text and Materials* 720, [footnotes omitted].

[1225] Ewing (2005) *ILJ* 7. With this being said, echoes of this new approach stretched back to the mid-1990s already, with H Bradley "Divided We Fall - Unions and Their Members" (1994) 16 *Emp Rel* 41 41 citing a number of British trade union leaders in describing their vision of a new "business unionism" with a social conscience as follows:

> "Union leaders such as Roger Lyons of MSF and Bill Morris of the TGWU have responded favourably to such suggestions with Lyons talking of the 'need to see our members as our customers', and Morris suggesting that unions should become 'a 'one-stop shop' for advice and action on the range of issues which impact on the wellbeing of the worker at work and at home', while Unison will offer its members 'free financial advice tailored to individuals in personalized packages' and 'discounts… such as 1 per cent off mortgages, cut-price insurance and snip holiday deals" [references omitted].

[1226] M Stuart, M Martinez Lucio & A Charlwood "Britain's Trade Union Modernisation: State Policy & Union Projects" (2010) 45 *Ind J IR* 635 635.

[1227] 635.

improvements in the professionalism of most of the larger trade unions".[1228] Stuart's explanation of the purpose of the UMF was that it "represents an attempt by the state to facilitate the operational modernisation of trade unions, so that unions may better respond to changing labour market conditions".[1229] Following an initial budget allocation of £10 million in 2005,[1230] a total of 82 projects were funded until the Fund's closure in 2010 (discussed below).[1231]

Whereas there still are trade unions who offer a range of additional services – in many instances as a mechanism of recruitment – it remains debatable to what extent the vision of the Labour Government towards the end of the 1990s came to fruition. In an environment that increasingly saw "individualisation", unions needed to do and offer what they could to attract members. The "duty of service" nonetheless remains interesting, offering as it does an example of an approach followed by organised labour in attempts to remain relevant in a contemporary environment. It also speaks to the possibility of the specific *level of service* offered by unions, but from the perspective of the member as opposed to the perspective of the union. Regardless, what is apparent from this period is the complete reversal of the fortunes of trade unions in Britain – from a stage where they virtually controlled all aspects of a member's employment to one that sees them offering discounted travel tours in attempts to attract members.

6 2 3 The coalition government

May of 2010 saw Gordon Brown calling for a general election, which resulted in a "hung parliament". This led to Brown's resignation as leader of the Labour Party and a new coalition government formed between the Conservative Party and the Liberal Democrats, with David Cameron and Nick Clegg as respective leaders fulfilling the

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[1228] Brown (2011) *JIR* 406-407.

[1229] Stuart et al (2010) *Ind J IR* 636. See M Stuart et al "'Soft Regulation' and the Modernisation of Employment Relations under the British Labour Government (1997–2010): Partnership, Workplace Facilitation and Trade Union Change" (2011) 22 *IJHRM* 3794 3805, for further details pertaining to the origins and purpose of the UMF.

[1230] Stuart et al (2010) *Ind J IR* 638

[1231] As per Stuart et al (2010) *Ind J IR* 638, 35 projects were started in the 2007 first round, 33 in the 2007 second round, with 14 projects in the third and final round of 2009. See Stuart et al (2011) *IJHRM* 3806 for an overview of some of the projects launched. A further point to make though, is that union modernisation – and funding in terms thereof – is still regulated in terms of s 116A of the TULRCA, with the Secretary of State being afforded the discretion as to whether or not to put such monies aside for the purpose.

roles of Prime Minister and Deputy Prime Minister. The result saw an end to thirteen years of "New Labour" rule[1232] and a review of the existing British industrial relations framework by the new coalition government.[1233]

One noteworthy enactment of the coalition government was the Enterprise and Regulatory Reform Act of 2013 ("ERRA 2013"),[1234] which brought several changes to the employment law system – including the introduction of an early conciliation service, compelling individuals with employment disputes to first approach ACAS (who will then have 30 days within which to attempt to resolve the dispute through conciliation)[1235] before taking things further to the more (legally-) technical[1236] and costly ET.[1237]

6 2 4 The 2013-2017 period and beyond

In May of 2015, following the Conservative Party's outright majority win in that year's general elections, David Cameron was re-elected as Prime Minister. This victory that

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[1232] See Brown (2011) *JIR* for a succinct discussion of the industrial relations policy of "New" Labour under Blair and Brown. Regarding the latter, Deakin & Morris *Labour Law* 797 perhaps best encapsulate it by stating:

> "In summary, therefore, the advent of a Labour Government undoubtedly brought a more hospitable approach to collective organisation than its predecessor, but there were evident limits to that hospitality."

[1233] B Hepple "Back to the Future: Employment Law under the Coalition Government" (2013) 42 *ILJ* 203 204-205 – see in general for an in-depth overview of the Coalition Government's "employment law policy". Deakin & Morris *Labour Law* 49 state, in this regard:

> "The Coalition Agreement committed the incoming administration to carry out a review of laws affecting employers and employees 'to ensure they maximise flexibility for both parties while protecting fairness and providing the competitive environment required for enterprise to thrive'" [quote taken from the new Coalition Government's post-electoral policy document: HM Government The Coalition: Our Programme for Government (2011) 10 – see Deakin & Morris *Labour Law* 49 n266].

Included herein, was the decision to close down the UMF, that had been instituted in 2005 (as at § 6 2 1 above) – see Brown (2011) *JIR* 406-407.

[1234] Enterprise and Regulatory Reform Act 2013 (c 24). See D Mangan "Employment Tribunal Reforms to Boost the Economy" (2013) 42 *ILJ* 409 and Hepple (2013) *ILJ* 217-219 for general commentary on, *inter alia*, the impact of ERRA 2013 in the context of the Coalition Government's new industrial relations' policy. Briefly stated, the Act is divided into 6 Parts, with Part 2 entitled "Employment", and containing the provisions regarding Conciliation and ACAS, from ss 7-24.

[1235] See s 18A of ERRA 2013, and its amendment of the ETA 1996.

[1236] GS Morris "Britain's New Statutory Procedures: Routes to Resolution or Barriers to Justice?" (2004) 25 *Comp Lab L & Pol'y J* 477 477.

[1237] For further information of the implications of ERRA 2013, see the discussion on the ET and EAT at § 6 3 2 4 and § 6 3 2 5 below.

was to result in the 2016 introduction of the Trade Union Act ("TUA 2016")[1238] with wide-ranging changes implemented once again.[1239] Below, a brief consideration of the meaning and implication of the TUA follows.[1240]

Bogg describes the TUA as "[constituting] a bold, ambitious and comprehensive attack on trade union freedoms"[1241] after outlining the key regulatory changes introduced by it as follows:

> "(i) restrictions on the right to strike, especially in relation to new ballot thresholds and notice requirements; (ii) tightening the law on picketing and protest; (iii) restricting the political voice of trade unions by switching to an 'opt-in' scheme for trade union political funds, applying to new members following a transitional period; (iv) new investigative powers for the CO,[1242] including the power to impose quasi-criminal penalties in certain circumstances; and (v) curtailing the organisational supports for public sector trade unionism, by limiting the check off and facility time in the public sector."[1243]

These changes introduced by TUA 2016, bar the point on the trade union political funds and organisational supports, will be considered in the further discussion below.[1244]

[1238] Trade Union Act 2016 (c 15)

[1239] M Ford & T Novitz "Legislating for Control: The Trade Union Act 2016" (2016) 45 *ILJ* 277 277 certainly pull no punches in asserting the potential impact of the new Act:

> "The combined effect of the measures is to make the TUA probably the most significant trade union legislation since the Employment Act 1980, representing a sudden acceleration in the incremental legislative controls subsequently introduced by Conservative governments."

[1240] At the time of writing, a useful point of departure was offered by the Industrial Law Journal, which saw its third publication of 2016 ([Vol 45(3)] in the form of a "Special Issue" on the 2016 Trade Union Act. That being said, Ford & Novitz (2016) *ILJ* 284 do make the following point:

> "A full assessment of the legislative programme is hampered because its implementation relies significantly on secondary legislation (eg the regulations defining 'important public services' which as yet have only appeared in draft form), the exercise of ministerial discretions (as in the case of restrictions on facility time), or revisions of statutory codes of practice. But it would be unwise to expect significant further dilation in favour of unions, because the detail is likely to be shaped by a future Conservative administration liberated by the peculiar circumstances of the Brexit referendum."

On the impact of Brexit, see in general M Ford "The Effect of Brexit on Workers' Rights" (2016) 27 *King's LJ* 398.

[1241] A Bogg "Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State" (2016) 45 *ILJ* 299 303.

[1242] Certification Officer, as discussed at § 6 3 2 7 below.

[1243] Bogg (2016) *ILJ* 303.

[1244] The relevant sections where these points are discussed in further detail as below, inasmuch as TUA 2016 makes changes to the existing law, are as follows: both points (i) and (ii) under "Industrial Action", and point (iv) under "Certification Officer".

For now, and in respect of the underlying motivation for the Act, Ford and Novitz state that:

> "[W]hat emerges is a determination to place unprecedented controls on trade union activity for more pragmatic economic reasons, in ways that also smack of the re-emergence of a highly authoritarian state, increasingly undermining trade union internal affairs."[1245]

As to the reasons why the government sought to walk further down the road of trade union control,[1246] Ford and Novitz make the point that there "was no great crisis in industrial relations that precipitated this legislative measure, and nothing like the "Winter of Discontent" which spurred the adoption of the Employment Act 1980". And further: "[n]or is there evidence of any substantial pressure from business for further laws on strikes".[1247] Bogg maintains that TUA 2016 is not merely a continuation of the "familiar neo-liberal story that was paused,[1248] or at least mollified, during the

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[1245] Ford & Novitz (2016) *ILJ* 291. The authors, in considering how most of the Act can be traced back directly to the Conservative Party's Manifesto (policy document) of 2015, state:

> "Located in a section dealing with 'jobs for all' and cutting red tape on businesses, a list of the envisaged changes to the law on industrial action, check-off and public sector facility time appeared under the sub-heading that 'we will protect you from disruptive and undemocratic strike action'… Appealing to the effect on the wider public rather than (eg) economic benefits, both sets of proposals [the other being in reference to the political funds of trade unions] sat awkwardly in their respective sections, giving the impression that the author was not sure where to place them" – see Ford & Novitz (2016) *ILJ* 278.

Says Bogg (2016) *ILJ* 303 on this point: "In many ways, then, the final version of TUA is the tip of a much larger ideological iceberg. It is important to keep this context in mind in assessing the broader significance of the legislation, for the Act reflects what was politically achievable rather than what was politically desired by the Government."

[1246] For further background context surrounding the influence of the Conservative think-tank "Policy Exchange", and its 2010 paper "Modernising Industrial Relations", see Ford & Novitz (2016) *ILJ* 279-280.

[1247] Ford & Novitz (2016) *ILJ* 291. In citing the Office of National Statistics, Ford & Novitz (2016) *ILJ* 291 state that "official statistics published by ONS one day after the Bill was introduced showed that working days lost to strikes were at historically very low levels". Regarding the possible views of the British public in general, J Lane "The Threat to Facility Time in the Trade Union Act 2016 – A Necessary Austerity Measure?" (2016) 46 *ILJ* 134 142, who in citing the Ipsos More Trade Union Poll (2013) states:

> "78% of Britons agreed that trade unions are essential to protect workers' interests, a finding that had remained consistent over the four decades during which the polling organisation had been tracking public opinion on trade unions. Only 35% believe that unions had too much power, while over 50% disagreed. Concern over trade union power was much lower than in the 1970s and 1980s when lengthy, damaging strikes rocked the country … The report noted that, for the last 10 years, the issue of trade unions and strikes had not been mentioned as an important issue for than 1% of those polled" [references omitted].

[1248] Regarding the theoretical underpinnings of neo-liberalism in the context of the British labour

intervening period between 1997 and 2015", warning that such an interpretation of the Act would be "complacent and mistaken".[1249] Rather, what is being demonstrated is a "new authoritarian Conservatism" that is centred around three distinctive approaches – namely, the "de-democratisation of trade unions and other actors in society";[1250] a "preference for *direct* State coercion"[1251] and an "important shift in justification for internal union democracy focused on an *external* concern to enforce the unity of the 'social order'."[1252]

In light of the above, Bogg questions whether the Act signifies the transition to a

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relations system, see in general: J McIlroy & A Campbell "Still Setting the Pace? Labour History, Industrial Relations and the History of Post-War Trade Unionism" (1999) 64 *Lab Hist Rev* 179 179-198; Fredman "Ideology" in *Future of Labour Law* 9 9-40; C Howell "Is There a Third Way for Industrial Relations?" (2004) 42 *BJIR* 1 1-22; P Smith & G Morton "Nine Years of New Labour: Neoliberalism and Workers' Rights" (2006) 44 *BJIR* 401 401-420; J McIlroy "Ten Years of New Labour: Workplace Learning, Social Partnership and Union Revitalization in Britain" (2008) 46 *BJIR* 283 283-313; P Smith "New Labour and the Commonsense of Neoliberalism: Trade Unionism, Collective Bargaining and Workers' Rights" (2009) 40 *IRJ* 337 337-355; and Hepple (2013) *ILJ* 203-223.

[1249] Bogg (2016) *ILJ* 306.

[1250] Bogg (2016) *ILJ* 308 draws his line of argument here between the focus on "de-democratisation" and the new regulations focusing on membership contributions to their trade union's political fund, care of s 11 of the TUA 2016, which substitutes s 84 and inserts s 84A into TULRCA. See Bogg (2016) *ILJ* 307-312 for details of his views on this point.

[1251] His emphasis. Bogg (2016) *ILJ* 306 provides as example "the progressive supplementation of civil law remedies administered by employers, to be flanked by criminal law measures administered and enforced directly by the State" – this being in reference to the new regulations regarding picketing and protest action [Bogg (2016) *ILJ* 313-316], the "check off" and facility time [Bogg (2016) *ILJ* 316-319], and the Certification Officer [Bogg (2016) *ILJ* 319-321].

[1252] His emphasis – Bogg (2016) *ILJ* 306. In this regard, Bogg (2016) *ILJ* 321-326 considers the increased threshold requirements for pre-strike ballots, as demonstrative of a measure (to discourage strike action) justified by concerns centred on external "sources" (including, for instance, the general public and employers). This external focus is in juxtaposition to the internally-focused "concerns" of the 1980s, that saw Thatcher's Conservative Government concentrate their efforts on re-balancing the power-dynamic between rank-and-file members and union leadership. A further dynamic that can be raised here, is the argument put forward by Novitz – where the focus on internal democracy within labour associations, is increasingly giving way to a new focus on the economic aspect surrounding unions, and organised labour as a whole. In this regard, T Novitz "UK Regulation of Strike Ballots and Notices – Moving Beyond 'Democracy'?" (2016) 29 *AJLL* 226 241 states:

> "In the [Coalition Government] Policy Exchange paper, unions are conceived solely as a mechanism to curb the 'monopsony power' of certain dominant employers and thereby achieving a legitimate wage premium where wages have been driven down 'below the efficient market equilibrium level'. On this basis, the entitlement to withdraw labour can only be justified collectively, rather than individually; hence the case for aggregating preferences via balloting thresholds and super-majorities. Unions are there to reduce transaction costs (which would follow from individually negotiated wages) and to counterbalance monopsony power, but only to the extent that the latter cannot be addressed through competition law" [footnotes omitted].

new phase in British industrial relations – one "beyond neo-liberalism into the realm of *anti*-liberal labour law".[1253] As Bogg pointedly states, it can surely not be argued that the policies that saw the introduction of the EA 1982 (together with Thatcher's Conservative government's vision of neo-liberalism) and New Labour's ERA 1999 (and its "Third Way")[1254] stem from the same ideological fountainhead as TUA 2016.[1255] However, any clear indication of whether or not the future of British labour law (inasmuch as it impacts upon trade unions) is on a new road to "beyond neo-liberalism", can only be measured in light of how the new Act plays itself out in the workplaces and homes of British workers, union officials and employers. History has repeatedly demonstrated that the intention of the legislature often manifests in something far different to what was initially envisaged. It would perhaps be prescient to conclude with the words of Bogg on just this point:

> "Any assessment of the legislation must await an assessment of how trade unions and employers respond to its provisions. As the experience of the 1980s with statutory balloting requirements demonstrates, the impact of legislation may be very different from that which is anticipated by its authors. Trade unions may adjust their behaviour to the new requirements of the legislation, even turning it to their advantage. Employers may not be willing partners with the Government in the use of legal sanctions to resist solidaristic practices in the workplace. It may be that the legislation has intervened in trade union affairs to such a grave extent that it prompts a backlash by trade unions and workers, leading to an escalation in various forms of official and unofficial industrial action. Although it is inevitably speculative to predict the use of the Act by employers, there is little sign of strong employer appetite for a new era of confrontation using the expanded armoury of legal countermeasures in the Act."[1256]

Finally, following the promulgation of the TUA 2016, no further major events have taken place in the context of organised labour and their members in Britain.[1257] The

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[1253] Bogg (2016) *ILJ* 334, [his emphasis]. See further the discussion in general by M Martinez Lucio "Beyond Consensus: The State and Industrial Relations in the United Kingdom from 1964 to 2014" (2015) 37 *Emp Rel* 692, and the possible path being taken by the current British government in respects of collective labour relations.

[1254] As above at § 6 2 1.

[1255] Bogg (2016) *ILJ* 334. Bogg continues by stating that were this to be the case, that these three ideological epochs could all be labelled as "neo-liberal", then the meaning thereof (as used in this manner) "probably risks collapsing the term into banality".

[1256] 331-332.

[1257] Reference can however be made to ACL Davies "The Trade Union (Wales) Act 2017/Y Ddeddf Yr Undebau Llafur (Cymru) 2017" (2018) 47 *ILJ* 135 135, which speaks to the 2017 promulgation by the Welsh parliament:

same, however, cannot be said of the British political environment,[1258] or for that matter, the broader British society – as encompassed within a single word: Brexit.[1259] While it remains to be seen to what extent Brexit will affect unions and their members in future, for now – the focus of the respective governments has certainly been on little other than finalising the UK's exit (and its associated political processes) from the EU.

6 3 The legislative regulation of unions in Britain

6 3 1 TULRCA

In this section a brief listing of the various provisions contained in TULRCA as they regulate the three broad themes of collective bargaining, the direct regulation of unions, and union representation in respect of their members, will be provided. This will provide an overview of the current statutory regulation of organised labour in Britain. Aspects raised here that require closer examination will be focused on in further discussion.

6 3 1 1 The promotion of collective bargaining

As an overview of the British approach to collective bargaining, Brodtkorb writes as follows:

> "The Employment Relations Act (ERA) 1999 enacted into UK labour law a system of statutory trade union recognition under which a union can compel an employer to recognise and bargain with it.

> "The rejection of the 2016 Act in Wales [inasmuch as it is applicable to 'Welsh public services'], where Labour is the largest party in the Assembly and where the government is Labour controlled, is embarrassing for the UK government, highlighting the politicised nature of the 2016 Act and the existence of alternative, more constructive ways of engaging with trade unions in public services. But it remains to be seen what the future will hold for the Act given the UK government's hostility towards it."

The Act is a mere four sections in length [Davies (2018) *ILJ* 136] – but its relevance to this study lies in the aforementioned commentary on the perceived underlying intention to TUA 2016.

[1258] Two Conservative Party leaders have taken their seats as Prime Minister following David Cameron, namely Theresa May (July 2016 to July 2019), and the current incumbent, Boris Johnson.

[1259] See T Novitz "Collective Bargaining, Equality and Migration: The Journey to and from Brexit" (2017) 46 *ILJ* 109 110, who states as follows:

> "On Thursday 23 June 2016, 52% of those who voted expressed the desire that Britain leave the EU. As the new Prime Minister, Theresa May, has said subsequently 'Brexit means Brexit', although the terms of negotiation still remain unclear", [footnotes omitted].

At the time of writing, in light of a multitude of political machinations (and the missing of deadlines), the UK has *still* not formally left the EU, although, it would appear to be a case of *when*, not *if*.

> The goals of the government in passing the legislation were to create a workable system whereby employers may be compelled to recognise unions with a majority of support in a relevant workforce, while at the same time, to encourage unions and employers to negotiate *voluntary agreements outside of the statutory procedure.* The possibility of a union attaining statutory recognition is intended to operate in the background of employer-union relations, persuading reluctant employers to retain control of their relationships with unions by negotiating *voluntary recognition* in order to forestall *mandatory statutory union recognition*."[1260]

In this regard, three key areas of the approach can be identified as: (i) Voluntary agreements outside of the statutory procedure; (ii) Voluntary recognition (as part of the statutory procedure);[1261] and lastly, (iii) Mandatory statutory union recognition procedure.[1262]

[1260] T Brodtkorb "Statutory Union Recognition in the UK: A Work in Progress" (2012) 43 *IRJ* 70 70, [my emphasis].

[1261] As explained succinctly by R Dukes "The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?" (2008) 37 *ILJ* 236 245:

> "Very broadly, the procedure involves an application to the CAC by a trade union that has been refused recognition, consideration of the application by the CAC and, ultimately, the possibility of a declaration by the CAC that the union is 'recognised as entitled to conduct collective bargaining'. 'Recognition' under the procedure, is recognition for the purposes of collective bargaining only, and collective bargaining is defined, for the purposes of the Schedule, as bargaining over pay, hours and holidays only. Admissible applications can only be made by independent trade unions, and only in respect of employers which (together with associated employers) employ at least 21 workers. Applications cannot be made in connection with workers in respect of whom the employer already recognises a trade union, even if that union is not independent, and even if it is not representative of the relevant workers" [footnotes omitted].

[1262] The entire process sees the intimate involvement of the CAC, with the latter being charged – in interpreting the procedures outlined in the Schedule – with the general duty to "have regard to the object of encouraging and promoting fair and efficient practices and arrangements in the workplace" – see Deakin & Morris *Labour Law* 877 n52, citing para 171 Sch A1 – the latter being entitled "CAC's general duty". As furthermore explained by B Simpson "Trade Union Recognition and the Law, a New Approach — Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992" (2000) 29 *ILJ* 193 201:

> "The crucial stage in activating the Part I procedure is an application to the CAC by the union which made a request to an employer for recognition under paragraph 4. If the employer either fails to respond to the request or within 10 days simply informs the union that it does not accept it, the union may apply to the CAC under paragraph 11 to determine both whether the proposed [bargaining unit] … is appropriate and whether the union has the support of a majority of the [bargaining unit]".

The alternative possibility, sees the employer responding to the request for recognition, "expressing a willingness to negotiate", but then sees the parties failing to reach consensus (within 20 days) on both the appropriateness of the bargaining unit and the question of majority support – see Simpson (2000) *ILJ* 201. In this scenario, the union has a right of recourse in approaching the CAC for the appropriate decision on both issues, as per para 12(2), para 12 being entitled "Negotiations fail". Lastly, should – in the aforementioned example – consensus be reached on the appropriate bargaining unit, but not recognition/majority support, then the union can also approach the CAC in terms of para 12(4) – see

This in mind, the management and regulation of collective bargaining in Britain is addressed in the main body of TULRCA through Chapter VA, entitled "Collective Bargaining: Recognition" (including sections 70A, [1263]70B[1264] and 70C[1265]) and sections 178 to 187 of Part IV ("Industrial Relations") Chapter 1 (also entitled "Collective Bargaining"). Of particular importance are sections 178[1266] and 179.[1267] Apart from three proscriptive provisions,[1268] the remainder of "Chapter 1" regulates an important statutory benefit of collective bargaining for independent unions, namely the duty of the employer to disclose information,[1269] the related requirements hereto,[1270] and the complaints procedure surrounding it (which involves the Central Arbitration Committee ("CAC") or ACAS depending on the circumstances).[1271] Section 186

Simpson (2000) *ILJ* 201-202. It can also be mentioned that para 12(5) prohibits any applications to the CAC, if either party had already (during this time) approached ACAS for assistance in negotiations. On this last point, Simpson (2000) *ILJ* 202 n33 reasons that this limit "reinforces the role of ACAS in promoting voluntary agreement on recognition."

[1263] This section is entitled "Recognition of trade unions", and merely serves to point directly to Sch A1 of the TULRCA.

[1264] This section (entitled "Training") pertains to the situation where a union has been duly recognised (in terms of the necessary procedures) as the body to conduct collective bargaining on behalf of the bargaining unit – and the training to be provided by the employer to the workers in that unit (to be monitored by the union).

[1265] The procedures surrounding a complaint that can be lodged with the ET, in respect of non-compliance with s 70B of the TULRCA.

[1266] Subsection 178(3) of the Act confirms that "'recognition', in relation to a trade union, means the recognition of the union by an employer, or two or more associated employers, to any extent, for the purposes of collective bargaining". Regarding what is to be understood by 'collective bargaining', subsection 178(1) defines it as meaning "negotiations relating to or connected with one or more of [the] matters" specified in subsection 178(2). Subsection 178(2), more specifically subss 178(2)(a)-(g), includes (*inter alia*) the following: Terms and conditions of employment; termination of employment; matters of [work-related] discipline; a worker's membership or non-membership of a trade union; and, facilities for officials of trade unions. In addition, subsection 178(1) further defines a 'collective agreement' as being "any agreement or arrangement made by or on behalf of one or more trade unions and one or more employers … and relating to one or more matters specified below", the latter again being reference to subsection 178(2).

[1267] Section 179 in turn defines the circumstances under which an agreement is to be seen as a legally enforceable contract.

[1268] Section 180 of the TULRCA (pertaining to the requirements of a collective agreement that seeks to prohibit/restrict strikes/industrial action by the employees), s 186 of the TULRCA (pertaining to the voiding of a provision in a contract in respect of the non-supply of goods/services unless a trade union(s) is recognised), and s 187 of the TULRCA (pertaining to a refusal to deal with a supplier on the grounds of trade union exclusion).

[1269] Section 181.

[1270] Section 182 (restrictions on/exceptions to the general duty to provide information).

[1271] Sections 183-185. For general background information about the right to disclosure of information, and the related requirements and conditions, see Collins et al *Labour Law* 584-587. In its simplest form,

declares a term or condition in a contract that requires a contracting party to recognise a union, or negotiate/consult with an official of a union void and section 187 prohibits the refusal to deal with a supplier/prospective supplier of goods/services, if the grounds for that refusal are similarly based on recognising a union, or negotiating/consulting with an official of a union.

Together with the obvious benefits of collective bargaining in the context of modern labour relations,[1272] including those matters set out in subsection 178(2), further advantages of recognition of purposes of bargaining and consultation include "time off work for workplace representatives and to redundancy consultation".[1273]

The bulk of regulation of collective bargaining under the Act is found in Schedule A1. The Schedule is divided into several Parts, with Part I ("Recognition") and Part II ("Volunteer Recognition") being most central to the process.[1274]

Once collective bargaining commences, and in clarifying what can be bargained about, the key point to keep in mind is the distinction between collective bargaining to conclude voluntary agreements outside of the statutory procedure[1275] and the

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the right stems from trade unions (who have been recognised for the purposes of collective bargaining) being "entitled to information held by the employer which may be relevant to collective bargaining" [at 584]. For specific information regarding the involvement of the CAC in this process, see H Gospel & G Lockwood "Disclosure of Information for Collective Bargaining: The CAC Approach Revisited" (1999) 28 *ILJ* 233.

[1272] As highlighted in chapter 2 above, in discussing the various functions of trade unions in the context of a modern labour relations system.

[1273] Collins et al *Labour Law* 551 [footnotes omitted]. The right in terms of 'time off work' (as regulated in terms of ss 168-170 of the TULRCA) stems from the union in question requiring "resources in the workplace to ensure collective agreements can be negotiated and administered" – see Collins et al *Labour Law* 577. However, new developments regarding these provisions, specifically ss 172A-1272B as introduced by the TUA 2016, need to be kept in mind – see in general Lane (2016) *ILJ* 136. Regarding "redundancy consultations" – in instances where an employer seeks to dismiss as redundant 20 or more employees at a single workplace within a period of 90 days or less, such an employer "shall consult about the dismissals all persons who are appropriate representatives" [subs 188(1)], with independent trade unions who have been recognised, being considered such representatives [subs 188(1B)(a)]. The "procedure for handling redundancies" is dealt with in terms of Chapter II, Part IV of TULCRA, specifically ss 188-198, and encompasses a significant section within Collins et al's Chapter 15 [Collins et al *Labour Law* 609-624] (entitled "The right to be informed and consulted"), and therefore, the latter provides a useful source for further information.

[1274] The remaining parts of Sch A1 are divided as follows: part III ("Changes Affecting Bargaining Unit"); part IV ("Derecognition: General"); part V ("Derecognition Where Recognition Automatic"); part VI ("Derecognition Where Union Not Independent"); part VII ("Loss of Independence"); Part VIII ("Detriment"); and finally, part IX ("General").

[1275] Defined in terms of s 178 of the TULRCA.

statutory scheme regulated by Schedule A1 of TULRCA.[1276] The scope of the latter process, introduced by ERA 1999, is very narrow: *Only* matters pertaining to (a.) pay/wages; (b.) working hours; and (c.) holidays are permitted to serve as the grounds upon which to collectively bargain. However, this is subject to an important qualifier in paragraph 3(4) of Schedule A1, namely that the parties (union and employer) can "agree matters as the subject of collective bargaining" and that these matters are to be so viewed irrespective of when the agreement between the two is made (in other words, before or after a CAC declaration or consensus that the union is to act as representative).[1277]

Part III of TULRCA, entitled "Rights in relation to union membership and activities" commences with section 137, which confirms that it is unlawful to refuse a person employment on the basis of their being a member, or *not* being a member, of a union,[1278] or if not prepared to take steps to become or cease to be, or to remain or not to become a member of a union.[1279] In terms of subsection 137(2), a person who is refused employment on these grounds, has a right of complaint to the ET.[1280] In terms of sections 144 and 145, a union membership requirement in a contract for goods or services is void, and a refusal to deal on union membership grounds is also prohibited (be that in favour of membership, or opposed to union membership). Furthermore, in terms of section 145A, a worker has a right against any "inducements" from an employer in an attempt to compel the member not to join, or not to make use of the services, or participate in the activities, of a union.[1281] In terms of sections 145D

[1276] Specifically, para 3(3) Sch A1. Para 3(2) Sch A1 specifically excludes subs 178(1) from any application to the recognition procedures outlined within the Schedule. Furthermore, as explained by Selwyn *Employment* 640, nothing done in terms of the mandatory procedures "in any way affects existing voluntary collective bargaining arrangements, which will no doubt continue without the necessity of being underpinned by a statutory procedure."

[1277] See R Hobbs "Great Britain" in R Blanpain (ed) *The Actors of Collective Bargaining: A World Report* (2004) 147 149; S Moore "The Relationship Between Legislation and Industrial Practice: A Study of the Outcome of Trade Union Recognition" (2006) 28 *Emp Rel* 363 364. In short therefore, unions and employers are free to engage in the voluntary collective bargaining process in order to conclude collective agreements, but any mandatory recognition process – where the employer potentially is compelled to recognise a union, albeit to (potentially) negotiate over a very specific ambit of conditions – will be regulated in terms of Schedule A1 of the TULRCA.

[1278] As per subs 137(1)(a).

[1279] As per subs 137(1)(b).

[1280] Subsection 139 regulates the time limits associated with the complaint to the ET in terms of subss 137 or 138 – whilst s 140 outlines the available remedies to be had at the ET.

[1281] Related hereto is s 145B, which regulates "inducements relating to collective bargaining".

and 145E, a complaint regarding the above lies to the ET.

In terms of section 146, a "worker has the right not to be subjected to any detriment as an individual by any act, or any deliberate failure to act, by his employer if the act or failure takes place for the sole or main purpose of" the scenarios outlined in subsection 146(1)(a)-(c). These include preventing/deterring the worker from becoming a union member, making use of union services, taking part in union activities, or compelling that worker to join a *particular* union. Sections 147 to 150 in turn regulate the procedures surrounding any referral of complaints regarding contravention of the above to the ET.

Section 151 is furthermore significant in that it directly references ERA 1996 and confirms that the dismissal of an employee shall be unfair if the reason for it included any of the scenarios outlined in subsections 151(1)(a) to (c). These include that the employee: was, or proposed to become, a member of a union; had taken part in or used, or proposed to take part in or use union activities or services. Section 153 confirms a dismissal as unfair where the worker was selected for redundancy on the basis/grounds related to union membership or activities.[1282]

Section 168 regulates the time off for carrying out trade union duties, while section 168A makes similar provision for union learning representatives[1283] and section 170 regulates time off for trade union activities.[1284]

Finally, in terms of section 174, an individual has a right not to be excluded or expelled from a union, unless this is done in terms of what is permitted within the section.[1285]

[1282] Section 156 regulates the minimum basic award that can be granted in instances where the dismissal was unfair in terms of the aforementioned.

[1283] Subsection 168A(2) outlines the purpose of affording these "learning representatives" the opportunity off work – and states:

> "The purposes are — (a) carrying on any of the following activities in relation to qualifying members of the trade union — (i) analysing learning or training needs, (ii) providing information and advice about learning or training matters, (iii) arranging learning or training, and (iv) promoting the value of learning or training, (b) consulting the employer about carrying on any such activities in relation to such members of the trade union, (c) preparing for any of the things mentioned in paragraphs (a) and (b)."

Furthermore, s 169 regulates the payment for time off in terms of s 168.

[1284] In terms of ss 171-172, the remedy for complaints concerning the aforementioned, lies at the ET.

[1285] As per subss 174(2)(a)-(d), 174(4), 174(4A)-(4F) certain scenarios are presented that would allow for such exclusion – one of which (as per subs 174(2)(d)) pertains to the exclusion/expulsion being entirely attributable to conduct of that person and the conduct is not protected conduct as per provisions of the Act – whilst several make reference to the political affiliations of the individual, and this being

6 3 1 2 The direct regulation of unions

A host of provisions are found in TULRCA that evidence direct regulation of trade unions, their representatives or their members. Commencing with section 1 of the Act, where the meaning of a union is defined, sections 2 through 9, focus *inter alia* on the list of trade unions as maintained and managed by the CO,[1286] the meaning of an independent union,[1287] and appeals against CO decisions.[1288]

Chapter II, entitled "Status and property of trade unions", commences with section 10, which confirms the "quasi-corporate status" of unions (as discussed earlier), while section 11 confirms the exclusion of common law rules as to restraint of trade – which, as is apparent both from the earlier discussion and the discussion below – is of significant importance. Sections 12 to 14 relate to property of the union, its trustees and any transfer of securities. Section 15, in turn, prohibits the use of union funds in order to indemnify any unlawful conduct on the part of "an individual" for actions that fall within the remit of the section.[1289]

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used as a grounds for exclusion/expulsion. Sections 175-176 (read with subs 174(5)), regulate complaints in respect of the above, being submitted to the ET.

[1286] Included herein is the application process to be added to, and removed from, the list (s 3-4 of the TULRCA). Regarding the advantages to listing, Selwyn *Employment* 618 states as follows:

> "First, it is evidence (but not conclusive evidence) that the body concerned satisfied the statutory definition. Second, there are tax reliefs on income in the union's provident funds. Third, they are procedural advantages in connection with the passing of property consequent on the change of trustees. Fourth, and perhaps the most significant of all, only a listed trade union can apply for a certificate of independence."

[1287] As per s 5 of the TULRCA, with s 6 regulating the application for a "certificate of independence" – and s 7 regulating the withdrawal/cancellation of that certificate. Regarding the significance of "independence", Selwyn *Employment* 619 states as follows:

> "Once granted, the certificate is conclusive evidence of the independence of the trade union, and in any proceedings before any court, the Employment Appeal Tribunal, the Central Arbitration Committee, or an employment tribunal, with the independence of the trade union is in issue and there is no certificate in force and no refusal, withdrawal or cancellation recorded, the proceedings shall be stayed until a certificate has been issued or refused by the certification officer."

Furthermore, a host of direct benefits are applicable to either the union, its officials and shop stewards or members, in the event of the union in question being certified as independent. As discussed by Selwyn *Employment* 621-622, these include *inter alia*: protection against "detriment or dismissal on grounds relating to union membership or activities" (s 146 and s 152 of the TULRCA); access to funding under possible trade union modernisation schemes; the right to receive information for collective bargaining purposes (s 181 of the TULRCA); and, officials having the right to paid time off work for union duties (ss 168-170 of the TULRCA).

[1288] This in terms of s 9 of the TULRCA.

[1289] Central to this, as per subss 15(1)(a)-(c) of the TULRCA, is the committing of an offence "or for

Sections 20 and 21 TULRCA, which are discussed in more detail in the context of the "Industrial action" section at § 6 4 6 1 below, regulate the liability of unions in certain tort proceedings and the repudiation by the union of certain acts (in order to avoid such liability). Related hereto, and also discussed at § 6 4 9 below, is section 22, which limits the amount of damages that may be awarded against a trade union for actions in tort.[1290]

In terms of section 24 – which falls under Chapter III, entitled "Trade union administration" – trade unions are required to maintain a register of the names and addresses of its members, which is of particular importance in light of the requirements surrounding balloting.[1291] A host of additional provisions regulate the appointment/removal and function of the "assurer" with regard to the register.[1292] Furthermore, in terms of section 27, a copy of the union rules/rule book/constitution is to be supplied to any person who so requests, either free or upon the payment of a reasonable fee, while section 28 regulates the keeping of accounting records by the union.[1293] Sections 32-32A provide details pertaining to the union's "Annual Return", while sections 33 to 37 regulate the procedural aspects pertaining to the auditors that are required to be appointed by unions for purposes of the oversight/audit of the union's financial records. Sections 37A to 37C, discussed below, sets out the detailed requirements surrounding the powers of the CO to require the production of documents by the union, and the investigative powers of CO inspectors. Sections 38 to 41 regulate the processes surrounding union members' superannuation schemes.[1294]

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contempt of court", and any security being offered in terms hereof. Should the union be found to have paid any such amount, then in terms of subs 15(2)(a), "an amount equal to the payment is recoverable by the union from him" – and should the union fail to take action against the individual in this regard, then in terms of subs 15(3), a union member may then approach the court for an order to bring about the payment/recovery of expenses in question.

[1290] Furthermore, in terms of s 23, certain restrictions apply to the enforcement of awards (in light of the abovementioned) against specific types of union property.

[1291] As per s 24A of the TULRCA, there is a requirement of confidentiality regarding who is listed on the register. Section 24ZA requires the union to provide a copy of the register to the CO, within each reporting period. Ss 25-26 regulates the procedures regarding complaints to the CO, or the courts, respectively, in the event of non-compliance with ss 24-24A of the TULRCA.

[1292] See ss 24ZB-24ZG of the TULRCA.

[1293] Ss 29-31 provides further regulation pertaining to the records, involving, *inter alia*, access (s 30) and availability for inspection (s 29).

[1294] The CO is afforded powers of investigation (in terms of s 41), whilst procedures are outlined in s 38 for the funds to be kept in a separate account, to that of the general funds of the union (subs 38(2) of

Section 44 provides for the extension of numerous procedural and regulatory provisions to that of union branches, where applicable.[1295] Section 45, simply titled "Offences", links criminal liability of trade unions to non-compliance with a variety of sections in the Act.[1296] Importantly, as per subsection 45(2), "the offence shall be deemed to have been also committed by – [(a)] every officer of the trade union who is bound by the rules of the union to discharge on its behalf the duty breach of which constitutes the offence, or ([b]) if there is no such officer, every member of the general committee of management of the union". Further subsections outline how culpability may be imputed to persons who either "wilfully alters" so as to falsify union documents,[1297] contravenes any duties owed by him in respect of CO investigations,[1298] acts improperly with regard to financial documents pertaining to the union,[1299] or provides or makes an explanation of statement which he knows to be false (or recklessly provides a false statement) in a CO investigation.[1300] Section 45A outlines the potential consequences of these offences – including being found liable to a fine,[1301] or imprisonment for a term not exceeding six months, or both.[1302]

Chapter V, titled "Rights of trade union members" is a particularly important part of TULRCA. It commences with section 62, which outlines the right to a ballot before industrial action. Similarly, section 63 confirms the right of members to not be denied access to the courts.[1303] Sections 64 to 67 are significant in that they address the right

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the TULRCA). The periodic examination of the scheme by a suitably qualified actuary is regulated in terms of s 40.

[1295] These include, *inter alia*, duties in regards to the keeping of accounting records (s 28); annual return, accounts and audit (ss 32, 33-37) and the provisions pertaining to the membership register (s 24 and related).

[1296] In terms of subs 45(1), the criteria is met when the union "refuses or wilfully neglects to perform a duty imposed on it by or under any of the provisions of", those sections listed in subs 45(1), including, *inter alia,* failure to provide a copy of the union rules; and not complying with the accounting records requirements.

[1297] Subsection 45(4).

[1298] Subsections 45(5)-(6).

[1299] Subsections 45(7)-(8).

[1300] Subsection 45(9).

[1301] Subsection 45A(1)(a).

[1302] Subsection 45A(1)(b). Section 45C outlines remedies and enforcement of the aforementioned.

[1303] The wording of subs 63(1) reads as follows:

> "This section applies where a matter is under the rules of a trade union required or allowed to be submitted for determination or conciliation in accordance with the rules of the union, but a provision of the rules purporting to provide for that to be a person's only remedy has no effect (or would have no effect if there were one)".

of a union member to not be "unjustifiably disciplined".[1304] Section 64 confirms the right, section 65 defines what unjustifiable discipline entails,[1305] while section 66 empowers the complainant to approach the ET where an award for compensation (or reimbursement for any fines paid to the union) may be issued in terms of section 67.[1306]

Chapter VI, entitled "Application of funds for political objects", contains a series of provisions (sections 71 to 91) that directly regulate the extent to which unions are permitted to make use of union funding for the purposes of political goals.[1307] A trade union is required to have in place both a "political resolution"[1308] and a set of rules[1309] that regulate and expressly clarify the circumstances and extent of such political contributions.[1310] Furthermore, trade union members are now required to opt-in to any deductions being made towards the fund,[1311] as opposed to the former scenario where

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Furthermore, in terms of subs 63(2) the courts are empowered to deem internal processes requesting the dispute to be settled/determined (with such request having been made six months or more prior to the court application) as "irrelevant" in determining whether or not proceedings before the court should be dismissed, stayed or adjourned.

[1304] See the discussion regarding the IRA 1971 (at § 5 2 4 4 above), and the initial introduction of s 65 into the British industrial relations system.

[1305] Included herein is, *inter alia*, disciplining a member for: failing to participate in or support a strike or other industrial action (subs 65(2)(a)); "asserting (whether by bringing proceedings or otherwise) that the union, any official or representative of it or a trustee of its property has contravened, or is proposing to contravene, a requirement which is, or is thought to be, imposed by or under the rules of the union or any other agreement or by or under any enactment (whenever passed) or any rule of law" (subs 65(2)(c)); or consulting with, or asking for advice/assistance from the CO (subs 65(3)). See further Deakin & Morris *Labour Law* 1007 for an explanatory list of the twelve "types of conduct" that accordingly fall within the ambit of subss 65(2)-(4) of the TULRCA.

[1306] It is worth mentioning that Collins et al *Labour Law* 517-518 group a collection of the TULRCA provisions (all discussed within these three sections under the "TULRCA" discussion), under the heading "A Bill of Rights for trade union members?", before stating:

> "British law now provides a comprehensive Bill of Rights for trade union members, which contrasts sharply with the correspondingly limited rights of trade unions, especially in their dealings with employers."

The authors [at 517-518] proceed to include the following TULRCA sections in this grouping: ss 30, 32A, 46, 47, 50, 62, 63, 64, 65, 73, 82 and 174.

[1307] Regarding what this entails, as stated by N Selwyn "Collective Agreements and the Law" (1969) 32 *MLR* 377 634, this includes *inter alia* "any contribution to the funds of, or the payment of any expense incurred by, a political party", or "the maintenance of any holder of a political office" – as per subss 72(1)(a)-(f) of the TULRCA.

[1308] Regulated in terms of s 73.

[1309] Regulated in terms of s 74.

[1310] This in terms of s 71.

[1311] Regulated in terms of s 84.

the onus was on them to specifically opt-out.[1312] An independent scrutineer also has to be appointed to oversee any ballot held in order to determine the abovementioned political resolution.[1313] Any breach of these obligations gives rise to the possibility of an application to the CO for an appropriate declaration and enforcement of the obligation (in terms of section 72A, 79 and 80). Alternatively – as per section 81 – application may also be made to the courts.

Chapter VIIA of TULRCA is entitled "Breach of rules". Section 108A, which is considered in more detail below in the 'Certification Officer' section (§ 6 3 2 7), regulates the right to apply to the CO where there has been a breach or threatened breach of the union rules. Section 108B outlines the declarations and orders that can be issued by the CO while section 108C confirms that appeals on any question of law arising from a decision by the CO lies to the EAT.

An entire range of provisions that directly regulate unions in the context of industrial action is to be found under Part V "Industrial action" of the Act. These provisions are discussed in more detail in the Industrial action section below (§ 6 4).

6 3 1 3 Trade union representation of members

Apart from the possibility of representing their members before the ET,[1314] assisting their members in general with regards to possible common law claims against employers,[1315] their role in settlement agreements, and overall functions as representatives within the overarching collective bargaining system in Britain, TULRCA, on a broader level, contains various provisions which directly or indirectly speak to union-member representation.

Chapter IV ("Elections for certain positions") regulates the processes and requirements surrounding free and fair representation within union structures. Specifically, in terms of section 46, TULRCA confirms the duty of unions to hold elections for certain positions and that "no person continues to hold such a position for more than five years without being re-elected at such an election".[1316] The positions

[1312] This still being available in terms of s 82 of the TULRCA.
[1313] As regulated in terms of s 75. See also s 76-77
[1314] This in terms of ss 10-15 of ERA 1999, with s 10 in particular regulating the "right to be accompanied".
[1315] For a succinct breakdown of the historical development of unions' representative role in the British courts, see C Grunfeld "British Report" (1964) 18 *Rut L Rev* 343 360-361.
[1316] As per subs 46(1)(b).

being referenced by the Act, in terms of subsections 46(2)(a) to (d), are that of a member of the union's executive, the union president and general secretary.[1317] Sections 47, 48 and 49 outline the requirements to be satisfied with respect to these elections and again requires appointment of an independent scrutineer.[1318] Section 50 outlines who is entitled to vote, while section 51 details the specific procedures that need to be complied with during the actual voting.[1319] The remedy for any contravention lies with the CO in terms of sections 54 and 55.[1320] Again, a further remedy is afforded to any interested persons, by means of an application to the courts, via section 56.

As far as redundancies are concerned, section 188 in Chapter II of the Act provides for a duty to consult representatives, subject to the requirements surrounding the size of the business in question. In terms of subsection 188(1B)(a) a duly-recognised independent trade union is considered one such representative.[1321] Complaints lie to the ET in terms of section 189. Similar procedures and obligations arise in terms of section 198A, which deals with employees being transferred to the employer from another undertaking – with section 198B making the necessary adjustments to again include an independent trade union as a possible representative of the employees in question.

The next direct mention of union representation appears under Part V, "Industrial action" where, notwithstanding the obvious implied representative role performed by unions in the context of industrial action, section 238A outlines the various regulatory aspects surrounding the participation in official industrial action. Section 238B, with reference to the relevant provisions of section 238A, sets out the requirements for conciliation and mediation in the context of subsection 238A(6). The latter subsection speaks of an agreement to use "certain services", and how – should this not be done by an employer – the resulting dismissal will be deemed unfair. Those "certain services" are outlined in s238B, which speaks of the interaction between a service provider and a union as representative of those who were involved in the official

[1317] See subs 46(3) for the full description of what is to be understood by "member of the executive".
[1318] As per s 49 of the TULRCA.
[1319] Section 51A regulates the counting of the votes by an independent person, whilst s 52 prescribes what is required in terms of the scrutineer's report.
[1320] Appeals of the CO's decision, lies to the EAT, in terms of s 56A of the TULRCA
[1321] The focus of the consultations, as per subs 188(2) shall focus on avoiding dismissals, or reducing the number of dismissals, or mitigating the consequences thereof.

industrial action, in making the necessary arrangements pertaining to the conciliation or mediation attempts.

Finally, section 288 of TULRCA provides for union officials to serve as a "relevant independent adviser" in the context of settlement agreements that may be concluded on behalf of the member/employee with the employer. The specifics hereof, and the possible implications of this, are discussed in greater detail under the Employment Tribunal section that follows below.

6 3 2 Statutory bodies

6 3 2 1 Introduction

The preceding section outlined the various provisions within Britain's primary statutory instrument regulating organised labour and its members. One topic that requires discussion, is the way in which effect is given to the statute through various statutory bodies and mechanisms empowered through, and in conjunction with, TULRCA. Furthermore, while not technically "creatures of statute", the civil courts are examined, to the extent that they too serve as adjudicators of labour disputes or issues, either in terms of the common law, or specific statutory provisions. The discussion is, of course, premised on the notion that even though rights may exist, those rights remain dependent on their effective enforcement. In light of these remarks, the section immediately below will consider the following: (i) The ACAS and Central Arbitration Service; (ii) The ET and EAT; (iii) The CO; and finally, (iv) the civil courts.

6 3 2 2 The Advisory, Conciliation and Arbitration Service

The ACAS was created in 1974,[1322] with subsequent statutory formalisation by the Employment Protection Act of 1975.[1323] As is evident from its name, ACAS has as its

[1322] S Hardy *Labour Law and Industrial Relations in Great Britain* 3 ed (2007) 60. For additional background pertaining to the creation of ACAS, see R Benedictus "Employment Protection: New Institutions and Trade Union Rights" (1976) 5 *ILJ* 12.
[1323] See § 5 2 6 above. See Deakin & Morris *Labour Law* 95.

primary duty the performance of advisory,[1324] arbitration and conciliation services[1325] as required by employees (or employers) within the British industrial relations system.[1326]

ACAS furthermore fulfils the role of facilitating conciliation in matters that have been referred to the ET and it is in this area that significant changes have been introduced by ERRA 2013, specifically section 7.[1327] This (from May 2014) requires the "prospective claimants" to *first* report their claim to ACAS as part of the so-called Early Conciliation process *before* approaching the ET.[1328] The underlying aim of this provision is to attempt to facilitate a settlement (with the assistance of the ACAS conciliation officer) between the claimant and employer, "that [thereby] avoids proceedings being implemented".[1329] One of the three "key characteristics" of ACAS identified by Hardy,[1330] namely ACAS's focus on "the value of voluntary dispute

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[1324] See Deakin & Morris *Labour Law* 98 for details pertaining to the extent of its advisory service to "employers … workers and trade unions, either by telephone, letter or personal visit". One would presume that the various "publications" and resources to be found on the ACAS website [see <http://www.acas.org.uk/> (accessed 27-05-2017)], could be included as a type of advisory function.

[1325] For further details pertaining to conciliation services for individuals, and in collective disputes – see Deakin & Morris *Labour Law* 96-97; for details pertaining to mediation and arbitration in collective disputes, see Deakin & Morris *Labour Law* 98-99.

[1326] 96, in citing s 209 of the TULRCA [at 96 n278] state that ACAS is "charged with the general duty of promoting 'the improvement of industrial relations'". In this regard, of particular importance is the issuing of Codes of Practice by ACAS – the latter being described by the authors [at 99] as "containing practical guidance to promote the improvement of industrial relations" and being "admissible in evidence before employment tribunals and the CAC". Furthermore, see in general G Dix & SB Barber "The Changing Face of Work: Insights from ACAS" (2015) 37 *Emp Rel* 670, for a succinct and recent overview of ACAS in the context of the current British labour relations system.

[1327] Thereby introducing s 18A into ETA 1996.

[1328] Mangan (2013) *ILJ* 413.

[1329] Subsection 18A(6) of the ETA, inserted by subs 7(1) of the ERRA 2013. See Hepple (2013) *ILJ* 218 and Mangan (2013) *ILJ* 413-414 for a discussion regarding the underlying rationale in expanding the role of ACAS in this manner – essentially in an attempt to cut the costs to employers in potentially reducing the number of ET claims. Mangan (2013) *ILJ* 413 states in this regard that the Government was (speculatively) hoping the new ACAS procedure "can reduce the number of claims which reach the [Employment] tribunal by 12,000" [footnotes omitted]. Dix & Barber (2015) *Emp Rel* 673 confirm that following the introduction of the early conciliation service, "over 60,000 notifications were received between April and December 2014", and that a mere "9 per cent of employees rejected the offer to engage with the service suggesting that willingness to consider conciliation is widespread."

[1330] The other two being "impartiality and independence from government" and "continuing tripartism" – the latter being in regard to its controlling Council. See Hardy *Labour Law* 60; Deakin & Morris *Labour Law* 95. Selwyn *Employment* 1 says, of the autonomy of ACAS, "[i]t is this complete independence from government control which is a distinguishing feature of ACAS".

settlement",[1331] remains. Accordingly, while the claimant is obliged to make the initial referral to ACAS, the parties to the referral are not forced to participate.[1332] However, subsection 18A(4) read with subsection 18A(8) ETA 1996[1333] confirms that a certificate is to be issued by the ACAS conciliation officer if the officer concludes that a settlement during the prescribed period of conciliation is not possible, or if the period expires without a settlement having been reached.[1334] A further claim to the ET may not be instituted in the absence of such a certificate.[1335] A final point to make regarding the Early Conciliation process are five exceptions (mostly procedural in nature) that permit a claimant to bypass ACAS and go directly to the ET – one noteworthy exception is where the claim in question pertains to an unfair dismissal.[1336]

Deakin and Morris[1337] explain, with regard to the actual nature of the conciliation service, that any discussions and revelations made with and to the conciliation officer[1338] provided for by ACAS remain confidential. Should the process not be successful (and proceed to an ET hearing) nothing disclosed during conciliation will be admissible at the ET. Furthermore, the services offered by ACAS are free and, unlike the ET, do not involve any payment of fees by the parties involved.[1339] In explaining "ACAS's role in preventing and resolving disputes",[1340] Hardy identifies two central categories, namely collective conciliation (as augmented by arbitration or dispute mediation, if required);[1341] and a process ACAS terms "advisory mediation".[1342]

[1331] Hardy *Labour Law* 60.

[1332] See Mangan (2013) *ILJ* 413 and Hepple (2013) *ILJ* 218.

[1333] As inserted by subs 7(1) of the ERRA 2013.

[1334] Subsections 18A(4)(a)-(b) of the ETA 1996, inserted by s 7(1) of the ERRA 2013.

[1335] Subsection 18A(8) ETA 1996, inserted by subs 7(1) of the ERRA 2013.

[1336] See in this regard The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (No. 254), specifically reg 3(1)(d) – where reference is made to Part X of ERA 1996, entitled "Unfair Dismissal" – and that any proceedings thereunder are exempt from Early Conciliation.

[1337] Deakin & Morris *Labour Law* 96.

[1338] Selwyn *Employment* 2.

[1339] Deakin & Morris *Labour Law* 96.

[1340] Hardy *Labour Law* 61.

[1341] Selwyn *Employment* 2 provides an example of collective conciliation as involving "a dispute over union recognition" (in the workplace).

[1342] Hardy *Labour Law* 61. See Deakin & Morris *Labour Law* 98 for further information regarding the ACAS mediation process, although, based on the minuscule numbers of parties who have recently used the service (a mere twenty-eight in 2010/2011), it would not appear to be a particularly important component of collective labour law in Britain.

6 3 2 3 The Central Arbitration Committee

The Employment Protection Act of 1975 ("EPA 1975")[1343] saw the establishment of the CAC.[1344] Its role "as a permanent and independent industrial relations arbitration body"[1345] sees it often being described and discussed in conjunction with – conceptually and textually – ACAS.[1346] The function of the CAC is to focus on three key areas: it "is charged with operating the statutory [trade union] recognition and derecognition procedures; adjudicating on complaints relating to a failure by employers to disclose information for collective bargaining purposes; and adjudicating on specified matters"[1347] pertaining to consultation in terms of a host of legislative instruments.[1348]

Structured in a similarly tripartite manner to the ET and ACAS, the CAC is composed of a Committee led by a chairman,[1349] a selection of deputy-chairmen,[1350] and members "as experienced in industrial relations and shall include some persons whose experience is as representatives of employers and … as representatives of workers".[1351] In describing the functioning of the CAC, Gennard explains that it is its "flexibility which sets it apart from the traditional courts".[1352] Given that it remains

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[1343] See § 5 2 6 above.

[1344] In terms of EPA 1975 Schedule 1, Part II, s14-27.

[1345] Deakin & Morris *Labour Law* 100.

[1346] See for instance Deakin & Morris *Labour Law* 100; Hardy *Labour Law* 63; Collins et al *Labour Law* 27-28; S Moore et al "Research and Reports. Recognition of Trade Unions – Consultation Over the Access Code and Method of Bargaining" (2000) 29 *ILJ* 406 406-415; Dukes (2008) *ILJ* 236 236-267; B Simpson "Judicial Control of the CAC" (2007) 36 *ILJ* 287 287-314. It furthermore makes sense that many authors choose to discuss the aims, functions and role of the CAC and ACAS in such close proximity, given that both institutions owe their formalisation to the same statute [EPA 1975], and accordingly, have shared institutional origins. See in this regard Benedictus (1976) *ILJ* 12 12-23; B Doyle "A Substitute for Collective Bargaining – The Central Arbitration Committee's Approach to Section 16 of the Employment Protection Act 1975" (1980) 9 *ILJ* 154 154-166.

[1347] Deakin & Morris *Labour Law* 100.

[1348] These include, *inter alia*, Companies (Cross-Border Mergers) Regulations 2007 (No. 2974); The Information and Consultation of Employees Regulations 2004 (No. 3426); and Transnational Information and Consultation of Employees Regulations 1999 (No. 3323) – the aforesaid all listed by Deakin & Morris *Labour Law* 100.

[1349] At the time of writing, Sir Michael Burton, also a High Court Judge (and former President of the EAT).

[1350] The Deputy-Chairmen preside over matters in the absence of the Chairman.

[1351] EPA Sch 1, P II, subs 14(2). See SM Burton "The Principles and Factors Guiding the CAC" (2002) 24 *Emp Rel* 606 607; Deakin & Morris *Labour Law* 100.

[1352] J Gennard "UK Industrial Relations State Agencies" (2010) 32 *Emp Rel* 5 6-7. See further Burton

completely independent of any governmental interference or the constraints of a precedence system,[1353] it essentially formulates its own rules and procedures[1354] in order to "attempt to encourage a joint, rather than an adversarial, approach".[1355] Regarding the success of the CAC, Deakin and Morris state that in the period between 1977 and 2011 573 complaints were received of which "only 13.26% resulted in a formal decision."[1356] As such, the experience with the CAC illustrates the benefits of an informal approach to dispute resolution.

6 3 2 4 The Employment Tribunal

Deakin and Morris state:

> "Just as there is no Labour Code in England, equally there is no separate labour court system for dealing with all labour law disputes. Rather the judicial determination of labour law matters is divided between tripartite employment tribunals, which, broadly speaking, hear claims involving statutory employment rights, as well as certain common law claims, and the common law courts."[1357]

As the primary institutions tasked with adjudicating on breach of statutory employment rights, both the ET and the EAT are important.[1358]

(2002) *Emp Rel* 607.

[1353] See Burton (2002) *Emp Rel* 608-609.

[1354] Deakin & Morris *Labour Law* 101, citing subs 263A(7) of the TULRCA.

[1355] Deakin & Morris *Labour Law* 100. See further Hardy *Labour Law* 63, who quotes the then Chairmen of the CAC, from the CAC Annual Report 1999-2000, as stating:

> "Its [the CAC] procedures and hearings are structured so as to achieve complete informality. The aim is to encourage the approach by way of problem solving rather than by emphasising the aspects of conflict and verdict. Above all there is a commitment to the principles of sound industrial relations and workable solutions."

[1356] Deakin & Morris *Labour Law* 100 – footnotes omitted.

[1357] 75, [footnotes omitted].

[1358] ACG Adams & JFB Prassl "Vexatious Claims: Challenging the Case for Employment Tribunal Fees" (2016) 80 *MLR* 412 state as follows:

> "Today, Employment Tribunal's (ETs) have come to play 'a central role in British employment relations'. With the demise of collective representation, and in the absence of consistent state enforcement, the ET system represents the only credible mechanism for vindicating most individual employment rights" [footnotes omitted].

Deakin & Morris *Labour Law* 78 state that in the period of 2010-2011, in excess of "218 000 claims were accepted by employment tribunals, although a significant proportion did not reach a hearing because they were resolved either through ACAS conciliation; withdrawn, for example, as a result of a private settlement; or struck out" [footnotes omitted]. Regarding more recent statistics, the period between 1 April 2015 to 31 March 2016 saw a total of 83,031 applications being made to the ET. Compare these numbers though to the 105,803 claims of 2013/2014, and the 191,541 claims for the

6 3 2 4 1 The origins and scope of the ET

"If the contract of employment can be considered to be the cornerstone of employment law, then employment tribunals can be considered its foundations."[1359]

The ET was originally brought into existence in 1964[1360] and remains regulated in terms of the ETA 1996[1361] read with subsequent amendments[1362] and (primarily) regulations.[1363] In the words of Hardy,[1364] the jurisdiction of the ET includes:[1365]

2012/2013 period. That being said, the possible reasons behind this noticeable decline, pertaining as they do the ET fees structure, are discussed at § 6 3 2 4 5 below. For further statistical information, see the Ministry of Justice "Tribunal Statistics" (12-09-2013) *Gov.UK* <https://www.gov.uk/government/collections/tribunals-statistics> (accessed 28-05-2017).

[1359] S Honeyball *Honeyball & Bowers' Textbook on Labour Law* 9 ed (2006) 12.

[1360] Section 12 of the Industrial Training Act 1964 (c 16). Hardy *Labour Law* 68 states the following regarding the origins of the Tribunal:

> "Known for many years as industrial tribunals, they were first created, under the Industrial Training Act 1964, to deal with the relatively minor question of appeals by employers against levies imposed on them by industrial training boards. Since then, the jurisdiction has been expanded enormously, to cover almost all statutory individual employment rights."

[1361] The procedures for employment tribunals are regulated in terms of ss 6-15 of the Act. See in general Honeyball *Textbook* 12-17 and Selwyn *Employment* 9-15.

[1362] See for instance, the Employment Act 2002 (c 22) and the Tribunals, Courts and Enforcement Act 2007 (c 15). Regarding the latter Act, and the (important) impact it had on the Tribunal system, see E Jacobs "Something Old, Something New: The New Tribunal System" (2009) 38 *ILJ* 417. Mention must, of course, also be made of ERRA 2013.

[1363] See The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (No. 1237) ("ET Regulations 2013"), which contains the overwhelming bulk of the provisions that regulate the ET and EAT.

[1364] Hardy *Labour Law* 68, [my emphasis].

[1365] Regarding the jurisdiction of the "ordinary courts" in Britain, see the discussion at § 6 3 2 8 below.

> "[C]omplaints of unfair dismissal,[1366] redundancy payment,[1367] failure to consult over proposed redundancies or transfer of undertakings,[1368] equal pay, breach of employment provisions of the sex, race and disability discrimination legislation,[1369] unlawful deduction from wages,[1370] *unjustifiable discipline, exclusion or expulsion from a trade union*;[1371] Sunday working, working time and the national minimum wage."[1372]

Furthermore,[1373] the ET can preside over claims for damages for breach of the employment contract, which could then include a claim for wrongful dismissal.[1374]

[1366] This in terms of s 2 of ETA 1996 read with s 111 of ERA 1996. Deakin & Morris *Labour Law* 78 state:

> "They [the ET] were accorded a more central role in labour law disputes with the introduction of protection against unfair dismissal in the Industrial Relations Act 1971 and since then their jurisdiction has been progressively extended to a wide range of employment-related matters. The biggest single category of claim has generally been that of unfair dismissal …" [footnotes omitted].

Regarding the latter claims, since April 2012, a new employee has to have been employed for two years at the same employer, before being able to claim unfair dismissal. The "qualifying period" was extended (non-retrospectively) from the former one year by the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (No. 989) – with the Order making the necessary changes, by means or arts 2-3, to subss 92(3)(b) and 108 of ERA 1996, the latter being entitled "Qualifying period of employment". See Mangan (2013) *ILJ* 411-412. It can be briefly mentioned that the qualifying period has seen repeated changes over the course of the past twenty years, with being lowered to a one year period as recently as 1999, care of the Employment Relations Act of that year (with the return to power of "New" Labour), before being adjusted back to its pre-1999 levels (as above) by the Coalition Government in 2012 – see in this regard Deakin & Morris *Labour Law* 45-46, 49. It is for this reason that the 6 April 2012 date applies to new employees [employed at the workplace for the first time after that date] – employees who were employed at the workplace against whom they seek to bring an unfair dismissal claim from before that date, are still subject to the one year qualifying period of the previous statutory regime. Furthermore, as indicated above, the primary statute that regulates individual employment rights is ERA 1996.

[1367] This in terms of s 2 ETA 1996 read with s 163 ERA 1996.

[1368] This in terms of "complaints brought under the Transfer of Undertakings (Protection of Employment) Regulations 2006 – see Selwyn *Employment* 10.

[1369] This in terms of the Equality Act 2006 (c 3) and Equality Act 2010 (c 15), which in turn served as consolidation of, *inter alia*, the Equal Pay Act 1970 (c 41), the Sex Discrimination Act 1975 (c 65), the Race Relations Act 1976 (c 74) and the Disability Discrimination Act 1995 (c 50), along with related anti-discrimination Regulations.

[1370] This in terms of s 2 ETA 1996 read with s 23 ERA 1996 and s 68A of the TULRCA. Deakin & Morris *Labour Law* 78 state that in the period between 2009 and 2011, "claims relating to unauthorised deductions from pay" overtook that of unfair dismissal claims.

[1371] This in terms of s 2 of the ETA 1996 read with ss 64-65, 174 and 176 of the TULRCA, [my emphasis].

[1372] This in terms of s 2 of the ETA 1996 read with ss 11, 19 and 22 of the National Minimum Wage Act 1998 (c 39) – see Selwyn *Employment* 10.

[1373] For a comprehensive list of the various enactments that legislate ET jurisdiction, see Selwyn *Employment* 11-12. For further discussion pertaining to the various labour aspects that fall within the jurisdictional scope of the ET, see Deakin & Morris *Labour Law* 78.

[1374] Selwyn *Employment* 15, as regulated in terms of The Employment Tribunals Extension of

6 3 2 4 2 The composition and structure of the ET

The composition of the ET[1375] should be seen in light of the historical development of British industrial relations (particularly the ebb and flow of judicial intervention in the internal affairs of trade unions and the resultant distrust this engendered). As a result, each tribunal panel consists of three individuals: an employment judge[1376] (formerly "chairman")[1377] and two "lay" members.[1378] Selwyn states that the lay members are "selected from a panel drawn up after consultation with representatives of employer's organisations and trade unions"[1379] thereby introducing a perceptible element of objectivity (and neutrality) in the "tripartite structure"[1380] of the ET.[1381] However, despite the representative origins of the tribunal composition, various enactments over the course of the last few decades have severely curtailed the extent to which all three members are required to preside, with significant implications for the tripartite nature

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Jurisdiction (England and Wales) Order 1994 (No. 1623). The author states further [Selwyn *Employment* 15] that the maximum award that can be issued in such cases is £25,000, and that such claims must be brought within a period of three months from the date of termination of the contract. Deakin & Morris *Labour Law* 76 explain the following regarding the use of both Courts and Tribunals in regard to labour matters:

> "The bifurcation between courts and tribunals means that an employee generally needs to bring separate proceedings in each where both contractual and statutory rights are at issue. One exception to this principle, introduced in 1994, allows employment tribunals to hear claims for money due under the contract, or damages for breach of contract, of up to £25,000 if the claim arises or is outstanding on termination of an employee's employment".

[1375] For specific details about the structure of the Tribunals, and the role played by the President of the ET and the Central Office of Employment Tribunals, see Hardy *Labour Law* 69.

[1376] Selwyn *Employment* 9.

[1377] Collins et al *Labour Law* 30. See further Hardy *Labour Law* 69 who states that this individual is drawn from a panel, appointed by the Lord Chancellor/Secretary of State for Justice, and must be either "a barrister or solicitor of at least seven years' standing".

[1378] Hardy *Labour Law* 69.

[1379] Selwyn *Employment* 9.

[1380] Hardy *Labour Law* 69.

[1381] Regarding the impact on the functioning of the ET, given the varied origins of its "presiding officers", Hardy *Labour Law* 69 states:

> "The lay members have full voting rights and it is not unknown for them to outvote the lawyer chairman [as they then were], although they are generally reluctant to do so on points of law. The lay members are not intended to act as representatives of trade unions or employers' associations. Instead, they are expected to act as neutral arbiters, drawing on their experience of industrial relations to enhance the quality of their decision-making. Indeed, the overwhelming majority of decisions are unanimous."

Selwyn *Employment* 9 states further: "[I]n practice it appears that, despite the somewhat diverse backgrounds [of the members], 96% of all decisions reached are unanimous".

of the ET.[1382]

6 3 2 4 3 The procedure and powers of the ET

Collins et al state the following in relation to the powers and procedures[1383] of the ET:

> "Employment tribunals are expected, like other tribunals, to act less formally than an ordinary court, without the requirement for legal representation, with a view to settling the dispute expeditiously. Final decisions of the tribunal may be enforced in the ordinary way as a judgment of a court through the county court system. Like that of a court, the procedure of an employment tribunal is adversarial, but the members of the tribunal are required to avoid formality, to ask questions of witnesses in order to clarify issues, and to avoid strict adherence to the legal rules of evidence."[1384]

[1382] Deakin & Morris *Labour Law* 79 explain, as discussed at 79-80 that "there are an increasing number of jurisdictions where the Employment Judge may sit alone". By way of example, as stated by Deakin & Morris *Labour Law* 80, one of the more controversial aspects that ERDRA 1998 introduced, was permitting the Employment Judge to preside alone over "complaints relating to the written statement of employment particulars" [the written statement is analogous to an employment contract in the South African context – see Deakin & Morris *Labour Law* 271-278]. However, the recent enactment of The Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 (No. 988), which Deakin & Morris *Labour Law* 80 explain came into effect from 6 April 2012 [see Deakin & Morris *Labour Law* 80 n142], took matters even further. By the simple addition, care of art 2 of Order 2012 (No. 988), of s 111 ERA 1996 into subs 4(3)(c)(3) ETA 1996, Employment Judges are now permitted to preside over unfair dismissal cases on their own should they so choose, a Coalition Government policy decision that was met with a fair amount of (unsuccessful) opposition. See further S Corby "British Employment Tribunals: From the Side-Lines to Centre Stage" (2015) 56 *Lab Hist* 161 171-172 regarding the historical progression of these changes, and where [Corby (2015) *Lab Hist* 171] in commenting on the changes made in regards to presiding over unfair dismissal claims, states:

> "In such cases, the tribunal has to decide whether the employer treated a potentially fair reason for dismissal as a sufficient reason 'in the circumstances'. The Employment Judge, however, will usually have little knowledge of the workplace circumstances, unlike the lay members who in the main no longer sit on unfair dismissal cases. The government's justification of the 2012 change was financial. In 1993, the government estimated that lay members cost £5 million per year, but it has never been shown what amount of money has been saved by the exclusion of lay members from a jurisdiction" [footnotes omitted].

[1383] Selwyn *Employment* 568-587 discusses the Practice and Procedure of the ET in detail.

[1384] Collins et al *Labour Law* 30. Deakin & Morris *Labour Law* 82 state: "Oral or written representations or evidence, as well as the claim form and response, may be considered." The authors [at 85] explain further that the [evidentiary] hearsay rule does not apply during the process of witnesses being questioned in the ET, and that the Employment Judge is obliged to "conduct the hearing in such a manner as he or it considers most appropriate for the clarification of the issues and generally for the just handling of the proceedings" [quoted from Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (No. 1861), rule 14(3) Sch 1) – see Deakin & Morris *Labour Law* 85 n201], currently regulated in terms of rule 41 Sch 1 ET Regulations 2013. Of further note, is the Overriding Objective of the ET's, as specified in terms of rule 2 Sch 1 ET Regulations 2013, which states:

However, Mangan says of the ET process that "[t]here is a movement away from informality and towards greater procedural formality", with increased statutory regulation resulting in "greater codification even if it is aimed at reducing the burden on employers."[1385] Similar thoughts are echoed by Corby, who reasons that "over the last 50 years employment tribunals have become barely distinguishable from the courts, essentially because of juridification".[1386] The shift spoken of here is manifested in a variety of ways within the ET system, with potentially far-reaching effects on access to justice.[1387]

In general, matters are "launched" before the ET by means of the completion of the necessary forms, which includes contact details of both claimant/applicant and respondent, together with particulars about the nature of the claim.[1388] A copy of the claim is then sent to the employer/respondent who has 28 days within which to reply – by indicating whether or not it will oppose the claim and, if so, on what grounds.[1389] Failure to reply, on the part of the employer, will result in a default judgment being issued in favour of the claimant.

6 3 2 4 4 The involvement by ACAS

6 3 2 4 4 1 Background to the ACAS involvement

Prior to the implementation of the Early Conciliation process as regulated by ERRA 2013,[1390] it was at this point (once the employer responded to a claim referred to the ET) that ACAS became involved in the ET process.[1391] A copy of the claim form,

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"The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with the case fairly and justly includes, so far as practicable – (a) ensuring that the parties are on an equal footing; (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues; (c) avoiding unnecessary formality and seeking flexibility in the proceedings; (d) avoiding delay, so far as compatible with proper consideration of the issues; and (e) saving expense."

For a more detailed discussion of the underlying procedures surrounding the ET during the mid-1990s, see in general JK MacMillan "Employment Tribunals: Philosophies and Practicalities" (1999) 28 *ILJ* 33.

[1385] Mangan (2013) *ILJ* 420-421.

[1386] Corby (2015) *Lab Hist* 162.

[1387] See (by way of background) the discussion by Corby (2015) *Lab Hist* 166-167.

[1388] Deakin & Morris *Labour Law* 80.

[1389] 80.

[1390] See § 6 3 2 2 above.

[1391] Deakin & Morris *Labour Law* 80-81.

together with any response received from the employer, would be sent to ACAS in an "attempt to promote a settlement between the parties without the need for a tribunal hearing".[1392] However, as was discussed above,[1393] the claimant is now required to approach ACAS first, *before* commencing with the ET application. Notwithstanding the initial involvement of ACAS – what must be kept in mind is that the Early Conciliation process is *not* mandatory and that the parties are under no obligation to make use of the process. Once the referral to ACAS is made and no attempts from either side at conciliation take place, the relevant ACAS official would then issue the necessary certificate (this being a prerequisite for the launching of the application to the ET). Importantly, the issuing of the certificate does not formally 'close' the ACAS process and, as a result, the services on offer by ACAS remain available as an option by the parties at all times until a final ET decision is made.[1394]

It was hoped that increasing the scope of ACAS intervention would result in a reduced number of referrals to the ET.[1395] It should be noted that this was not the first measure that attempted this. Instead, a statutory mechanism was put in place that sought to encourage private settlements of employment disputes between the employer and employee *before leaving the workplace.* This mechanism had at its heart the so-called "Compromise Agreement" (now termed "Settlement Agreement")[1396] – and it is of particular interest to this study, involving as it does trade union

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[1392] 81. The authors state further [at 81 n149] that following amendments by the 2008 Employment Act, "ACAS's duty to conciliate subsists until the [employment] tribunal delivers a decision". In the event that settlement is reached, the matter may then not be referred to the Tribunal. See further Selwyn *Employment* 563 who states:

> "The latter [conciliation officer] is under a statutory duty, either at the request of the parties, or on his own initiative if he thinks he can be successful, to endeavour to promote a settlement without the matter going to a tribunal hearing, either by getting the parties to agree on reinstatement or re-engagement of the claimant, or securing agreement on the amount of compensation to be paid, or to get the claimant to withdraw his claim because it has little prospect of success".

Importantly, despite both passages being written prior to the enactment of ERRA 2013, the contents remain applicable.

[1393] See § 6 3 2 2 above.

[1394] See subs 18A(5) of the ETA 1996.

[1395] Mangan (2013) *ILJ* 413. A parallel intervention in this regard, was the introduction of the ET fees structure, discussed at § 6 3 2 4 5 below. Mangan, in commenting on the new changes implemented by ERRA 2013, makes the following point:

> "The new additions speak to the essence of the changes: a generalised view that claimants have used the system in a manner which wastes employers' financial resources" – see Mangan (2013) *ILJ* 417.

[1396] The renaming from "compromise" to "settlement" was initiated in terms of ERRA 2013, specifically subss 23(1)-(6).

representatives. Given that this process envisages an agreement that obviates the further involvement of the ET, the section below will be a brief detour to consider this process before the discussion of the ET/EAT will be completed.

6 3 2 4 4 2 The settlement agreement mechanism

Deakin and Morris[1397] discuss the procedural apparatus that was introduced by TURERA 1993,[1398] specifically the introduction of the compromise agreement (hereafter settlement agreement) intended as a "further mechanism by which binding settlements could be reached."[1399] Whereas settlement agreements are most often envisaged in situations where a contract of employment is terminated, the agreements can be used to settle virtually any employment dispute and would be subject purely to both parties being willing to use the agreement to settle the matter.[1400]

There are a series of requirements that surround the recognition of these settlement agreements,[1401] which are primarily focused on ensuring that the employee(s) made a fully cognisant decision in agreeing to and accepting the terms of the settlement.[1402] The agreement is deemed to be legally binding[1403] and has the significant consequence of prohibiting the parties to the agreement to institute any future court or ET claim on any of the matters covered by the agreement.[1404] Furthermore, in terms of section 111A of ERA 1996,[1405] any evidence of pre-termination negotiations, which includes negotiations for the purposes of an unsuccessful settlement agreement, are deemed *in*admissible in ET claims, subject to the qualification that the prospective

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[1397] Deakin & Morris *Labour Law* 81.

[1398] See § 5 2 7 8 above – specifically s 39 (prior to subsequent amendments).

[1399] Deakin & Morris *Labour Law* 81. See further Collins et al *Labour Law* 815-816.

[1400] Selwyn *Employment* 566.

[1401] See in general Deakin & Morris *Labour Law* 81.

[1402] See in particular, the ACAS Code of Practice 4 "Settlement Agreements (under section 111A of the Employment Rights Act 1996)", available at <https://archive.acas.org.uk/media/3725/Code-of-Practice-on-settlement-agreements/pdf/11287_CoP4_Settlement_Agreements_v1_0_Accessible.pdf> (accessed 29-05-2019), regulated in turn (as are all ACAS Codes of Practice) by s 199 of the TULRCA.

[1403] Subject to their requirements being met, *inter alia*, that it is in writing; that the specific claim to which the agreement is to apply is specified; and must specifically state that the "conditions regulating [settlement] agreements under this Act [ERA 1996/TULRCA] are satisfied". Subsection 203(3)(a)-(f) ERA 1996 [the same provisions are also incorporated in TULRCA at subs 288(2B)(a)-(f)] sets out the specific requirements.

[1404] Specifically subs 203(2)(f) read with subss 203(1)-(2) ERA 1996 – as referenced to subs 18(1) ETA 1996.

[1405] Entitled "Confidentiality of negotiations before termination of employment".

claim is *not* one of (automatically) unfair dismissal or based on improper behaviour.[1406]

1998 saw the promulgation of Employment Rights (Dispute Resolution) Act of 1998 ("ERDRA")[1407] with key amendments to who was permitted to assist applicants in reaching a settlement. As mentioned, there is a need to ensure that the employee is fully aware of the implications of the settlement. The original position (as per TURERA 1993) was that the agreement would only be deemed valid and binding if the employee had obtained independent legal advice from a qualified lawyer.[1408]

6 3 2 4 4 3 Settlement agreement advisers

Section 9 of ERDRA 1998 replaced the term "qualified lawyer" (in the various Acts that regulated this point),[1409] with the phrase "relevant independent adviser".[1410] It furthermore introduced a host of provisions for the addition of this new adviser category,[1411] by implementing the necessary amendments to the related Acts.[1412] ERDRA 1998 described this category to include, *inter alia*,[1413] "an officer, official, employee or member of an independent trade union *who has been certified in writing by the trade union as competent to give advice*[1414] and as authorised to do so on behalf of the trade union".[1415] Furthermore, subsection 10(1) of ERDRA 1998 introduced (in

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[1406] Subsections 111A(3)-(4) ERA 1996, respectively. Subsection 111A(3) effectively sees the inadmissibility protection apply to ordinary unfair dismissal cases, but not the automatically unfair scenarios as contained in the relevant sections of ERA 1996 or the TULRCA (for example, dismissal based on trade union membership). Furthermore, claims based on discrimination or any forms of harassment, or relating to breach of contract or wrongful dismissal are not covered – see in general ACAS Code of Practice 4 "Settlement Agreements (under section 111A of the Employment Rights Act 1996)". That being said, the underlying rationale behind the introduction of s 111A ERA 1996, was to essentially broaden the common law protection offered under the "without prejudice" construct, since this only covered instances where a dispute was already ongoing. S 111A now allows the employer to initiate the settlement agreement despite there being no dispute and have s 111A "run alongside" the common law protections, to allow for the necessary negotiations. See in this regard ACAS Code of Practice 4 "Settlement Agreements (under section 111A of the Employment Rights Act 1996)"; Hepple (2013) *ILJ* 217.

[1407] The Employment Rights (Dispute Resolution) Act, as at § 6 2 1 above.

[1408] Deakin & Morris *Labour Law* 81. As mentioned above, this was in terms of s 39 of the TURERA.

[1409] The relevant Acts that are impacted by the amendment, are listed in subs 9(2) of ERDRA 1998.

[1410] Subsection 9(3).

[1411] See Sch 1.

[1412] See for instance s 288 of the TULRCA and subs 203(4) of ERA 1996, as inserted by ERDRA 1998 Sch 1 ss 9 and 24, respectively.

[1413] See subss 203(3A)(a)-(d) of ERA 1996 for the complete list.

[1414] My emphasis.

[1415] Subsection 203(4)(b) of ERA 1996. The individual in question will however not be regarded as an

the various applicable Acts highlighted above) the requirement that there must be in place – when the advice is offered by the adviser – "a contract of insurance, or an indemnity provided for members of a profession or professional body, covering the risk of a claim by the employee or worker in respect of loss arising in consequence of the advice".[1416]

This immediately raises the question whether an analogy can be drawn between advice from a legal professional and from trade union officials?[1417] The short answer to this, it is submitted, is "no". The longer answer is more interesting.

The point may be made that this extension (of who may provide advice for purposes of settlement) does not enjoy significant attention in the sources consulted for the purposes of this study. There are at least two reasons for this. Firstly, while the use of settlement agreements following their introduction was generally welcomed and widely used,[1418] it is also true that, given the nature and effect of settlement agreements and with the exception of specific surveys,[1419] not much statistical information on the extent of union advice services (regarding settlement agreements) is available. This is compounded by the fact, as highlighted by Hepple,[1420] that trade union representation levels in the British private sector are at record lows, which no doubt means that in many instances, despite the monopoly being broken,[1421] employees would still need

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"independent adviser" if – in the words of Deakin & Morris *Labour Law* 81 –

> "they are employed by or acting in the matter (our italics) for the employer or an associated employer; if the union … giving advice is itself the employer or an associated employer; or, in the case of advice centres [see subs 203(4)(c)], if the worker pays for the advice" [footnotes omitted].

[1416] Subsection 203(3)(d) of ERA 1996; subs 288(2B)(d) of the TULRCA.

[1417] The term "officials" is used here in the broadest sense, to include officer, official, employee or member of an independent trade union – as listed in subs 203(3A)(b) ERA 1996.

[1418] See J Earnshaw & S Hardy "Assessing an Arbitral Route for Unfair Dismissal" (2001) 30 *ILJ* 289 293-294 and T Colling "What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights" (2006) 35 *ILJ* 140 152, who cite PL Latreille et al "Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives" (2005) 34 *ILJ* 308 30 [at n69] as stating that "[u]nion representatives were markedly better disposed towards compromise agreements than other representatives [who are empowered to provide advice in terms of ERDRA 1998]", with in excess of 60% of them being of the opinion that the "compromise [settlement] agreements deliver outcomes for members that were as good as those at [the Employment] tribunal or better."

[1419] See for instance the Department of Trade and Industry survey from 1998, as highlighted in Latreille et al (2005) *ILJ* 30 above at § 6 3 2 4 4 3.

[1420] Hepple (2013) *ILJ* 217-218.

[1421] Earnshaw & Hardy (2001) *ILJ* 294 make the point that with the broadening of the advice scope, as brought about by ERDRA 1998, "[t]he monopoly enjoyed by lawyers on the giving of such advice is thereby lost".

to rely on either legal services (lawyers), or an advice centre.[1422] This is not to suggest that trade union representatives are not extensively involved in settlement agreements, but rather that this is simply not a factor that sees significant focus within the broader study of the labour system. And the reason for *this*, it is submitted, leads into the second point: namely that there is limited focus on the extension due to the absence of controversy surrounding trade union representatives providing such advice.

This means that the legislator, employers, employees and broader society in Britain were accepting of the fact that trade unions and their representatives are suitably skilled, experienced and knowledgeable *to be able to effectively advise employees to a similar standard as would be expected of an indemnified legal professional*. However, the required indemnification and also the requirement that the trade union specifically confirms the competence of the representatives involved as being authorised to act, play no small part in ensuring that the consequences of problematic advice and potential liability of the union remain uncontroversial. In short, therefore, the extension implemented by ERDRA 1998 was a non-event as it made complete sense in the context of both the British industrial relations system and the mechanism that was being implemented. To return to the initial question of whether or not an analogy can be drawn (at the point of settlement agreements) between legal and trade union representation, what remains incontrovertible is that the extension to include trade unions as a viable "advice service" was neither unqualified, nor limited to *only* trade unions. Statutory protection measures were put in place and the positioning (or rather, *reduced* positioning) of trade unions in modern Britain was taken into account by also making provision for the use of certified advice centres.[1423] What is striking, more so than the fact that trade unions were added five years later by means of statute, is that they were never included in the first place (together with the lawyers). And then, when they *were* added, they were included *alongside* certified advice centres and

[1422] As specified in terms of subs 203(3A)(c) ERA 1996. A typical example would be the Citizens Advice Bureau, a non-governmental organisation partly funded by the British Government to provide free advice to the British public on matters ranging from finances, legal and consumer issues. See in general B Abbott "Determining the Significance of the Citizens' Advice Bureau as an Industrial Relations Actor" (2006) 28 *Emp Rel* 435 435-448 and B Abbott et al "Civil Society Organizations and the Exercise of Power in the Employment Relationship" (2011) 34 *Emp Rel* 91 91-107. See further *Freeman v Sovereign Chicken Ltd* [1991] UKEAT 514_89_2707 regarding the permissibility of an Advice Bureau official completing a compromise/settlement agreement on behalf of an employee.

[1423] See § 6 3 2 4 4 3 above.

subject to specific requirements (which also apply equally to the advice centres). Therefore, if the argument was to be made that ERDRA 1998 effectively placed trade union advice on the same footing as that of legal advice then that argument would have to apply to the advice centres as well. And that reasoning, it is submitted, is taking such a conclusion several steps too far.

This discussion of the role of trade unions in advising employees for the purposes of settlement agreements highlights two key points: Firstly, that Britain's particular union history saw a readjustment so significant that it impacted on the role fulfilled by organised labour to the point where a measure that most would view as falling squarely within the domain of trade unions,[1424] was initially reserved for members of the legal profession only. Secondly, it speaks of an approach aimed at the provision of competent advice – arguably equivalent to legal advice. In short, this an example of the legislator requiring a direct link between unions and their representatives *and, in addition*, the existence of insurance against inept advice.

6 3 2 4 5 Applications, fees and time limits of the ET

In the absence of a settlement agreement, the employee has further recourse to either the courts or the ET. Following the initial contact with ACAS, care of the Early Conciliation process, and upon the required certificate being issued by ACAS (where conciliation was unsuccessful), the claimant would be in a position to launch an application to the ET.

As indicated earlier, the relevant application form is completed and submitted (either via the postal services, or online). However, July 2013 saw the enactment of Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (No. 1893) which had as new requirement the first of two payments – called the "issue fee" needing to be made[1425] – with the amount dependent on whether or not the claim is deemed to be, in terms of the relevant Regulations, a "type A" or "type B" claim.[1426]

[1424] This being the informing of an employee about the implications of concluding an agreement that could waive future employment-related claims.

[1425] Failure to provide the prescribed fee, along with the claim form, will see the claim being rejected. See rule 11(1) Sch 1 of ET Regulations 2013.

[1426] See in this regard specifically Part 2, art 4(1) and art 9-11 read with the relevant Tables contained in Sch 2 of Order 2013 (No. 1893). The amounts in question is either £160 or £250 respectively, for a single claimant. Briefly stated, all type A claims are outlined in Table 2 Sch 2 of Order 2013 (No. 1893), whereas those claims pertaining to matters not so listed, are automatically deemed to be type B claims.

The second amount, the so-called "hearing fee", became payable once the various preliminary matters were completed and the matter was ready to proceed to the hearing stage.[1427]

Regarding these preliminary stages, rule 53 of ET Regulations (2013) specifies that the tribunal is empowered to, *inter alia*, "determine any preliminary issue"[1428] – with the latter being defined as meaning "any substantive issue which may determine liability (for example, an issue as to jurisdiction or as to whether an employee was dismissed)."[1429] The tribunal is also empowered to "make a deposit order under rule 39",[1430] which rule provides: "Where at a preliminary hearing (under rule 53) the tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (the paying party) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument".[1431] The regulations were instituted in terms of subsection 9(1) of the ETA 1996, which made provision for the carrying out of a "preliminary consideration of any proceedings before it (a 'pre-hearing review')".[1432]

Furthermore, claimants – and employers – can be required to pay any "wasted costs" and "preparation costs" associated with the hearing.[1433] Claimants[1434] are entitled to either represent themselves or make use of a number of alternatives,

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[1427] This also being regulated in terms of art 4(1) and arts 9-11 read with the relevant Tables contained in Sch 2 of Order 2013 (No. 1893) – and was also variable (£230 or £950) depending on whether it was a type A or B claim. By way of example, both an unfair dismissal and "whistleblowing" claims would be type B claims.

[1428] See rule 53(1)(b) Sch 1 of the ET Regulations (2013).

[1429] See rule 53(3) Sch 1.

[1430] See rule 53(3)(d), referring to rule 39 Sch 1.

[1431] Rule 39 Sch 1, entitled "Deposit orders".

[1432] Deakin & Morris *Labour Law* 81-82 discuss the requirements surrounding the pre-hearing review, and confirms it involves "an 'interim hearing' conducted by an Employment Judge alone unless a party otherwise requests … and the Employment Judge considers that a substantive issue of fact is likely to be determined and a full tribunal would be desirable" [footnotes omitted]. Furthermore, Deakin & Morris *Labour Law* 83 confirm the amendments to the ET Regulations (2013), saw the deposit amount increased from £500 – and the hurdle raised from what was previously described as being "no reasonable prospect of success" [my emphasis]. See further Selwyn *Employment* 573, for a discussion of the procedure prior to the changes being made.

[1433] See Selwyn *Employment* 581-583 and Deakin & Morris *Labour Law* 82-83 for further information pertaining to the various cost orders, and associated requirements, these being currently in terms of rules 74-84 Sch 1 ET Regulations (2013). Corby (2015) *Lab Hist* 172 makes the important point that costs are seldom awarded, citing statistics from 2012-2013 that show that cost orders against the claimant were issues "in less than 1% of claims accepted" [footnotes omitted].

[1434] The same applies *mutatis mutandis* to the employer.

including a representative of a trade union.[1435]

Thus, despite it being possible (depending on the outcome of the hearing) to recoup some of the fees and costs by order of the tribunal and notwithstanding the limited circumstances under which a claimant can apply for exemptions from certain of the fees,[1436] – what is clear from the above discussion is that a claimant was required to pay between £390 and £1,200 or £1,390 to £2,200 (assuming a deposit order was made) for their claim to be heard by the ET (depending on whether the claim is a type A or B claim).[1437] The increased use of fees within the ET system evoked a host of commentary regarding its impact on employment claims. About the number of referrals to the ET, Adams and Prassl state as follows:

> "Claim numbers have grown accordingly, from a mere 13,555 actions in 1972, the year in which unfair dismissal protection came into force, to 191,541 cases in 2012/2013. With this rise in claims came concerns from some quarters about the cost implications for employers; not least because cost awards have not traditionally been available in order to protect the tribunals' 'essential character' as a 'cost-free user friendly jurisdiction'. Davies and Freedland[1438] detect a change of emphasis in the 1980s, away from the realisation of rights 'to discouraging "undeserving" applicants from wasting management's time over "hopeless" claims'".[1439]

[1435] The possible representatives are regulated in terms of subs 6(1) of ETA 1996. Selwyn *Employment* 574 in paraphrasing ETA 1996 lists as options the following: "The parties may represent themselves, or be represented by a solicitor or barrister, or a representative of a trade union or employers' association, or any other person whom they desire to represent them." Taking this into account, it is worth noting that despite the less formal procedures envisaged by the ET, most parties still prefer legal representation. Deakin & Morris *Labour Law* 85 explain that for the year 2007/2008, 73% of employers (against 34% of claimants) were represented, and in those instances where parties were represented, 60% of them were by legal representation. In considering more recent statistics, the Ministry of Justice Statistics Bulletin confirms that in the period 2015/2016, 84% of claimants were represented by a lawyer, an increase by 9% compared to the previous year – see <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550952/tribunal-and-gpc-stats.pdf> at 41 "Representation (Table E.3)" (accessed 26-05-2019).

[1436] The "remission" or "part remission" of tribunal fees is regulated in terms of Sch 3 of Order 2013 (No. 1893). See further Adams & Prassl (2016) *MLR* 415-416.

[1437] By way of illustration of the financial effects of the fee payments, according to the Office for National Statistics, the Labour Market Statistical Bulletin ("LMSB") for the month of March 2017, places the Average Weekly Earnings ("AWE") of UK workers at £479 – see <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours#datasets> (accessed 30-05-2017).

[1438] Adams & Prassl (2016) *MLR* 413 n9 [citing Davies P & M Freedland *Labour Legislation and Public Policy: A Contemporary History* (1993) 208].

[1439] Adams & Prassl (2016) *MLR* 413, [footnotes omitted]. The authors, in citing the government policy paper that gave rise to the scheme state further that the primary aim of the fees structure implementation was "thus to alleviate the Government's cost burden, both directly, through the

The effects of the changes in the fee structure were felt almost immediately, with claims to the ET following the introduction of the scheme in July 2013 falling by nearly 80% within a year.[1440] Despite attempts by Government to explain the drop both by reference to broader economic measures and the introduction of the ACAS early conciliation programme,[1441] it would appear that this explanation had very little basis in fact.[1442] Despite broad opposition to the fees measures,[1443] the system was implemented. However, it did not take long before it was formally challenged. In *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)*,[1444] the UK Supreme Court – in a unanimous judgment[1445] handed down by Justice Lord Reed (on appeal as judicial review from the Court of Appeal Civil Division)[1446] – found in favour of UNISON[1447] and ruled that the ET and EAT fees in respect of proceedings

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additional income raised, and indirectly, by discouraging excessive litigation" [footnotes omitted] – Adams & Prassl (2016) *MLR* 433.

[1440] Adams & Prassl (2016) *MLR* 413. The authors continue by stating:

> "Between the second and third quarter of 2013/14, the volume of claims, complaints, and cases accepted by the employment tribunals fell by 73 per cent, 65 per cent, and 54 per cent respectively. This dramatic decline appears to be permanent: in the first quarter of 2015/16, claim receipts remained 72 per cent lower compared to the same period in 2013/14. This drop was much larger than anticipated. A predicted fall in single claims to between 31,863 and 33,816 cases per year following the introduction of the fees, for example, stands in stark contrast with the 16,420 such cases actually received in 2014/15" [footnotes omitted] – see Adams & Prassl (2016) *MLR* 416-417.

[1441] 417.

[1442] 417-418.

[1443] 419:

> "The vast majority of commentators, on the other, expressed deep reservations. Following a parliamentary enquiry in late 2015, the Justice Select Committee concluded that 'the regime of employment tribunal fees has had a significant adverse impact on access to justice for meritorious claims', and stakeholders from the Equality and Human Rights Commission to the Tribunals Judiciary were united in their fear that 'the introduction of fees has had a damaging effect upon access to justice'" [footnotes omitted].

See further Adams & Prassl (2016) *MLR* 420-427 for a discussion around various legal challenges to the system, brought by one of Britain's largest trade unions UNISON.

[1444] [2017] UKSC 51.

[1445] Whereas all the Justices were in agreement with the principal judgment, JL Hale dealt with one of points raised (namely unlawful discrimination against women and other protected groups) in a separate judgment at *UNISON* paras 121-134.

[1446] The matter was the culmination of four years of legal action, which saw unsuccessful claims being brought before the Divisional Court on two occasions (2013, 2014) and the Court of Appeal (2015) – *UNISON* paras 60-63.

[1447] UNISON is one of the largest trade unions in Britain (with approximately 1.3 million members) and focuses on the public service sector – see the UNION website available at <https://www.unison.org.uk/about/> (accessed 13-09-2017).

before these tribunals were unlawful[1448] *ab initio*[1449] due to their effect on access to justice.[1450] In what has been described as a "surprise ruling",[1451] the effect of the decision has seen the British Government promise to implement a multi-million GBP refund process[1452] "[i]n a humiliating defeat to its justice policies"[1453] and to review any possible tribunal fees going forward. At the time of writing, it is no longer required to pay these fees for claims brought before the ET.[1454] What remains unclear is whether a revised fee-structure system will be implemented in future,[1455] or whether the claim process will remain as is – that is, fee-free.[1456]

Regarding the time limits associated with the ET, claimants usually have three months from the act complained of in which to launch their claim to the ET[1457] (any

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[1448] Para 98.

[1449] Para 121.

[1450] The crux of the judgment focusing on the constitutional right to access to the courts in the context of the British law, is to be found at *UNISON* paras 64-85; the examination of the aforementioned in the context of the facts before the Court, are considered in *UNISON* paras 86-97; the impact of the fees in light of EU law, is considered at *UNISON* paras 105-117 (with the Court concluding – at para 117 – that the Fees Order is also unlawful in terms of the applicable EU laws).

[1451] M Walters "Supreme Court humiliates government over tribunal fees" (26-07-2017) *The Law Society Gazette* <https://www.lawgazette.co.uk/law/supreme-court-humiliates-government-over-tribunal-fees/5062220.article> (accessed 12-09-2017).

[1452] L Hughes "Government's employment tribunal fees are 'illegal', Supreme Court rules" (26-07-2017) *The Telegraph* <http://www.telegraph.co.uk/news/2017/07/26/governments-employment-tribunal-fees-illegal-supreme-court-rules/> (accessed 21-09-2017); Gazette Reporter "No announcement on tribunal fee refunds until September" (17-08-2017) *The Law Society Gazette* <https://www.lawgazette.co.uk/practice/no-announcement-on-tribunal-fee-refunds-until-september/5062480.article> (accessed 12-09-2017).

[1453] Walters *Supreme Court humiliates government over tribunal fees* 1.

[1454] Equally applicable to the EAT – discussed in the section to follow below. Furthermore, general commentary suggests the judgment could result in a sudden increase in tribunal claims in the immediate future – J Cox "Supreme Court rules employment tribunal fees are unlawful" (26-07-2017) *The Independent* <http://www.independent.co.uk/news/business/news/supreme-court-employment-tribunal-fees-unlawful-plaintiffs-women-gender-uk-companies-lawyers-a7860521.html> (accessed 12-09-2017).

[1455] B Beyzade "Employment tribunal fees – the next steps" (01-08-2017) *The Law Society Gazette* <https://www.lawgazette.co.uk/practice-points/employment-tribunal-fees-the-next-steps/5062300.article> (accessed 12-09-2017).

[1456] For a detailed discussion of the *UNISON* case, see in general M Ford "Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court" (2018) 47 *ILJ* 1 – where the author [at 36-43] discusses the predicted short and long(er) term effects of the judgment, on employment law in Britain.

[1457] Deakin & Morris *Labour Law* 83 state: "As far as the speed of the tribunal process is concerned, the time limit for presenting claims is specified under each head of statutory jurisdiction. It varies between claims but is commonly within three months of the act complained of" [footnotes omitted – my emphasis].

involvement in the early conciliation process through ACAS temporarily suspends the ET timeframe).[1458] Should claimants wish to appeal the decision reached by the ET,[1459] they have a period of 42 days from receipt of the "written reasons" (of the ET) to launch the appeal.[1460]

6 3 2 5 The Employment Appeal Tribunal

6 3 2 5 1 The composition, procedure and powers of the EAT

The jurisdiction of the EAT[1461] is explained by Deakin and Morris[1462] as encompassing "[a]ppeals from employment tribunals on points of law",[1463] "appeals from decisions of the Certification Officer *relating to trade union matters*[1464] and from the CAC on [matters pertaining to the provision of] information and [redundancy] consultation, again on points of law".[1465]

In comparison to the High Court, the EAT "has the same powers as the High Court with regard to the attendance and examinations of witnesses, production and inspection of documents and other matters incidental to its jurisdiction."[1466] Furthermore, the structure of the EAT is similar to the tripartite system of the ET, with the main difference being that the legally-qualified chairman is a judge, and not a

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[1458] See Sch 2 ERRA 2013 for the provisions regulating the extension of the ET limitation period, to so allow for conciliation to take place.

[1459] Collins et al *Labour Law* 31 explain the scope of appeal as follows: "If the employment tribunal makes an 'error of law', a litigant can bring an appeal to the Employment Appeal Tribunal (EAT), where a judge of a status equivalent to the High Court will subject the decision to forensic examination and point out the tribunal's mistakes of law, sometimes with withering comments".

[1460] Deakin & Morris *Labour Law* 85; Selwyn *Employment* 583.

[1461] See in general Deakin & Morris *Labour Law* 86-94 and Selwyn *Employment* 7-9, 583-587.

[1462] Deakin & Morris *Labour Law* 86.

[1463] The authors [Deakin & Morris *Labour Law* 86] state further: "The EAT was established by the Employment Protection Act 1975 and replaced the National Industrial Relations Court (NIRC) created by the Industrial Relations Act 1971" [footnotes omitted].

[1464] My emphasis.

[1465] Deakin & Morris *Labour Law* 86. The authors state further [at 86] that the "distinction between questions of law and of fact, crucial to whether an appeal will lie, is a notoriously difficult one to apply. To succeed in an appeal on a point of law, an appellant must establish that the tribunal misdirected itself in law, or misunderstood the law, or misapplied the law; or that there was no evidence to support a particular conclusion or finding of fact; or that the decision was 'perverse' in that it was one which no reasonable tribunal, directing itself properly on the law, could have reached, or alternatively, was one which was obviously wrong" [Deakin & Morris cite several cases in support of the foregoing – see Deakin & Morris *Labour Law* 86 n222].

[1466] 86.

lawyer or advocate. However, ERRA 2013 brought about a major change to whether or not all the members (in addition to the judge) preside over an appeal: subsection 12(2) of ERRA 2013 amended section 28 of ETA 1996 to provide for a new "default position" in that "[p]roceedings before the Appeal Tribunal are to be heard by a judge alone", with the judge having a discretion as to whether or not to direct that the appeal also be heard by the additional members.[1467] This distinction aside,[1468] the majority of procedures and processes are similar between the ET and EAT, with due allowance for the fact that the matter is now an appeal.[1469] In this regard, Deakin and Morris[1470] state that "[i]n disposing of an appeal the EAT may either determine the issue itself or remit the case to the same or a differently-constituted employment tribunal to be decided in the light of its ruling on the law". Selwyn[1471] points out that appeals from the EAT are made to the Court of Appeal, and from there – if necessary/possible – to the Supreme Court (as court of final instance).

6 3 2 6 ET and EAT conclusion

The discussion of the ET and EAT brought to light the structure and procedures of these two important role players in the British labour relations system, and

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[1467] The authors, at 86 state, writing immediately prior to the implementation:

> "This radical departure from the tripartite principle was justified on the grounds of cost. In view of research which found that a majority of EAT judges considered that lay members add value in unfair dismissal and discrimination cases it will be interesting to monitor how often they are asked to sit under the new regime" [footnotes omitted].

See further Hepple (2013) *ILJ* 212-213 for more recent criticism pertaining to this new approach by Government – of application both in the ET and in the EAT, where is said: "This is happening not simply because of ambiguous goals, shared professional understandings and cost pressures, but it also rests on a neo-liberal philosophy that regards the common law of contract and property as the natural basis of free markets and is hostile to state regulation which seeks to adjust conflicts of interest and conflicts of rights between workers and employers by the involvement of their representatives".

[1468] Along with no additional "tribunal fees" having to be paid for appeals to the EAT.

[1469] See, in general, Selwyn *Employment* 583-587 and Deakin & Morris *Labour Law* 86-88 for additional information about the internal workings of the EAT. One point to be made, is that various tribunal fees were also applicable in instances involving an appeal to the EAT – *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent)* [2017] UKSC 51 para 19. The aforementioned judgment, being equally applicable to the ET and EAT fees, means that – in similar fashion to the ET – fees are no longer payable (at the time of writing) in order to institute a claim with the EAT. As discussed above, should the British Government decide to introduce a different fee structure going forward, such would need to be measured considering the *UNISON v Lord Chancellor* decision.

[1470] Deakin & Morris *Labour Law* 86.

[1471] Selwyn *Employment* 587.

demonstrated the various changes that have been introduced in recent times. Of interest to this study is the gradual dilution of the tri-party representative structure of the tribunal panels, the judicial involvement that heralded the dissolution of the tribunal fees system in the interests of access to the courts, and the possible lessons to be learnt from the statutory mechanisms facilitating the involvement of trade unions in the provision of advice. What remains, for now, is a consideration of the final statutory body involved in the contemporary British system, namely the CO.

6 3 2 7 The Certification Officer

6 3 2 7 1 The origins and structure of the CO

The CO was another product of EPA 1975[1472] and was essentially tasked with taking over the role previously performed by "the former Registrar of Friendly Societies under earlier trade union legislation".[1473]

6 3 2 7 2 The functions of the CO

Gennard[1474] lists the functions of the CO as follows: (i) Maintenance of a register of trade unions operating in Britain; (ii) Determining if a trade union complies with the CO's criteria for independence (from "employer control, domination or interference");[1475] (iii) *Processing complaints on a variety of issues, from trade union members, about their trade union*;[1476] (iv) Processing complaints pertaining to the

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[1472] Sections 7-9 EPA 1975.

[1473] Deakin & Morris *Labour Law* 101. See G Lockwood "The Administration of Union Business: The Role of the Certification Officer" (2006) 37 *IRJ* 209 209, who states: "The office of the Certification Officer (CO) has a long history and pedigree. The original forerunner to the CO was the Registrar of Friendly Societies, who administered the registration of unions under the Trade Union Act 1871." See further G Pitt *Employment Law* 6 ed (2007) 9-10 for additional background information to the initial formation of the CO, and its links to the Registrar.

[1474] Gennard (2010) *Emp Rel* 5-6.

[1475] 5. In terms subs 5(a)-(b) of the TULRCA, an independent trade union is so construed if it "is not under the domination or control of an employer" and "is not liable to interference by an employer or any such group or association (arising out of the provision of financial or material support or by any other means whatsoever) tending towards such control". See further Pitt *Employment* 321-323, for specific details about the criteria considered by CO.

[1476] [My emphasis.] These include, *inter alia*, "complaints that a trade union has failed to maintain an accurate register of members or failed to permit access to its accounting records, seeing that a trade unions keep proper accounting records, have their accounts properly audited and submit annual returns, investigating the financial affairs of trade unions, ensuring that the statutory requirements concerning the actuarial examination of members superannuation [pension] schemes are observed,

elections of key positions within the union;[1477] (v) Managing compliance with statutory requirements regarding trade unions' political funds, including the processing of complaints received in terms thereof;[1478] (vi) Managing compliance with statutory requirements regarding trade union mergers, including the processing of complaints received in terms thereof;[1479] and finally, (vii) Performing many of the same functions highlighted above but in respect of employer associations.[1480]

6 3 2 7 3 The CO position following TURERA 1993

During the 1980s and early 1990s (at the height of the Conservative Government's powers) there were a number of statutory provisions that gradually expanded the role of the CO.[1481] Of importance, as explained by Lockwood,[1482] was the TUA 1984 and TURERA 1993. The 1984 promulgation was essentially divided into three parts, focusing on "Secret Ballots For Trade Union Elections",[1483] "Secret Ballots Before Industrial Action",[1484] and "Political Funds and Objects".[1485] In each one of these areas, the CO was to fulfil a central role in certifying, regulating and overseeing the various statutory requirements. Similarly, almost ten years later, TURERA 1993 saw the introduction of a more controversial expansion of the CO's powers, which Lockwood explains as follows:

> "The role of the CO was expanded, despite critical comments being made in Parliament about the way the CO's role involves administration, regulation, investigation and judicial decision making. The concern was that such developments might politicise the role of the CO and jeopardise the CO's reputation for independence… First, it extended his powers, particularly in relation to overseeing

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and dealing with complaints that a trade union has failed in its duty to ensure that positions in the union are not held by [a] certain [type of] offender" – see Gennard (2010) *Emp Rel* 5-6.

[1477] 6.

[1478] 6.

[1479] 6.

[1480] 6. See further Bogg (2016) *ILJ* 319 and S Cavalier & R Arthur "A Discussion of the Certification Officer Reforms" (2016) 45 *ILJ* 363 367 for a succinct description of the CO's duties.

[1481] Pitt *Employment* 10 states:

> "However, from 1979 onwards the Conservative administration pursued a policy of increased intervention in the internal affairs of trade unions and the Certification Officer became a key player in its implementation."

[1482] Lockwood (2006) *IRJ* 209-210.

[1483] Part I

[1484] Part II

[1485] Part III Part IV was simply supplementary in nature, and name.

> trade union finances. The CO was given the power to appoint an inspector to investigate union practices where fraud is suspected without receiving any complaint from individual union members.[1486] This was a significant development which presaged a move to the direct regulation of unions by state agencies. Second, it placed new duties on trade unions in relation to matters on which members can lodge complaints for investigation…[1487] As the statutory regulation of trade unions increased during the 1980s and early 1990s, the CO's administrative role was supplemented by an expansion in the supervisory and judicial functions of the post."[1488]

TURERA 1993, through sections 37A, 37B and subsection 37E(1)(b) of TULRCA, introduced (respectively) – (a.) the possibility of either the CO; alternatively (b.) an inspector appointed by the CO, launching an enquiry of their own accord; *or* (c.) allowing for such enquiry [in terms of the aforesaid (a.) or (b.)] to be invoked by a member of the union in question.[1489] In respect of the rationale for this approach (together with the motivation for implementing CROTUM)[1490] Lockwood states: "The desire to introduce a programme of measures giving the individual trade union member rights, which could be enforced against trade unions, *was predicated upon the mobilisation of dissident members to control the unions from within.*"[1491] Regarding the criteria for the TURERA 1993 enquiry, subsections 37B(2)(a) to (d) TULRCA

[1486] Sections 37A and 37B, read with s 37C of the TULRCA (as inserted by s 10 of TURERA 1993).

[1487] These included a variety of grounds, ranging from perceived errors in the register of members for the purposes of union elections (ss 49-52 of the TULRCA, as inserted by ss 1-2 TURERA 1993), and the involvement therein of the independent scrutineer's report (s 100E of the TULRCA, as inserted by s 4 of the TURERA 1993), to member complaints in terms of subs 37E(1)(b) of the TULRCA (as inserted by s 10 of the TURERA 1993).

[1488] Lockwood (2006) *IRJ* 209-210 [footnotes omitted].

[1489] Section 37A of the TULRCA, and its related subsections, are discussed in greater detail below. But suffice it to say at this point, that the relevant provisions focus primarily on matters pertaining to alleged irregularities in a unions' annual returns, their general financial matters and the required appointment of auditors. Section 37A specifically is placed under the heading "Investigation of financial affairs", within the broader chapter III, entitled "Trade Union Administration".

[1490] Discussed at § 5 2 7 5 1 above.

[1491] Lockwood (2006) *IRJ* 210 [my emphasis]. Regarding the rationale of the procedures for "secret ballots" in terms of internal elections and industrial action (as introduced in TUA 1984), Lockwood [at 210] states further:

> "Trade union members could free themselves from the *tyranny of the majority* by making decisions about strikes and elections in the confines of their own home, protected from the *'intimidation' of mass meetings*" [my emphasis].

See Deakin & Morris *Labour Law* 30-31 who state:

> "What was perhaps most remarkable about this programme of reform was the use of labour law not as a means of achieving distributive goals or embodying a notion of industrial justice, but as part of an economic policy designed to foster competitiveness … The rights of individual union members, in particular, were advanced as a rationale for legislation regulating internal trade union affairs".

stipulate four grounds that may warrant the appointment of inspectors to investigate a union's finances, namely: (i) "that the financial affairs of the trade union are being or have been conducted for a fraudulent or unlawful purpose";[1492] (ii) "that persons concerned with the management of those financial affairs have, in connection with that management, been guilty of fraud, misfeasance or other misconduct";[1493] (iii) "that the trade union has failed to comply with any duty imposed on it by this Act in relation to its financial affairs";[1494] or (iv) "that a rule of the union relating to its financial affairs has not been complied with".[1495]

6 3 2 7 4 The CO position following ERA 1999

1999 was to prove another pivotal year for the CO.[1496] The Employment Relations Act[1497] again effectively "extended the Certification Officer's power of supervision over *the internal workings of trade unions*"[1498] by inserting (through its Schedule 6 paragraph 19) a host of provisions into TULRCA.[1499]

6 3 2 7 5 The CO procedure – section 108 and related powers

The new TULRCA section 108A states the following: "A person who claims that there has been a breach or threatened breach of the rules of a trade union relating to any of the matters mentioned in subsection (2)[1500] may apply to the Certification Officer for a declaration to that effect" (subject to subsections (3) to (7)).[1501] The matters listed

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[1492] Subsection 37B(2)(a) of the TULRCA.

[1493] Subsection 37(B)(2)(b).

[1494] Subsection 37(B)(2)(c).

[1495] Subsection 37(B)(2)(d).

[1496] See Lockwood (2006) *IRJ* 209-211, who discusses the effects of the abolishment of CROTUM in 1999, on that of the CO – given that the latter took over certain of the functions previously being held by the former. In terms of numbers, Lockwood (2006) *IRJ* 216 states:

> "[T]he new Labour government abolished the CROTUM and transferred to the CO the power to determine members' complaints in relation to breaches of the union's own rules. This jurisdiction has been responsible for a sevenfold increase in applications to the CO, albeit from a low base".

[1497] ERA 1999.

[1498] Gennard (2010) *Emp Rel* 6 [my emphasis]. Arguably the most direct reason behind this extension, was the abolishment of the Commissioner for Protection Against Unlawful Industrial Action, and CROTUM – by ERA 1999. The CO was accordingly afforded extended powers by virtue of absorbing into its remit various duties formerly held by the aforementioned Offices.

[1499] See Part I Chapter VIIA of the TULRCA, entitled "Breach of Rules".

[1500] See subs 108A(2) of the TULRCA.

[1501] Subsection 108A(3) has as requirement that the "person" in question, must be a member of the

in section 108A(2) are as follows:

> "(a.) the appointment or election of a person to, or the removal of a person from, any office; (b) disciplinary proceedings by the union (including expulsion); (c) the balloting of members on any issue other than industrial action; (d) the constitution or proceedings of any executive committee or of any decision-making meeting; (e) such other matters as may be specified in an order made by the Secretary of State."[1502]

In considering subsections 108A(14) to (15),[1503] Lockwood states that "[i]n respect of complaints [from members] about accounting records and political funds, the applicant can choose to go to the CO or the courts, but is not able to do both."[1504] Similar provisions applicable to functions of the CO are scattered throughout TULRCA.[1505]

Given the potentially far-reaching power of the CO outlined above, it would be appropriate to explore its nature and extent more closely, particularly with regard to the terms of the declarations or orders that may be made upon application by a union member. Hardy, for instance, explains that ERA 1999[1506] inserted subsections 25(5A) and 25(5B) into TULRCA with the effect that the powers of the CO "include an enforcement order[1507] which may be enforced in the same way as an order[1508] of the court."[1509] This was not unique to section 25 – a host of sections spread throughout

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union (or been one), at the time of the alleged/threatened breach. Subsection 108A(5) excludes employees of the trade union from approaching the CO, since such an action would lie as an "ordinary" labour dispute, between employer and employee, and involve following the ordinary, associated labour dispute procedures. Subsection 108A(6) sets out the required time period of six months, in which the claim is to be brought – subs 108A(7) provides further associated details pertaining to the timing of the claim.

[1502] Subsection 108A(2) of the TULRCA.

[1503] Lockwood (2006) *IRJ* 211.

[1504] 211, citing s 71 of ERA 1999 [Lockwood (2006) *IRJ* 211 n3].

[1505] See for instance: Subsection 31(1), read with subss 31(6)-(7), in respects of s 30 ("Right of Access to Accounting Records") of the TULRCA; Subsection 45C(1), read with subs 45B(5B), in respects of s 45B ("Duty to secure positions not held by certain offenders") of the TULRCA; Subsections 72A(10)-(11) in respects of s 71 ("Restrictions on use of funds for political purposes") of the TULRCA.

[1506] Schedule 6 para 4(3) of ERA 1999.

[1507] See subs 25(5A) of the TULRCA.

[1508] See subs 25(10).

[1509] Hardy *Labour Law* 66-67. Smith & Morton (2001) *BJIR* 132, in examining the legislative changes introduced by New Labour through ERA 1999, state the following:

> "Whereas the CROTUM could only advise and support complaints by union members, the CO now possesses a quasi-judicial function. Various declarations and enforcement orders made by the CO in relation to a wide range of issues relating to union government and administration … most of

TULRCA include a similar provision for "enforcement".[1510] These sections include, *inter alia*, section 24;[1511] section 24(A);[1512] section 28;[1513] various sections within Chapter IV, "Elections for Certain Positions", such as section 45B;[1514] various sections within Chapter VI, "Application of Funds for Political Objects", such as section 71,[1515] section 79,[1516] and section 82;[1517] and finally, sections 99 to 100E in Chapter VII, dealing with amalgamations (and similar matters) of trade unions.

In an attempt to examine the nature of these enforcement provisions – and bearing a single prominent exception in mind[1518] – this discussion will use subsections 108B(1) to (3), placed as they are under Chapter VIIA (entitled "Breach of Rules") as the example of the statutory powers provided to the CO in order to ensure compliance with the various sections of the Act.[1519]

Subsection 108B(1) allows the CO the discretion to "refuse to accept an application under section 108A *unless he is satisfied that the applicant has taken all reasonable steps to resolve the claim by the use of any internal complaints procedure of the union*" [my emphasis]. This is the only section in TULRCA that requires the exhaustion of internal remedies. Given that the possible grounds of complaint in section 108A include union official elections,[1520] disciplinary proceedings against members[1521] and executive committee decision-making,[1522] this is understandable – in light of the

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which were introduced by the Conservative government, have the status of court orders and may be enforced as such. Wedderburn [L Wedderburn "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *ILJ* 1 37] notes that the Certification Officer '*has* become a court'. Non-compliance may lead to contempt" [their emphasis].

[1510] A necessary point to mention, pertaining as it does to the various enforcement provisions, are the minor amendments brought about by recent legislation, discussed in more detail below. Importantly however, the changes do not impact on what is highlighted in this section of the discussion – given that the amendments merely serve as clarification to the original intention of the provisions within TULRCA.

[1511] Entitled "[d]uty to maintain register of member's names and addresses".

[1512] Entitled "[s]ecuring confidentiality of register during ballots."

[1513] Entitled "[d]uty to keep accounting records."

[1514] Entitled "[d]uty to secure positions not held by certain offenders."

[1515] Entitled "[r]estriction on use of funds for political objects".

[1516] Entitled "[r]emedy for failure to comply with ballot rules: general."

[1517] Entitled "[r]ules as to political fund".

[1518] This being subs 108B(1), as discussed below.

[1519] It goes without saying at this point, that the s 108 provisions would apply, *mutatis mutandis*, as an example of the similar provisions contained in the relevant primary sections highlighted above.

[1520] Subsection 108A(2)(a) of the TULRCA.

[1521] Subsection 108A(2)(b).

[1522] Subsection 108A(2)(d).

importance of these processes in union-member relations. In its application, there is an expectation on the part of the CO that the member involved at the very least attempted to exhaust internal remedies.[1523] Once the application is accepted by the CO, the second leg of section 108B kicks in with subsections (2)(a) to (e)[1524] setting out the various powers and obligations of the CO in respect of the complaint. In summary, the CO may either "make or refuse the declaration asked for"[1525] (and regardless of his choice, he must provide written reasons);[1526] "shall ensure that"[1527] a decision is reached ("so far as reasonably possible")[1528] within a period of 6 months; shall apply the principles of *audi et alteram partem* in allowing both union and applicant "an opportunity to be heard"; and finally, "shall make such enquiries as he thinks fit".[1529] Subsection 108B(3) regulates the circumstances under which the CO, alongside the declaration, may make an enforcement order – the latter "imposing on the union one or both of the following requirements",[1530] namely that the union must either remedy the breach (or withdraw the threat of the breach),[1531] or "abstain from such acts" in such a manner so that a similar breach does not occur in future.[1532] While subsections 108B(4) to (5) regulate the time periods relating to complaints, subsection 108(B)(6) states (again)[1533] that a "declaration made by the Certification Officer under this section may be relied on as if it were a declaration made by the court". Subsection 108B(8) confirms that the same applies to an enforcement order made by the CO.[1534]

[1523] See Deakin & Morris *Labour Law* 995. This is by no means a novel idea or prescript, despite it only being inserted into TULRCA by Sch 6 par 19 of ERA 1999. See further RW Rideout "The Implied Requirement of the Exhaustion of Internal Remedies" (1965) 28 *MLR* 351, for a general discussion about the early history of the concept within British caselaw, and M Kay "The Settlement of Membership Disputes in Trade Unions" in JR Carby-Hall (ed) *Studies in Labour Law* (1976) 160, for subsequent developments.

[1524] Subsections 108B(2)(a)-(e) of the TULRCA.

[1525] Subsection 108B(2)(d).

[1526] Subsection 108B(2)(e).

[1527] Subsection 108B(2)(c).

[1528] Subsection 108B(2)(c).

[1529] Subsection 108B(2)(a).

[1530] Subsection 108B(3).

[1531] Subsection 108B(3)(a).

[1532] Subsection 108(B)(3)(b).

[1533] In similar fashion, *inter alia*, to subs 25(9).

[1534] In similar fashion, *inter alia*, to subs 25(10). To be noted, is that both subs 108B(10) and subs 25(10) of the TULRCA saw minor amendments made in terms of TUA 2016, with the words "applicant or person mentioned in subsection [108B(7)/25(5B), respectively]" being inserted as additional parties (along with the CO) who can enforce the order so made.

Lastly, subsection 108B(7) TULRCA provides that where an enforcement order has been made, "any person who is a member of the union and *was* a member at the time it was made is entitled to enforce obedience to the order as if he had made the application on which the order was made" [my emphasis].

Given these powers, Deakin and Morris remark that "[r]ecourse to the Certification Officer is likely to prove a much speedier and cheaper option than the High Court".[1535] This has to be counterbalanced with the fact that the time periods available to potential applicants in making their complaint differ significantly from that of the courts.[1536] A further point worth mentioning would be that since ERA 2004,[1537] the CO has been permitted to strike out applications which are deemed, *inter alia*, to be vexatious or misconceived, or are unlikely to be successful.[1538]

6 3 2 7 6 The CO position from 2014 onwards

The earlier position relating to appeals from the CO to the EAT on points of law (either on the part of the trade unions or the member)[1539] has now been significantly amended. TUA 2016 (discussed at § 6 3 2 7 7 below) has removed the specific reference to "questions of law" as being a prerequisite for appeal from the CO to the EAT, with section 21 (entitled "Rights of appeal not limited to questions of law") introducing the change to several sections in the TULRCA.[1540] Cavalier and Arthur, in

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[1535] Deakin & Morris *Labour Law* 995. This statement is however qualified by the authors, by their pointing out that if the "applicant seeks interim relief or damages" [at 995], then they would have no choice but to proceed in the High Court.

[1536] The period pertaining to High Court action, is "normally" 6 years – whereas 6 months (subject to the presence of an internal union complaints procedure) is the default position in matters before the CO. See Deakin & Morris *Labour Law* 994-995, read with n67 for specific details – and the discussion of the time-frames by the CO in his decision in *Rodriguez-Noza v UNISON* (11 December 2013) D/34/13-14, paras 10-20.

[1537] Section 48 inserted s 256ZA "Striking Out" into TULRCA. See Selwyn *Employment* 6.

[1538] Subsection 256ZA(1)(a) states that an "application or complaint, or any response" may be struck out "on the grounds that it is scandalous, vexatious, has no reasonable prospect of success or is otherwise misconceived."

[1539] Deakin & Morris *Labour Law* 995.

[1540] The applicable sections of the TULRCA are as follows: ss 45D; 56A; 95; 104 and 108C. In exploring these particular provisions in more detail, s 45D (amended by subs 21(a) of the TUA 2016) covers ss 24B, 24C, 25, 31, 32ZC and 45C of the TULRCA – with these applying to, respectively, the register of members' names and addresses (ss 24B, 24C and 25); access to accounting records (s 31); including details of industrial action in the annual return (s 32ZC); and lastly, the duty to secure positions not held by certain offenders (s 45C). Section 56A pertains to applications in light of a union's failure to comply with the requirements of the duty to hold elections for certain positions, whilst s 95 deals with non-

commenting on this change and its underlying reasons,[1541] raise the point of one possible outcome as follows: "An appeal on facts to the EAT is more likely to encourage [an] unjustified complainant to have a second bite of the cherry by seeking a full re-hearing before the EAT, at great cost to the union."[1542] Regardless, a mechanism is in place to allow for final adjudication before an impartial Appeal Tribunal.

This discussion shows that, as various statutory regimes pertaining to internal union affairs were applied to organised labour by the respective British governments, the role of the CO[1543] was gradually refined and adapted to suit the changing employment relations' (or Government policy) environment. While "the role of the CO was untouched from 1999 to 2014",[1544] the return to power of the Conservative Party was to bring about the first noteworthy change.

6 3 2 7 6 1 The Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act of 2014

2014 saw the promulgation of the Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act ("TLA 2014"),[1545] which was to begin the expansion of the CO's investigative powers and was to serve as the precursor for an even more dramatic intervention that followed two years later.[1546] TLA 2014 allowed the CO, at his own behest, to scrutinise the extent to which trade unions have complied with their duty to "maintain an accurate register of members' names and addresses",[1547] with the relevant changes regulated in terms of sections 40 to 43

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compliance of the requirements in respect of funds for political objects. Section 104 speaks to issues pertaining to union amalgamation resolutions and, finally, s 108C regulates appeals flowing from the alleged breach of trade union rules (Chapter VIIA).

[1541] Cavalier & Arthur (2016) *ILJ* 388-389.

[1542] 389.

[1543] Together with the other, associated statutory institutions already discussed.

[1544] Cavalier & Arthur (2016) *ILJ* 371.

[1545] Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (c 4).

[1546] Cavalier & Arthur (2016) *ILJ* 363 make the point that the "enhanced powers of investigation and the ability to exercise powers without receiving a complaint from a trade union member are now applied across much of the CO's jurisdiction" – with the latter being in reference to TUA 2016, which built on the initial expansion "foundation" laid by TLA 2014.

[1547] See Bogg (2016) *ILJ* 320. The register of names and addresses is regulated in terms of Chp III ("Trade Union Administration"), specifically ss 24-24A of the TULRCA.

of the TLA 2014.[1548] Cavalier and Arthur state that the Act "gave supervisory, investigative and enforcement powers over new membership record requirements designed to assist with legal challenges to industrial action."[1549] A key change introduced by the Act (inasmuch as it referred to the CO) was the introduction of trade union membership audit certificates and the additional requirement surrounding the appointment of "assurers" by unions with more than 10,000 members.[1550] The assurer was required to notify the CO in the event the union is not complying with the statutory requirements regarding the register.[1551] The CO, in turn, was provided with "investigatory powers" in terms of section 40[1552] which provides both for its own investigation – at its own behest[1553] – and the appointment of inspectors.[1554] Should the CO have found non-compliance on the part of the union, the CO could then issue a declaration confirming as much[1555] – and where a declaration was issued, the CO would then be required to issue an enforcement order.[1556]

The Government's justification for this legislation was based on the apparent need

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[1548] These in turn list the amendments and insertions (in)to s 24 of the TULRCA.

[1549] Cavalier & Arthur (2016) *ILJ* 363. Regarding the aforementioned assistance for legal challenges to industrial action, Cavalier & Arthur (2016) *ILJ* 365 reason that the additional requirements pertaining to the maintenance of the register are in turn linked to the point that "most industrial action challenges turn on the sufficiency of the union's membership information either in terms of the content of the ballot or action notices, or the persons to whom ballot papers are sent and their addresses" – as discussed further below [footnotes omitted].

[1550] Cavalier & Arthur (2016) *ILJ* 371, in terms of ss 40-41 TLA 2014, inserting s 24ZA ("Duty to provide membership audit certificate") and s 24ZB ("Duty to appoint an assurer") respectively into s 24 of the TULRCA.

[1551] If the assurer cannot meet their statutory functions (in terms of ss 24ZD-24ZE TLA 2014), on account of their opinion that "the union's system for compiling and maintaining the register" was not such so as to allow the union to comply with the necessary requirements (as outlined in terms of s 24(1) of the TULRCA), then the assurer has a duty to inform the CO accordingly (in terms of s 24ZF of the TLA 2014).

[1552] Section 40 TLA 2014 inserted ss 24ZH-24ZJ into s 24 of the TULRCA.

[1553] The wording of subs 24ZH(1) of the TULRCA, as inserted by s 42 of the TLA 2014 ("Investigatory Powers") states: "If the Certification Officer thinks there is good reason to do so, the Officer – [subs 24AH(1)(a)] may give directions to a trade union …".

[1554] In terms of ss 24ZI-24ZH of the TLA 2014.

[1555] Prior to issuing the declaration, the CO was required to give the union opportunity to make written representations, and was permitted to allow oral representations – see subss 24B(2)(a)-(c) of the TULRCA, as inserted by subs 43(2) TLA 2014.

[1556] Unless it was considered to be inappropriate under the circumstances – see subs 24B(6) of the TULRCA. Furthermore, both the declaration and enforcement order would be relied on/enforced in the same manner as if issued by the Courts – see subss 24(B)(11)-(12) of the TULRCA respectively, as inserted by subs 43(2) TLA 2014.

of the broader public "to be confident that voting papers and other communications are reaching union members so that they have the opportunity to participate even if they choose not to exercise it …"[1557] In addition, both Ford and Novitz[1558] and Cavalier and Arthur[1559] reason that the expansion of the CO's powers was in effect the Government's response to the significant decision taken by the Court of Appeal in the *National Union of Rail, Maritime and Transport Workers v SERCO Ltd; Associated Society of Locomotive Engineers and Firemen v London & Birmingham Railway Ltd* ("*SERCO*") case.[1560] In this case, called on to evaluate the interplay between the common law and the right to strike, Elias LJ[1561] held that TULRCA provisions pertaining to the formalities of industrial action ballots "should be construed in the normal way, not strictly against unions".[1562] While this might not appear, at face value, to be particularly remarkable (it being a mere "change in emphasis rather than substance"),[1563] "in practice it enhanced the ability of unions to resist injunction applications".[1564] This had the result that "that these rulings were swiftly followed by

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[1557] Cavalier & Arthur (2016) *ILJ* 373. The authors state further:

> "The logic was that industrial action had the potential to affect the daily lives of members and non-members, and therefore more invasive supervision by the CO of the records used to send out ballot papers was required, whether at the instigation of an individual member or otherwise" – Cavalier & Arthur (2016) *ILJ* 374.

[1558] Ford & Novitz (2016) *ILJ* 281.

[1559] Cavalier & Arthur (2016) *ILJ* 374-375.

[1560] [2011] IRLR 399; [2011] EWCA Civ 226. Cavalier & Arthur (2016) *ILJ* 375 state:

> "Part 3 of the TLA, adopting the policy set out in the 'Policy Exchange' research paper concerning 'Membership Audit Certificates', was therefore, so far as the requirements for industrial action are concerned, the legislative response to the Court of Appeal's judgement in SERCO."

For further discussion of the *SERCO* judgment, see in general J Elgar & B Simpson "The Impact of the Law on Industrial Disputes Revisited: A Perspective on Developments over the Last Two Decades" (2017) 46 *ILJ* 6 17; G Gall "Injunctions as a Legal Weapon in Collective Industrial Disputes in Britain, 2005-2014: Injunctions as a Legal Weapon" (2016) 55 *BJIR* 187 189; R Dukes & N Kountouris "Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door" (2016) 45 *ILJ* 337 343 and Collins et al *Labour Law* 699-703.

[1561] Incidentally, this being the very same Patrick Elias who co-authored (along with Keith Ewing), the seminal "Trade Union Democracy, Members' Rights and the Law", in 1987.

[1562] Ford & Novitz (2016) *ILJ* 281. Cavalier & Arthur (2016) *ILJ* 375 state:

> "If the courts were not to construe the legislation concerning industrial action restrictively on account of its conferring immunity, and unions were to be able to rely on the membership information they already had, then the restrictions on organising industrial action could be re-asserted by more invasive requirements concerning union membership information, including (in the case of larger unions) the requirement for external audit and enforcement by the CO."

[1563] Ford & Novitz (2016) *ILJ* 281.

[1564] 281. The authors, by example, refer to *Balfour Beatty v UNITE* [2012] ICR 822, which demonstrated the immediate effects of *SERCO*. See further B Simpson "The Labour Injunction and Industrial Action

proposal for compulsory membership audits and new powers on the part of the CO to investigate membership records and take unilateral enforcement action".[1565]

The TLA 2014 demonstrates a statutory response from government triggered by judicial intervention in the labour relations system (albeit this time in response to a judicial ruling arguably in "favour" of organised labour).

6 3 2 7 7 The TUA of 2016

In introducing his overview of the CO amendments introduced by the enactment of TUA 2016, Bogg reasons the reforms "are of major political importance" and "have the potential to transform the CO from a neutral independent officer discharging largely administrative functions into a coercive and interventionist instrument of the State".[1566] In quoting from the House of Lords' debate on the passing of the new Act, the intended changes to be brought about in the functioning of the CO are described as follows:

> "[T]he certification officer… will have the power to initiate investigations without the need for anybody to complain. The investigations can be outsourced – no doubt to expensive law firms and consultants… This is a big step towards state supervision of trade unions. It offends the principle of autonomy and is a distant echo – I emphasise 'distant' – of a totalitarian and certainly an arrogant approach. Where is the justification for it? The certification officer deals perfectly adequately with complaints now and has not been seeking new powers".[1567]

Similarly, Cavalier and Arthur state: "The role of the CO, now described by the government as that of a 'regulator', is politicised to an unprecedented degree and is transformed into that of instigator, investigator, prosecutor, adjudicator and sentencer."[1568] In justification for this shift in focus towards that of CO as "regulator", Cavalier and Arthur state, in citing from the policy documentation in support of the new

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Ballots" (2013) 42 *ILJ* 54, for a discussion of *Balfour Beatty* and related cases following *SERCO*. Cavalier & Arthur (2016) *ILJ* 374 state of *SERCO*: "This apparently small change in emphasis had a big impact on the ground".

[1565] Ford & Novitz (2016) *ILJ* 281. The authors maintain that, in light of the policy considerations giving light to the 2014 Act, the result "led to the provisions in TLA [2014] inserting ss 24ZA-24C into TULRCA" – Ford & Novitz (2016) *ILJ* 281 n27.

[1566] Bogg (2016) *ILJ* 320.

[1567] Bogg at 320 quoting Lord Monks – HL Hansard, vol 768, col 29 (11 January 2016) [Bogg (2016) *ILJ* 320 n80].

[1568] Cavalier & Arthur (2016) *ILJ* 363. The authors continue by reasoning that "[h]aving already optimised the opportunities for legal challenges to industrial action, these measures are designed to heap unwarranted administrative burdens and expense on trade unions".

Act:

> "The main market failure arguments which underpin the existence of a regulator are externalities which occur because of union behaviour and imperfect information between employers and trade unions. The actions of unions can have wider impacts beyond their membership and their operations may not always be transparent to the wider public".[1569]

As discussed above, prior to TUA 2016 the CO's investigatory measures initially encompassed a broad range of provisions within TULRCA, focused primarily on monitoring the financial affairs of trade unions. Subsequent expansion of these measures by ERA 1999 led to the increased "power to hear complaints in relation to access to accounting records, application of funds for political purposes and a new general jurisdiction over breaches of union rules relating to specified matters."[1570] However, in contrasting these measures with the provisions of the TUA 2016, Cavalier and Arthur do question the Act's compliance with international labour standards and the rights to freedom of association and also remark that the earlier period of Conservative Party governance (1980-1997) saw organised labour legislation that "did at least have some tenuous connection, however disingenuous, with a union's democratic arrangements and relationship with its own members".[1571] In particular:

> "While the intent was undoubtedly to impose administrative burden and inconvenience on trade unions, the means chosen were predominantly the creation and enforcement of ever increasing individual rights of trade union members against their trade union (and encouragement and support in doing so such as through CR[O]TUM and CPAUIA). Likewise, the investigatory powers introduced by [TURERA] 1993 were focused (at least in part) on circumstances of suspected fraudulent conduct in financial affairs, as permitted by the ILO."[1572]

[1569] Cavalier & Arthur at 364, citing the BIS Impact Assessment, Trade Union Bill (January 2016) 77.

[1570] Cavalier & Arthur at 370 state that these matters include "appointment or election to office, balloting on any issue other than industrial action, the constitution or proceedings of the Executive Committee and other matters that may be specified in regulations" – as per para 19 Sch 6 of ERA 1999, which served to insert s 108A Chapter VIIA "Breach of Rules", into Part I, after Chapter VII of the TULRCA.

[1571] 371.

[1572] 371. What is further questioned by the authors, is how the above potentially impacts on the various international instruments that the UK is signatory to, as arguably applicable to such intervention in the internal affairs of trade unions – with no immediate answer being available. Cavalier & Arthur (2016) *ILJ* 366-367 make reference to the International Labor Organization ("ILO") Convention No 87 [Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87)], the European Social Charter (1961) and Articles 11 [Freedom of Assembly and Association] and 14 [Discrimination] of the European Convention on Human Rights ("ECHR"). See further Cavalier & Arthur (2016) *ILJ* 370-371,

6 3 2 7 7 1 The increase in the powers of the CO

Bogg[1573] outlines four key areas where TUA 2016 expanded the investigative powers of the CO, namely (i) The expansion of details to be provided by trade unions to the CO in submitting their annual returns; (ii) In terms of Schedule 2, the authority of the CO to now "initiate investigations at its own behest where it 'is satisfied' that relevant statutory duties have not been complied with,[1574] rather than being triggered by an individual member's complaint";[1575] (iii) In terms of Schedule 1,[1576] increased powers of investigation by the CO once such investigations have been triggered (discussed in greater detail below); and finally (iv) In terms of Schedule 3,[1577] newly approved powers "to impose financial penalties on the trade union, in addition to its [CO] existing enforcement powers".[1578] "In effect," states Bogg, "this gives the CO the power to impose quasi-criminal penalties on the trade union in what are properly regarded as civil matters".[1579]

In each one of these four areas, the CO is tasked with taking receipt of trade unions' annual returns.[1580] TUA 2016 brought about changes in respect of additional

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377-378 regarding the aforementioned.

[1573] Bogg (2016) *ILJ* 320-321.

[1574] Subsection 17(3) confirms that Sch 2 of the TUA 2016 (duly entitled "Certification Officer: Exercise of Powers Without Application etc."), "makes amendments to the 1992 Act to enable the Certification Officer to exercise certain powers without an application or complaint to the officer, has effect". Furthermore, subs 17(1) of the TUA 2016, under the heading "Certification Officer", inserts s 256C [entitled "Investigatory powers"] into TULRCA, and confirms that "Schedule A3 (Certification Officer: investigatory powers) shall have effect". As per subs 17(2) of the TUA 2016, Sch 1 of the TUA 2016 is to be inserted as Sch A3 (and after Sch A2) into TULRCA.

[1575] Bogg (2016) *ILJ* 320-321. See in this regard, the earlier discussion pertaining to the members' register, in terms of TLA 2014. Of further interest, in the CO now being able to launch investigations without application from others, is the possible impact on the appeal process. As stated by Cavalier & Arthur (2016) *ILJ* 389, where a union "faces an inquisitor CO who then metes out judgement and sentence", with a subsequent appeal: "In cases where the CO has acted as prosecutor and adjudicator, who are the parties before their EAT? There is no complainant, so if a union appeals a finding of the CO, does the CO appear as a party before the EAT? The injustice and absurdity is manifest."

[1576] Subsection 17(2) of the TUA 2016 inserts Sch 1 of the Act as Sch A3 into TULRCA.

[1577] Subsection 19(2) of the TUA 2016 inserts Sch 3 of the Act as Sch A4 into TULRCA.

[1578] Bogg (2016) *ILJ* 321.

[1579] Bogg (2016) *ILJ*. Bogg furthermore points to s 16 of the TUA 2016, which amends subs 254(2) of the TULRCA by insertion that the CO "is not subject to directions of any kind from any Minister of the Crown as to the manner in which he is to exercise his functions" – Bogg (2016) *ILJ* 321.

[1580] The annual returns are regulated in terms of ss 32-32A of the TULRCA. Broadly speaking the information that is to be provided includes, *inter alia*, the following: "revenue accounts indicating the

information that must now be provided in these returns.[1581] In terms of the relevant provisions, there is now the added requirement that trade unions provide the CO with information pertaining to any industrial action initiated by the union during the term covered by the annual return – including details regarding the industrial action taken, or any ballots held by the union.[1582]

The significance of the second area mentioned above (investigations that may now be done at the CO's own behest) lies in the possibility that trade unions could face "intervention into unions' administrative affairs not only by members but also by third parties who will no doubt try to persuade the CO to exercise his powers against trade unions for their own ends."[1583] The key headings listed in Schedule 2 of TUA 2016, indicative of the administrative affairs at stake, include the following:[1584] (i) Ensuring that positions within trade unions are not held by offenders;[1585] (ii) Compliance with the necessary rules regulating expenditure for political objects;[1586] (iii) Requirements

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income and expenditure of the trade union" [subs 32(3)(a)(i)]; "a balance sheet" [subs 32(3)(a)(ii)]; "such other accounts as the [CO] may require" [subs 32(3)(a)(iii)]; "details of the salary paid to and other benefits provided to or in respect of – (i) each member of the executive, (ii) the president, and (iii) the general secretary, by the trade union" [[subs 32(3)(aa)(i)-(iii)]; a copy of the union's auditors report (including related documentation) [[subs 32(3)(b)]; "a copy of the rules of the trade union as in force" [subs 32(3)(c)]; a statement pertaining to the number of names on the register – as required in terms of s 24 of the TULRCA – if applicable; and finally, "a note of all the changes in the officers of the union and of any changes in the address… of the union" [[subs 32(3)]. Compare the above with the position in South Africa, and the similar requirements contained in ss 99-100 of the LRA, as discussed below in chapter 12, *vis-à-vis* the duty to keep records and provide information to the Registrar.

[1581] See s 32ZA of the TULRCA as inserted by s 7 of the TUA 2016.

[1582] See subss 32ZA(1)-(2) of the TULRCA respectively. See further Cavalier & Arthur (2016) *ILJ* 378-379.

[1583] Cavalier & Arthur (2016) *ILJ* 366. The authors state further: "Whoever holds this office will have to decide when to initiate investigations and his exercise other powers without receiving a complaint from a member, no doubt under pressure from employers and other third parties, quite possibly in the midst of a bitter industrial dispute, and intentionally open to legal challenge if he (or she) chooses not to exercise these powers" – Cavalier & Arthur (2016) *ILJ* 366.

[1584] Cavalier & Arthur (2016) *ILJ* 379, with reference to Sch A3 of the TULRCA, as inserted by Sch 1 of the TUA 2016.

[1585] In terms of para 1(1)(b) Sch A3 of the TULRCA, as inserted by s 17 – read with para 1(1)-(6) Sch 2 of the TUA 2016. Regarding the categories of "offenders", and the related offences thereto, see in general subss 45(1)-(2), read with s 45B of the TULRCA. Briefly stated, the offences pertain to non-compliance with any statutory duties pertaining to the supply of union rules to its members (s 27 of the TULRCA); accounting records (ss 28-30 of the TULRCA); annual returns (ss 32-37 of the TULRCA); and finally, members' superannuation schemes (ss 38-42 of the TULRCA).

[1586] In terms of para 1(1)(d) Sch A3 of the TULRCA, as inserted by s 17 – read with para 4 Sch 2 of the TUA 2016.

surrounding elections to specific positions within trade unions;[1587] (iv) Political resolutions and political funds' ballots;[1588] (v) Ballots pertaining to amalgamations of unions and transfers between unions;[1589] and finally (vi) Requirements as imposed under conditional penalties.[1590]

Regarding each of these topics, different powers are given to the CO. For example, to ensure the "duty to secure positions not held by certain offenders" the CO, *before* deciding on the matter in order to make the declaration has to make the necessary enquiries, must give the union and applicant (if any) an opportunity to make written representations and may give the union and applicant (if any) an opportunity to make oral representations.[1591] Only then, if "satisfied" that the union has failed to comply,[1592] a declaration to that effect may be made. In summary of the core components of the powers afforded to the CO in Schedule 2, the following may be said: In all six instances where the newly established regulations are applicable (mentioned above, points (i)-(vi)), the CO is permitted to investigate at the CO's own behest[1593] and required to allow representations to be made (written or oral).[1594] In four of the instances, the CO is empowered to issue a declaratory order;[1595] and in two of them[1596] the CO is required to both attempt to complete the enquiry within six months[1597] and provide

[1587] In terms of para 1(1)(c) Sch A3 of the TULRCA, as inserted by s 17 – read with paras 2-3 Sch 2 of the TUA 2016.
[1588] In terms of para 1(1)(e)-(f) Sch A3 of the TULRCA, as inserted by s 17 – read with paras 5-7 Sch 2 of the TUA 2016.
[1589] In terms of para 1(1)(g) Sch A3 of the TULRCA, as inserted by s 17 – read with para 8 Sch 2 of the TUA 2016.
[1590] In terms of para 1(1)(h) Sch A3 of the TULRCA, as inserted by s 17 – read with Sch 3 of the TUA 2016 (inserting Sch A4 into TULRCA), care of s 19 of the TUA 2016.
[1591] Para 1(4)(2)-(2A) Sch 2 of the TUA 2016. The CO is further obligated, as far as reasonably practicable, to make its determination within six months of receiving the application [in terms of para 1(3)], and is to provide written reasons for the decision [in terms of para 1(4)(2B)].
[1592] In terms of s 45B of the TULRCA.
[1593] See paras 1(2); 2(2)(1); 3(3)(1)(b); 4(2); 5(2)(1); and 6(3)(1); 7(2); and 8(3) of Sch 2 of the TUA 2016.
[1594] See paras 1(4)(2A)(a)-(c); 3(3)(2)(a)-(c); 4(4)(2A)(a)-(c); 6(3)(2)(a)-(c); 7(3)(3)(a)-(c); and 8(6)(3A)(a)-(c).
[1595] The four instances being the "duty to secure positions not held by certain offenders", "elections for certain positions", "application of a trade union's funds in furtherance of political objects" and "compliance with political ballot rules" – see paras 1(4)(2); 3(3)(1); 4(4)(2); and 6(3)(1) of the TUA 2016.
[1596] The two instances being "duty to secure positions not held by certain offenders' and 'application of a trade union's funds in furtherance of political objects".
[1597] Paras 1(3)(1A) and 4(3)(1A) of the TUA 2016.

written reasons for the decision.[1598]

In considering the third area of changes to the CO's powers introduced by TUA 2016 (namely the increased powers of investigation), one of the key provisions is in paragraphs 2 to 5 of Schedule A3 (inserted into the TULRCA by Schedule 1 of TUA 2016).[1599] Paragraph 2, in almost identical fashion to what was initially inserted by the TLA 2014 and section 37A TURERA 1993,[1600] states that "[i]f the Certification Officer thinks there is good reason to do so"[1601] the CO may then exercise several options to obtain documentation from trade unions.[1602] In terms of paragraph 3, "if the Certification Officer has reasonable grounds to suspect that a trade union has failed to comply with a relevant obligation",[1603] the CO is entitled to appoint one or more of the CO staff *or other persons*[1604] as "inspector(s)", in order to "investigate whether the union has failed to comply with such an obligation" and to "report to the Officer"[1605] about their findings.[1606] Furthermore, the inspectors – in those instances where a person appears to have information pertaining to the matter – may require the person to "produce to the inspector… any relevant documents relating to that matter";[1607] "to attend before the inspector";[1608] and "otherwise to give the inspector … all assistance

[1598] Paras 1(4)(2B) and 4(4)(2B).

[1599] See s 256C of the TULRCA, as inserted by s 17 of the TUA 2016.

[1600] The similarities of the application provisions introduced in 1993, 2014 and 2016 are discussed in greater detail at § 6 3 2 7 7 2 below.

[1601] Para 2(1) Sch A3 of the TULRCA.

[1602] These include giving directions to trade unions to provide such relevant documentation as our specified in the direction issued by the CO [para 2(1)(a)], with "relevant documentation" being regarded as "documents that in the opinion of the Certification Officer … may be relevant to whether the trade union has failed to comply with a relevant obligation" [para 2(2)]. Furthermore, upon such information being provided, the power of the CO includes the right "to require any person who is or has been an official or agent of the trade union to provide an explanation of any of them [documents provided]", with this regulated in terms of para 2(5)(iii) Sch A3 of the TULRCA.

[1603] The point must be made that para 3 Sch A3 of the TULRCA therefore also envisages a scenario where the CO can take action at his own behest (in this instance – by appointing inspectors), without an application from other parties in that regard.

[1604] Importantly, as noted by Bogg (2016) *ILJ* 320, in his choice of quotation of Lord Monks from the House of Lords' debate on the Trade Union Bill (at § 6 3 2 7 7 above), other persons certainly opens up the possibility of external and "expensive law firms and consultants" from being potentially utilised as inspectors, should the CO so choose.

[1605] The requirements pertaining to the inspector reports are regulated in terms of para 4(1)-(5) Sch A3 of the TULRCA.

[1606] Para 3(1)(a)-(b) of Sch A3 of the TULRCA.

[1607] Para 3(2)(a).

[1608] Para 3(2)(b).

in connection with the investigation which the person is reasonably able to give".[1609] Paragraph 5, in turn, provides for an enforcement mechanism where the CO "is satisfied that a trade union or any other person has failed to comply with any requirement imposed under paragraph 2 or 3", upon which the CO "may make an order requiring the trade union … to comply with the requirement".[1610] This includes granting the trade union "an opportunity to be heard" prior to the issuing of the order[1611] and that the order "must specify the requirement with which the trade union… has failed to comply, and the date by which the trade union … must comply".[1612] An order made by the CO in terms of paragraph 5 "may be enforced by the Officer in the same way as an order of the High Court".[1613]

Subsection 19(1) of the TUA 2016 inserts section 256D (entitled "Power to impose financial penalties") into TULRCA, which confirms that Schedule A4 – also newly inserted into TULRCA – shall have effect.[1614] This means that where the CO either makes an enforcement order, or has the power to make an enforcement order but has chosen not to do so,[1615] the CO "may make a penalty order or a conditional penalty order".[1616] This involves payment of an amount to the CO by the defaulting party (unless, in the case of the conditional penalty, the party rectifies the default in compliance with the specified request made by the CO).[1617] Paragraphs 3 to 7 of

[1609] Para 3(2)(c).
[1610] Para 5(1).
[1611] Para 5(2).
[1612] Para 5(5)(a)-(b) .
[1613] Para 5(6).
[1614] The contents of Sch A4, in turn, are set out within Sch 3 of the TUA 2016.
[1615] The relevant provisions under which the CO is entitled to make enforcement orders, are set out in terms of para 1(1) Sch 3 of the TUA 2016 (inserted as Sch A4 of the TULRCA), and apply, *inter alia*, to the following TULRCA provisions: Failure by a union to comply with the duties regarding the register of members (subss 24B(6) or 25(5A)); failure by a union to comply with a member's request for access to accounting records (subs 31(2B)); failure by a union to provide details of industrial action or political expenditure in the annual return (subs 32ZC(6)); failure by a union to comply with the duty to secure positions not held by certain offenders (subs 45C(5A)); failure by a union to comply with the requirements about elections for certain positions (subs 55(5A)); various subsections pertaining to political objects or political funds (subss 72A(5), 80(5A), 82(2A), 84A(5)); failure to comply with an order on a breach or threatened breach my the union of its rules on certain matters in terms of s 108A (subs 108B(3)); and lastly, failure to comply with in order regarding the failure by a union or other person to comply with investigatory requirements in terms of para 5(1) Sch A3 (as inserted by Sch 1 of the TUA 2016).
[1616] Para 2(2) Sch 3 of the TUA 2016 (inserted as Sch A4 of the TULRCA).
[1617] Paras 2(3)-(5) Sch 3 of the TUA 2016 (inserted as Sch A4 of the TULRCA).

Schedule A4 regulate the enforcement of the penalty orders, affording the parties involved opportunities to make written or oral representations, appeals in regards to and the amount of the penalties,[1618] and the early or late payment of the penalties. Paragraph 9 confirms that any amounts received shall be paid by the CO into the so-called "Consolidated Fund".[1619] Cavalier and Arthur state that "the 'primary policy reason' for making financial penalties available to the CO was 'to support his new expanded role in ensuring compliance with the various requirements by trade unions, which are clearly civil in nature'".[1620]

However, Cavalier and Arthur also make the following point:

> "It is acknowledged that very similar powers of investigation exercisable by the CO have existed since 1993 in relation to the financial affairs of a union and are (or were) contained in the TLA [2014] in relation to matters concerning the membership register. However, these related essentially to matters of administration – finance and membership records – not to the democratic functioning of the union. It is a major step to extend those powers to the majority of areas of complaint over which the CO has jurisdiction."[1621]

6 3 2 7 7 2 The overlap between 2016 and the prior positions

At the same time, it is apparent there is a measure of overlap between the CO's powers introduced by TUA 2016 and what came before. In particular, TURERA 1993, ERA 1999 and TLA 2014 introduced similarly worded sections regarding the power of the CO to investigate matters and what the CO is empowered to do thereafter. Where noticeable distinctions become apparent are in relation to the areas of internal union affairs requiring scrutiny and for whom they were introduced, rather than the specific powers afforded to the CO in respect of them.[1622]

[1618] Cavalier & Arthur (2016) *ILJ* 384 state in this regard: "The amount of the penalty will [be] set by Regulations, and will not be less than £200 and not more than £20,000" – see in this regard paras 6(3)(a)-(b) of the TUA 2016 (inserted as Sch A4 of the TULRCA).

[1619] Para 9 Sch 3 of the TUA 2016 (inserted as Sch A4 of the TULRCA). Briefly stated, the Fund can be described as follows: "The Consolidated Fund is the Government's general bank account at the Bank of England. Payments from this account must be authorised in advance by the House of Commons. The Government presents its "requests" to use this money in the form of Consolidated Fund Bills" – see <http://www.parliament.uk/site-information/glossary/consolidated-fund/> (accessed 10-05-2017).

[1620] Cavalier & Arthur (2016) *ILJ* 384.

[1621] 381.

[1622] On that basis, as will be apparent from the discussion to follow immediately hereafter, certain powers afforded to the CO in terms of the 2016 provisions, have been introduced for the first time.

For example, while TURERA 1993 through section 37A[1623] was first to insert the right of the CO "to give directions" to a union to obtain relevant documents "if he thinks there is good reason to do so", virtually the same wording and powers are provided for in subsection 24ZH(1) of TULRCA (as inserted by section 42 TLA 2014) and paragraph 2(1) of Schedule A3 of TULRCA (as inserted by subsection 17(2) TUA 2016). But the critical point to make is that 1993's section 37A followed a variety of sections focusing on the appointment of auditors and the trade union's annual return (which is also to be made available to the union's members). In other words, the provisions were put in place to protect the interests of that union's own membership. The provisions of TLA 2014 and TUA 2016 on the other hand, respectively speak to increased union administrative burdens focused on the members' register and on *internal* union functioning, but for the benefit of the broader public and employers. Put differently, 1993 focused on the finances of unions (to the potential benefit of the members), whereas 2014/2016 shifted that focus to *potential* external parties, despite there being arguably no immediate evidence of the shift in focus being necessary.

Similarly, ERA 1999 brought renewed focus on union accounting records, political fund purposes and breaches of internal union rules – again speaking to an underlying focus on a union-member focus. However, TUA 2016 affords the CO the roles of "instigator, investigator, prosecutor, adjudicator and sentencer"[1624] by giving the CO the right to investigate at own behest also those areas formerly requiring an application by union members,[1625] by expanding the CO's powers in terms of those investigations[1626] and by the introduction of financial penalties for non-compliance with a host of TULRCA (and TUA 2016) provisions.[1627]

This means that, while a close-reading of the wording provided for in the most recent amendments (pertaining as they do to the CO) show overlap and similarity with

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[1623] Entitled "Power of Certification Officer to require production of documents etc.".

[1624] Cavalier & Arthur (2016) *ILJ* 363.

[1625] As set out in terms of Sch 2 of the TUA 2016.

[1626] By way of example, a comparison between s 37A (as introduced by TURERA 1993) and para 2 Sch 1 of the TUA 2016 (inserted as Sch A3 of the TULRCA) provides the CO with essentially the same powers. However, a comparison between s 37B ("Investigations by inspectors") and para 3 (similarly entitled) Sch 1 of the TUA 2016 (inserted as Sch A3 of the TULRCA), reveals a key difference: In the former, subs 37B(2) sets out four specific provisions that specify the circumstances under which the CO is permitted to appoint an inspector – whereas in the latter, no such provision is to be found. In other words, the CO is afforded broader grounds upon which to base his decision to appoint inspectors for the relevant investigations.

[1627] As regulated in terms of Sch A4 of the TULRCA (inserted care of Sch 3 of the TUA 2016).

what went before, it is the breadth and underlying "target market" of the CO's role in monitoring organised labour that has been significantly extended.

6 3 2 7 7 3 The external regulators and the CO Levy

Cavalier and Arthur[1628] draw an interesting comparison between the CO and "other regulators" within Britain (while making the point that "those regulators are not supervising organisations whose activities are protected by fundamental social rights").[1629] The authors note the broad powers provided to the CO with regard to documentation that may be requested, the "separate power to require an explanation of [the] documents provided by the person producing them", the "separate power to require a person unable to produce the documents requested to say where, to the best of their knowledge, the documents are" and the enforcement powers of the CO in this respect.[1630] Thus, the CO has increased investigatory powers which appear to exceed that of similar commissioners in Britain.

Subsection 19(4) TUA 2016 introduces a list of provisions amending TULRCA with regard to orders made by the CO.[1631] These changes do emphasise the variety of persons who, over and above the CO (namely "applicant", "person" or "complainant") are permitted to enforce orders made by the CO depending on the context.

Section 257A TULRCA[1632] empowers the Secretary of State (by virtue of the necessary Regulations) to make provision for the CO to levy payment by trade unions and employers' associations. This is in an effort (as outlined in terms of subsection 257A(2) TULRCA) to offset the annual expenses of the CO.[1633] It must be noted that since the provisions allow for the determination of the levy to be based upon proportional expenses relative to the performance of the CO's tasks, the distinct possibility exists that proportionately more levies will be drawn from trade unions, as opposed to employer associations.[1634] In similar fashion to that of the financial

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[1628] Cavalier & Arthur (2016) *ILJ* 381-382.
[1629] 381.
[1630] 382.
[1631] The list of effected provisions, all within TULRCA, are as follows: subs 24B(12); subs 25(10); subs 31(5); subs 45C(9); subs 55(9); subs 72A(9); subs 80(9); subs 82(4B); and finally, subs 108B(8).
[1632] As inserted by s 20 of the TUA 2016.
[1633] Furthermore, in terms of subs 257A(3), the CO expenses "may" provide for "expenses incurred by ACAS" in terms of ss 254(4)-(5) of the TULRCA.
[1634] Cavalier & Arthur (2016) *ILJ* 385-386.

penalties, any levies accumulated are to be paid to the Consolidated Fund.[1635] In conclusion to their comment on the possible imposition of the levy, Cavalier and Arthur highlight the apparent paradox at play:

> "The irony is not lost that a trade union member making a complaint against their trade union to the CO will have to pay no fee and the expense of the CO as adjudicator (very possibly added to the expense of the CO as investigator, and, where he decides to activate his enforcement powers without receiving a complaint from a member, as prosecutor) are to be loaded onto the trade union. This is to be contrasted with the situation of a trade union member bringing a complaint against their employer where the member would need to pay a series of fees before their case was determined by an Employment Tribunal".[1636]

But perhaps, as the immediate focus on the changes brought about by TUA 2016 draws to a close, it would be most apt to leave the last words to an outgoing CO, who in his final Annual Report summarised the (then) impending changes as follows:

> "The purpose of these additional powers is said to be to enhance transparency and accountability. I was not, however, consulted on whether I had evidence of an unmet demand for further powers prior to the introduction of the Bill.
>
> The regulation of the internal affairs of trade unions has hitherto been based on the premise that they are voluntary associations. Historically, the law has intervened to protect and support the position of members. Thus it is the members who have the right to complain to the Certification Officer about an alleged breach of their rights under the rules of the union or an alleged breach of statute. The TUA is based on a different premise, namely that the public has an interest in the internal affairs of trade unions given the impact of some industrial action on the public. Accordingly, the right of the Certification Officer to investigate and initiate formal complaints against trade unions has been extended. The role of the Certification Officer will change from being mainly the adjudicator of members' complaints to become one with more general policing and enforcing responsibilities. This is not the role to which I was appointed in 2001.
>
> This changed role is likely to have two main consequences. First, alleged breaches can be raised with the Certification Officer by anyone, not just members. If there appears to be anything in the issue raised, the Certification Officer has a discretion to take the matter further. My concern is that

[1635] See § 6 3 2 7 7 1 above.

[1636] Cavalier & Arthur (2016) *ILJ* 386. This comment must of course be seen within the context that it was made prior to the decision in R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51, and the significant impact made in terms of finding the ET fees structure unlawful. Regardless, the underlying point – speaking as it does to the overall picture of the British labour relations system – *vis-à-vis* organised labour, and the rights of employees, remains.

> trade unions may find themselves subjected to a myriad of references to the Certification Officer by persons and/or organisations seeking to pursue them for industrial, political or other purposes and who have the motivation and money to put any given situation under a microscope. Each case will, of course, be dealt with on its merits by the Certification Officer but, at the very least, trade unions will have to bear the financial burden of contesting such cases and the levy imposed by the Certification Officer may be increased as a result.
>
> My second concern is that, in the above circumstances, the Certification Officer will in effect be the investigator, prosecutor and adjudicator."[1637]

6 3 2 7 8 An Analysis of the CO model

As is clear from the earlier discussion, the Office of the CO underwent significant changes between 2014 and 2016 after almost a decade of relative stability. Many of the current provisions have the potential to have an instant and direct impact on the functioning of the Office and its relationship with the broader labour relations system. What remains incontrovertible is that the statutory amendments are again demonstrative of the practical implementation of an underlying governmental policy, shaped in no small part by perceptions surrounding the role of organised labour within broader society. The CO, in turn, continues to play a significant part in the context of understanding the British labour relations system, both past and present.

As such, whereas the discussion of the current state of affairs is of obvious importance to this study and its question about union accountability to its members, the activities of the CO in the decades leading up to present can similarly not be ignored. Interest in the CO flared up at different stages. However, for the better part of almost 15 years very little changed. And yet, it is precisely because of this relative stability that the opportunity is provided, through more detailed analysis, to examine the interplay between the CO and organised labour (and their members) over a prolonged period of time. And it is here that possible lessons for South Africa can be identified.

6 3 2 7 8 1 Applications made to the CO

For the purposes of this study – and in comparison to the various statutory

[1637] Annual Report of the Certification Officer 2015-2016, 2-3 – available at <https://www.gov.uk/government/publications/annual-report-of-the-certification-officer-2015-2016> (accessed 20-06-2019).

institutions discussed earlier in this chapter – the Office of the CO is one of the most important: Given its focus on internal trade union management, the extent to which it has impacted (if at all) on the relations between unions and their members requires particular attention.

Lockwood's analysis of complaints made to the CO between 2000 and 2004[1638] reveals the following:[1639] Applications in terms of "union elections"[1640], "political fund[s]",[1641] "political fund ballot irregularity",[1642] "financial affairs"[1643] and "[b]reach of trade union rules"[1644] were considered, with the latter category being particularly important (focusing as it does on section 108A infractions).[1645] Applications based on breach of union rules numbered 48 (2000/1), 57 (2001/2), 28 (2002/3) and 18 (2003/4).[1646] Annual Reports found on the UK government's website,[1647] reveal that the same complaint category ("Breach of trade union rules") for the years between 2004/5 to 2015/16, saw the highest applications per year top out at 19,[1648] the lowest number received being nine.[1649] There was thus a decrease in applications relating to breach of union rules over time.[1650] Of these applications, a number were struck out

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[1638] Lockwood (2006) *IRJ* 217. For the summary of complaints to the CO prior to ERA 1999 (1985-1999), where union members had the option to make use of CROTUM, see Lockwood (2006) *IRJ* 212-216.

[1639] 217, Table 2.

[1640] Section 54 of the TULRCA.

[1641] Subsection 82(2).

[1642] Ss 77-80.

[1643] Section 37.

[1644] Various sections of the TULRCA, including s 108A.

[1645] As discussed at § 6 3 2 7 5 above, subs 108A(2) has as the grounds upon which members can complain to the CO, including *inter alia* "disciplinary proceedings by the union (including expulsion)" [subs 108A(2)(b)], and "the constitution or proceedings of any executive committee or of any decision-making meeting" [subs 108A(2)(d)].

[1646] Lockwood (2006) *IRJ* 217, Table 2. Regarding the other grounds of application to the CO, namely union elections (s 54 of the TULRCA), political fund aspects (subs 82(2) of the TULRCA) and political fund ballot irregularity (ss 77-80 of the TULRCA), the 2000-2001 to 2003-2004 period saw the respective totals for each of the aforementioned grounds at 27, 3, 0 and 13 (compared to the total for union rule breaches over the same period at 151) – see Lockwood (2006) *IRJ* 217, Table 2.

[1647] See <https://www.gov.uk/government/collections/certification-officer-annual-reports> (accessed 22-06-2017).

[1648] For the period 2014-2015. Prior thereto, the highest had been 17, achieved on two occasions in 2004-2005 and 2006-2007.

[1649] For the reporting period 2005-2006.

[1650] The total number of annual applications, over the ten-year period between 2004/5 to 2015/16 comes to 162, or an average of 13.5 per year. Thus, when compared to the four years that fall in the scope of Lockwood's analysis (ie, 2000-2001 to 2003-2004), the current average is significantly below that of the

by the CO in terms of section 256ZA for being scandalous, vexatious, not having a reasonable prospect for success, or "otherwise misconceived".[1651] The power to strike out such applications or complaints was only introduced in 2004,[1652] but after this and until 2016 a total (including 2007/8) of 29 out of 124 applications (over the same period) were struck out.[1653]

6 3 2 7 8 2 Inadequate Representation applications

The number of applications based on union rule breaches and financial affairs only tells one part of the story. In making a further important point, Lockwood states:

> "It is also illustrative to note that the majority of applications to the CO fell outside the jurisdiction of the Office. These applications concerned inadequate representation of members by their union or were in relation to the provision of union benefits or membership"[1654]

Annual Reports released by the CO lists the total number of enquiries received each year by the Office. Along with categories such as "[g]eneral advice on the role of the

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37.75 applications per year, launched then. Furthermore, were the four highest application years of the current period to be taken (19, 17, 17 and 16 – for the periods 2014-2015, 2006-2007, 2004-2005 and 2009-2010 respectively), their average of 17.25 per year, is still far lower than Lockwood's analysis period. Regarding complaints, and responses thereto by the CO, in regard to s 37(A) applications ("Investigation into Financial Affairs"), Lund's analysis of the period between 1999-2007, has the author reach the following conclusion:

> "Table 1 shows that for the last eight years, relatively few members have either complained about their trade union's financial management in general … or [have complained] that their trade unions have refused to provide them with access to financial records … The CO has very broad powers under Section 37(A) of the Act to compel trade unions to produce financial documents, or to appoint a special investigator or inspector to review these documents … yet in the last eight years, he has had to do so only four times …".

The total complaints/concerns received in the eight-year period that falls within Lund's analysis, was 34 – or an average of 4.24 per year. See Lund (2009) *IRJ* 129-130. Perusal of the relevant Annual Reports for the subsequent years (up and till the latest reporting period of 31 March 2016), reveals that this trend continues. More specifically, from 2008 and including 2016, a total of 23 concerns were raised, at an average of 2.8 concerns raised per year (none were raised in 2011/12).

[1651] See subs 256ZA(1)(a) of the TULRCA.

[1652] ERA 2004.

[1653] The totals are as follows: (format: [reporting period]; [struck out it.o. s 256ZA]; [total applications]; [percentage of total applications]) 2007/8, 2 (14) 14.29%; 2008/9, 1 (12) 8.33%; 2009/10, 2 (16) 12.5%; 2010/2011, 4 (10) 40%; 2011/12, 1 (14) 7.14%; 2012/13, 4 (14) 28.57%; 2013/14, 4 (12) 33.33%; 2014/15, 2 (19) 10.53%; 2015/16, 9 (13) 69.23%. See the relevant Annual Reports, as issued by the CO.

[1654] Lockwood (2006) *IRJ* 217 [my emphasis].

Certification Officer", "[d]isciplinary proceedings within the union" and "[e]nquiries about Annual Returns and financial issues", the CO furthermore tracks questions received about "[i]nadequate representation of members by their union". The period 2004/5 to 2015/16 saw an average of 94.25 queries per year,[1655] with the highest number topping out at 143[1656] and the lowest number being 67, as recorded in the 2013/14 period. When that average is compared with the period of Lockwood's analysis (that is, 2000/1 to 2003/4), it too is lower, albeit not by much,[1657] further suggesting a slight decrease (arguably) in levels of discord amongst union members.

6 3 2 7 8 3 Analysis of CO enforcement orders

A final issue worthy of closer examination would be the extent to which the CO in fact made use of its powers to compel trade unions to comply with their statutory obligations through declaration or enforcement orders. In analysing the number of complaints made to the CO between 1985 and 1999,[1658] Lockwood reasons that "the CO has made few declarations against trade unions",[1659] before quoting the then

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[1655] In calculating the average, the following numbers [drawn from the appropriate Annual Reports on the CO website, as above] were used: (format: [reporting period]; [inadequate representation queries]; [total enquiries received]; [percentage of total enquiries]) 2004/5, 80 (467) 17.13%; 2005/6, 77 (522) 14.75%; 2006/7, 130 (708) 18.36%; 2007/8, 143 (723) 19.78%; 2008/9, 88 (691) 12.74%; 2009/10, 94 (461) 20.39%; 2010/11, 95 (599) 15.86%; 2011/2012, 114 (727) 15.68%; 2012/2013, 70 (494) 14.17%; 2013/2014, 67 (569) 11.78%; 2014/15, 73 (542) 13.47%; 2015/16, 100 (552) 18.12%. [Note to reader: The 2010-2011 Annual Report, (at 43) states the following: "[a]lmost a 100 were issues around inadequate representation of members by their union." It is unclear why this remains the only Report where an exact number was not provided. For the purposes of the foregoing calculations, a figure of "95" was used. The Annual Report can be found here:<http://www.certoffice.org/CertificationOfficer/files/44/4469bff8-f7a6-4949-99f3-577c37511cec.pdf> (accessed 20-05-2017).]

[1656] In the reporting period 2007-2008.

[1657] The 2000-2004 period saw the following numbers: (format: [reporting period]; [inadequate representation queries]; [total enquiries received]; [percentage of total enquiries]) 2000/1, 146 (410) 35.61%; 2001/2, 88 (281) 31.32%; 2002/3, 95 (386) 24.61%; 2003/4, 111 (563) 19.72%. The total "inadequate representation" queries received was accordingly 440, leaving the average at 110 per year (vs 94.25 in the current period). It can be noted however, that percentage wise, the earlier period's queries made up – by and large – a higher proportion of the overall queries received.

[1658] See Lockwood (2006) *IRJ* 212, Table 1. The author states further: "Table 1 reveals a relatively low number of complaints have been made to the CO, despite the introduction of a legal framework that encouraged the individual union member to take action against their trade union" [see Lockwood (2006) *IRJ* 212-213].

[1659] 213.

CO[1660] as stating that "trade unions generally run their affairs in an appropriate manner".[1661] Therefore, at least until the ERA 1999, the following would appear to hold true: "The modest number of complaints which result in declarations being made indicates that most complaints made by union members must be unfounded, that trade unions are genuinely attempting to comply with the law and/or that the CO's application of the law has been narrow in its operation".[1662]

But what then of the period to follow? Again, focusing on the "union rule breach" category and following the dissolution of CROTUM,[1663] it would appear that this trend continues: In the period between 2004/5 and 2015/2016, several years saw no enforcement orders being made,[1664] whereas the highest number issued per year ever was only four,[1665] bringing the total to 18.[1666] While slightly more declarations were issued – the highest in a single year being 10[1667] – their status is less invasive than enforcement orders, which furthermore serves to confirm that the CO did not have much to do in terms of compelling unions to comply with their duties.[1668]

It would, therefore, appear as if – relative to the total registered trade union members in the UK[1669] – an insignificant number felt compelled to take action against their own trade unions by using the services of the CO. Furthermore, while an average of 94.25 enquiries per year to the CO in respect of "inadequate representation" would appear to be noteworthy, it must be kept in mind that it remains impossible to

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[1660] Ted Whybrew – see Lockwood (2006) *IRJ* 213 n4.

[1661] 212.

[1662] 216.

[1663] For a discussion of the impact that CROTUM's abolishment – see Lockwood (2006) *IRJ* 216-217.

[1664] 2004-2005, 2006-2007, 2010-2011 and 2011-2012 saw no enforcement orders being issued by the CO. See the respective Annual Reports of the CO, available from the CO website, as above.

[1665] As per the relevant Annual Reports, 2005-2006, 2007-2008, 2008-2009, 2009-2010 and 2013-2014 all saw two enforcement orders issued. 2012-2013 was the only reporting year that saw a single enforcement order being made by the CO. The 2014-2015 and 2015-16 periods, respectively, saw three and four orders being made.

[1666] Again, as above, perusal of the various Annual Reports demonstrates even lower numbers for complaints pertaining to, for example, financial irregularities – evidence of the point that applications in terms of s 108A (breach of union rules), whilst low, are the most prominent in the context of the other available grounds. As is to be expected, with very few complaints received annually, enforcement/declaration orders are also very rare in the context of the other grounds for complaint.

[1667] This being in the reporting period 2011-2012. Furthermore, several years saw no declaration orders being issued: 2004-2005, 2005-2006, 2008-2009, 2009-2010 and 2012-2013.

[1668] A total of 55 declaration orders were issued between 2004-2005 and 2015-2016, or five on average per year.

[1669] As noted above, 2012 estimates place union membership numbers in Britain at 6,5 million.

conclusively interpret any such numbers, since the category is inherently broad and there is no clarity what exactly is meant by the term.[1670] This discussion shows that, despite the far-reaching functions and powers of the CO that exist for the benefit of union members, this office has seen a decrease in its use.

In considering the role of the CO in light of statistics now a decade old, Lockwood argued that the various legislative regimes implemented by the Conservative Governments of the 1980s and 1990s sought to "improve union democracy by strengthening the rights of individual trade union members", by shifting "towards an individualistic approach to union democracy that was aimed at increasing the participation and influence of the ordinary member in union affairs, while at the same time restricting the excessive concentration of power in the hands of militant trade union leaders."[1671] An important cog in this "democracy-machine", was to be the various statutory institutions – in particular CROTUM, the CO and ET/EAT.[1672] While New Labour more or less continued with what was started earlier, "subject to only minor modifications",[1673] and with the coalition government likewise (mostly) doing the same (notwithstanding the TLA 2014),[1674] the significant changes brought about under the new Conservative government, in terms of TUA 2016, brings to light interesting questions.

One question is whether the statements of Lockwood that "union members are not sufficiently interested in the general administrative affairs of the union" and that there is "little evidence that providing members with the right to make complaints to the CO has led to substantial reforms being made to the internal affairs of trade unions"[1675] still hold true today? And, were the preceding question to be answered in the

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[1670] It would appear that, at the very least, "enquiries" would include telephonic, postal and web-based queries (either through email, and possibly even online resources/documentation that were downloaded or accessed) – which might therefore be enough to categorise the query as being one or the other, but does not necessarily accurately reflect its intent or degree of intent.

[1671] Lockwood (2006) *IRJ* 218.

[1672] 218.

[1673] 218.

[1674] Deakin & Morris *Labour Law* 49 provide a succinct overview of the initial policy decisions that were considered by the Coalition government, in underlying their employment relations' plans. See further the Department for Business Innovation & Skills' (BIS) "Employment Law 2013 – Progress on reform" (March 2013), at <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184892/13-P136-employment-law-2013-progress-on-reform2.pdf> (accessed 20-06-2017).

[1675] Lockwood (2006) *IRJ* 219.

affirmative, it would raise the further query as to whether a statutory institution such as the CO *should* serve as a useful model with which to ensure the necessary probity in internal union procedures?

6 3 2 7 8 4 Analysis of the interest in the CO services by union members

The preceding discussion illustrated that: (a) The services/functions and powers of the CO, with which to manage internal union affairs are hardly called into use any more, and; (b) Where such complaints are taken up by the CO, relatively few of them result in declarations being issued, much less actual enforcement orders being made.[1676] But herein lies a difficulty. Any argument that the CO, as an institution, does not offer enough evidence of its success in ensuring trade union accountability depends on how that would be measured. In other words, could the diminishing use of the CO's services not equally be demonstrative of (on the one hand) members who are simply "not sufficiently interested" in the affairs of their unions, or (on the other hand) of unions increasingly being compliant with their obligations? In fact, could it not be argued that the very fact that the CO is being used less is indicative of its success? Lockwood himself foresees this possibility by stating that "some trade union officials believe that the introduction of a stricter regulatory framework resulted in union members and the general public having confidence in the propriety of unions' internal affairs."[1677] The author adds: "Indeed, some union officials assert that the external regulation of their affairs now plays an important role in legitimising their activities".[1678]

But what then of those enquiries to the CO that appear to suggest unions are *not* performing their tasks adequately – the queries each year about "inadequate representation"? They surely cannot be ignored completely? Whereas the CO simply states that such queries fall outside of its statutory ambit, what happens to them? Do they proceed to private counsel via an attorney, or to the courts, the ET or another institution such as the Citizens Advice Bureau – or do they simply come to nothing? It remains speculation at best.[1679] Focusing on what is known, it is submitted that to call

[1676] The annual 23% average of complaints that are being struck out for being either without merit, unfounded or vexatious certainly do no help.

[1677] Lockwood (2006) *IRJ* 219.

[1678] 219 [footnotes omitted].

[1679] Included herein would be theorising about what the impact would have been, had the ambit of the CO simply been extended to allow for those very queries – in other words, to have allowed the CO to investigate such complaints?

in to question the suitability of the CO as a model for potential change purely based on its diminished use, is ill-advised.

In many ways, the CO serves as an extension – in certain respects – of the former CROTUM. Whereas the latter was envisaged to fulfil a very specific role, within a very specific time, within the British industrial relations system, there is nonetheless an overlap of duties and functions between the two offices. But it is when CROTUM is considered in the light of a statutory attempt at empowering members to act against their own unions, that the decision *not* to allow either CROTUM or the CO to investigate "inadequate representation" claims, becomes all the more peculiar.

Surely the question to be asked is why, if the Conservative government was indeed serious about holding unions accountable to their members,[1680] did it not make provision for a statutory mechanism to investigate poor service on the part of the unions?[1681] Surely such an approach, this time compelling unions to perform their functions to the satisfaction of their membership at risk of CO involvement could yield improved union accountability? It is submitted that one part to the answer is that CROTUM, along with the increased powers being afforded to the CO might *ostensibly* have been about giving the unions back to their members and improving union accountability. However, in reality these initiatives were always about comprehensively quashing the unions' power. And any mechanism – such as an external statutory body – that might have resulted in organised labour improving their service-offering subject to oversight, would arguably not have been viewed favourably by the government of the day. Unions needed to become less popular, not more. This, it is submitted, is the primary reason why neither CROTUM nor the CO has ever been empowered to entertain inadequate representation claims.

[1680] Says Deakin & Morris *Labour Law* 986 of the various statutory enactments that followed CROTUM during the early 1990s in Britain:

> "The justifications for introducing individual statutory provisions varied. A central theme was the need for legislative imposition of democracy within trade unions, based on the assertion that union leaders did not adequately reflect the views of their members and that, in the light of the special 'privileges' and immunities which unions enjoyed, it was particularly important to ensure that the rights of individual members were adequately protected and that there was proper accountability for the use of union power."

[1681] Similarly, whilst this might be expected of the supposed pro-organised labour *New Labour* party (between 1997-2010), given the most recent extension to the CO's powers by the Conservative government, why no extension in terms of this under the new regime, either?

6 3 2 7 9 CO Conclusion

What becomes apparent is an ever-increasing schism between the everyday functioning of the CO and the statutory framework and governmental policies that have shaped – and continue to shape – its intended ambit and role in the British industrial relations system. Put differently, despite substantial evidence that contemporary trade unions do not appear to act in a manner that warrants noticeable action on the part of their members, the UK government has remained focused on expanding the functions of a statutory body in order to further empower internal (member) *and* external (broader public/employers) intervention in the internal affairs of organised labour. In this regard, Cavalier and Arthur (in quoting from the Parliamentary discussion in the debate on the Trade Union Bill) describe the TUA 2016 proposals pertaining to the CO as "a disproportionate response to an unidentified problem."[1682] Nonetheless, the Office of the CO offers a useful model to consider for the purposes of the regulation of trade unions, and by implication, accountability to union members. It is how that model should possibly look and function and whether it could be adjusted to meet the particular circumstances prevalent within the South African context that will enjoy further attention in the chapters below.

6 3 2 8 The civil courts in Britain

6 3 2 8 1 Scope and jurisdiction involving unions

Deakin and Morris make the point that, in the absence of a "separate labour court" in Britain, labour or employment disputes are heard either by the ET's, or by the civil (common law) courts.[1683] As such, the civil courts are most typically approached in matters involving a breach of contract and tort whereas the tribunals, being creatures of statute, see their jurisdiction being regulated by their empowering statutory provisions.[1684] In this regard, Hardy explains that in instances involving tort/delict, the primary employment-related actions are injunctions and claims for damages associated with industrial action. The civil courts hold exclusive jurisdiction over these cases. This is unlike contractual actions since certain employment-related contractual

[1682] Cavalier & Arthur (2016) *ILJ* 490.
[1683] Deakin & Morris *Labour Law* 75.
[1684] As per the ETA 1996 (and where incorporated into TULRCA), and its associated Regulations.

claims can also be brought before the ET.[1685] Thus, Collins et al state: "The principal exclusions from their [the ET] jurisdiction are claims for compensation for personal injuries,[1686] claims for injunctions against collective industrial action, and any legal process contemplating the application of a criminal penalty".[1687]

An important consequence of the overlap in jurisdiction that does exist, as explained by Deakin and Morris, is that the "bifurcation between the courts and tribunals means that an employee generally needs to bring separate proceedings in each where both contractual and statutory rights are at issue".[1688] At the same time, the ET is empowered "to hear claims for money due under the [employment] contract, or for breach of contract, of up to £25,000 *if the claim arises or is outstanding on termination of an employee's employment.*"[1689] Consequently, "[t]ermination of employment apart, all other contractual claims must be brought in the common law courts."[1690]

However, given this study's focus on the union-member relationship, and apart from injunctions (to prevent industrial action) and damages claims (as a result of industrial action), the most common type of civil court claim that involve members and unions remains that of complaints surrounding the contract of membership.

In this regard, two points need to be made: Firstly, as discussed in chapter 5, actions involving members against their unions nowadays are increasingly rare, particularly when compared to the period between the 1950s and 1980s. As the earlier discussion showed, legislative intervention to address the overwhelming presence of

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[1685] Hardy *Labour Law* 68. Whether or not the intended action is brought before the County or High Court, will, as explained by Hardy *Labour Law* 68, depend largely on the "value of the claim, its importance, complexity and need for speed". Deakin & Morris *Labour Law* 76 state:

> "Thus many contractual or minor personal injuries claimed will be heard in the county court; employers' claims in tort against trade unions in relation to industrial action are heard in the High Court, together with claims for interim injunctions to halt the action."

[1686] In terms of subs 3(3) ETA 1996.

[1687] Collins et al *Labour Law* 28.

[1688] The typical example of this in the context of employment matters, pertains to unfair dismissal claims. The plaintiff can elect to either institute their claim before the ET, or in the courts. Aside from the risks associated with costs orders in the events of being unsuccessful, and costs of instituting the proceedings, a claimant only has three months following the dismissal to action the matter in the ET, compared to six years in the civil courts (in terms of s 5 of the Limitation Act 1980 c 58). Furthermore, the limit of £25,000 for breach of contract claims in the ET, does not apply to the civil courts.

[1689] Deakin & Morris *Labour Law* 76 [my emphasis].

[1690] 76. The authors make the further point [at 76] that, notwithstanding the possibility of instituting a claim before the ET, in terms of ss 13-27 ERA – which regulate the unlawful deduction from wages – these "may, in practice, involve the determination of contractual matters".

closed-shop agreements and their effect on employment meant that there no longer was and is such a pressing need for intervention by the judiciary in protecting a trade union member's employment.

Secondly, as the discussion earlier in this chapter and in chapter 5 showed, statutory protection measures are increasingly part and parcel of the British industrial relations' system – starting with the IRA 1971 and followed by Thatcherism during the 1980s onward. Deakin and Morris state:

> "Before 1970 the common law was the primary means of controlling the conduct of union affairs, statutory regulation being confined to the areas of union political activities and mergers … The first radical break with the abstentionist framework of the 1871 Act came with the Industrial Relations Act 1971, although even then its provisions were largely concerned with requiring unions to have rules on particular matters rather than requiring them to take a specific form … From 1980 onwards, however, the activities of unions were subjected to an increasing degree of statutory regulation … In all cases the statutory provisions were deemed to prevail over anything to the contrary in the union rule book."[1691]

Even so, the point of departure in actions involving members and their union remains that of the membership contract.[1692] Thus, the remedies available to a member, to be sought from the High Court, are either a declaratory order, an injunction, or damages[1693] – while any appeals lie to the Supreme Court of the UK, as the highest court in Britain.[1694] The common law principles on which courts will rely (and how those principles developed) in these cases, were discussed in chapter 5.

To conclude, therefore, an individual seeking to act against their union for a breach of union rules in Britain essentially has three options: (i) The ET, assuming the action complained of pertains to unjustifiable discipline, exclusion or expulsion from a trade union;[1695] (ii) The CO, where the action complained of pertains to *inter alia* non-compliance with either statutory requirements or the union's own rules in terms of financial affairs,[1696] or the requirements listed in terms of section 108A of the

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[1691] Deakin & Morris *Labour Law* 985-986, [footnotes omitted].

[1692] At 985 the authors note in this regard: "A trade union is constituted by an association of individuals bound together by a contract of membership and the courts have jurisdiction to enforce this contract at the suit of union members".

[1693] 992.

[1694] This is the position since 2009, following the commencement of the Constitutional Reform Act 2005 (c 4).

[1695] See s 2 ETA 1996 read with ss 64-65, 174 and 176 of the TULRCA.

[1696] See s 37B of the TULRCA – Selwyn *Employment* 632.

TULRCA;[1697] or finally, (iii) The civil courts. A final point to be made with regard to the civil courts is that – as discussed under the "Certification Officer" above[1698] – many of the statutory provisions pertaining to the CO afford the claimant the option of *either* approaching the CO, *or* the civil courts.

6 4 Industrial action in Britain

6 4 1 Introduction

Godard, in his assessment on strikes in contemporary Britain, writes: "Those who predict the withering away of the strike commit the fallacy of assuming that short-term trends will continue indefinitely".[1699] What remains to be explored below, is the extent to which these words, published as they were in 1972, still hold true today.

There are three primary reasons for the focus on industrial action: Firstly, it is only through unpacking the wide array of statutory provisions regulating strike action that the full extent of the regulation and compliance requirements imposed on organised labour in Britain – in addition to all the requirements already discussed – becomes apparent. It, therefore, serves as a further and good example of the regulatory complexities that face modern-day unions in the UK. Secondly, insight into such an onerous labour environment serves as a yardstick of what is indeed possible – in terms of compliance with statutory prerequisites by unions – so as to better contextualise the observations and recommendations made in the conclusion of this study. Thirdly, underlying all of this, the earlier chapters introduced one theme informing this dissertation: it is in the area of (unlawful) industrial action and its consequences that the relationship between trade unions and trade union members often is brought into sharp relief. Given the centrality of industrial action in the process of collective bargaining and what trade unions do, it is expected that consideration of the rules regulating industrial action will also be informative of the different ways in which, in effect, the relationship between a trade union and its members may (need to) be

[1697] Included herein, as discussed at § 6 3 2 7 5 above, is *inter alia* (i) The appointment or election of a person to, or the removal of a person from, any office; (ii) Disciplinary proceedings by the union (including expulsion); (iii) The balloting of members on any issue other than industrial action; and (iv) The constitution or proceedings of any executive committee or of any decision-making meeting.
[1698] See § 6 3 2 7 above.
[1699] J Godard "What Has Happened to Strikes?" (2011) 49 *BJIR* 282 282, quoting R Hyman *Strikes* (1972) 104.

regulated.

The discussion will commence with a brief look at the available statistical information regarding British strike action, before examining the various individual components of the regulation of industrial action – starting with the common law and statutory immunities, considering what constitutes a "trade dispute", trade union liability, balloting and notice requirements, and injunctions. The section will conclude by examining the effects of non-compliance with these requirements and the impact of industrial action.

6 4 2 Statistics on industrial action in Britain

In his analysis of the pattern of strikes in the UK between the periods of 1964 to 2014, Lyddon[1700] identifies three key phases that coincide, as discussed above, with the socio-economic and political changes that arose in Britain during this time: (i) 1964-1979, which saw the number of strikes vary "between 2,000 and 3,000" per year; (ii) The 1980s, signified by Margaret Thatcher's Conservative government's return to power and its targeting of organised labour, which resulted in a "transition, from a high to historically very low level of all three main indicators (numbers of strikes, strikers and 'days lost')";[1701] and finally (iii) 1992 onwards, demonstrating increasingly lower instances of "between 100 and 250 strikes per year."[1702] Lyddon states as follows:

> "From 1980 the biggest economic recession for 50 years saw a rapid step change down in strike numbers and then free fall after 1984. The 1980s have been depicted, in Hyman's memorable phrase, as the years of 'coercive pacification' when employers 'exploited the new opportunities to challenge the former balance of power [...] sometimes brutally, sometimes with sophistication'. This was compounded – under an unexpected four consecutive Conservative governments (1979-1997) – by six statutes (from 1980 to 1993) progressively narrowing what constituted a lawful trade dispute. It was aptly described as 'class struggle from above'".[1703]

[1700] D Lyddon "The Changing Pattern of UK strikes, 1964-2014" (2015) 37 *Emp Rel* 733 734.

[1701] 734.

[1702] 734. In regard to the post-1992 period, Lyddon (2015) *Emp Rel* 734 states further:

> "From 1992 the annual number of strikes has been lower than at any time since 1893 (when a consistent series of statistics were started)."

See further Lyddon (2015) *Emp Rel* 734 Table I, for the overall picture of strike statistics between 1964-2014, as listed per the main strike indicators – these being (a.) number of strikes; (b.) workers involved; and (c.) working days lost.

[1703] Lyddon (2015) *Emp Rel* 734, [references omitted].

Gall also provides a useful overview of strike action and industrial action short of a strike,[1704] along with ballots related thereto, for the period 2002-2014 and finds that the number of strikes averaged 131 per year.[1705] A further useful resource of statistical information is the Office for National Statistics ("ONS"), which publishes annual reports on labour disputes in the UK. The 2016 Report,[1706] provides an overview of industrial dispute data from 1997 to 2016,[1707] and demonstrates (despite three significant outliers)[1708] the downwards tendency in strike activity.[1709]

With regard to the (important) balance between official and unofficial strikes, Lyddon reports that during the 1960s and 1970s, "[o]n average, some 95 per cent of recorded strikes were unofficial".[1710] September 1984 saw the introduction of the balloting requirement (discussed below) as a prerequisite for official strikes but "unofficial (now meaning unballoted) stoppages still featured in the build up to official action."[1711] The high levels of unofficial strikes during the 1980s was to give rise to the government's response in the form of EA 1990.[1712] While the economic recession at the time arguably had a larger impact on the reduction in overall strike numbers,[1713]

[1704] Gall (2016) *BJIR* 190, Table 1.

[1705] The highest number in a single year was placed at 158 in 2006, the lowest at 92 in 2010. 2014 saw 155 strikes being recorded.

[1706] Office for National Statistics (ONS) [R Clegg] *Labour Disputes in the UK: 2016* (2017) 31 – available at <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/workplacedisputesandworkingconditions/articles/labourdisputes/latest#review-of-1997-to-2016> (accessed 12-08-2017).

[1707] Office for National Statistics (ONS) *Labour Disputes* (2017) 7-8, Table 2.

[1708] 2002 saw over 1.3 million working days lost to a "very large stoppage in the transport and storage industry", with 2007 (just over 1 million days lost) seeing a large strike in the national post services, and 2011 (just under 1.4 million days lost) marked by "two large public sector strikes" – see Office for National Statistics (ONS) *Labour Disputes* (2017) 7, commentary to Table 2.

[1709] The three outlier years notwithstanding, all the data confirms the reduction in industrial action, particularly when compared to the entirety of the statistical data records (1891 onwards). See in this regard Office for National Statistics (ONS) *Labour Disputes* (2017) 5-6, Figure 3 and related commentary.

[1710] Lyddon (2015) *Emp Rel* 738 – who makes the further point that this number was in itself "an underestimate due to under-recording of strikes that met the criteria for inclusion in government statistics".

[1711] 738.

[1712] As discussed, EA 1990 introduced a series of reforms to address industrial action, including the abolishment of protection for secondary strike action and the loss of the right to claim unfair dismissal if participating in an unprotected strike. Furthermore, subss 6(4)-(5B) EA 1990 introduced the requirement that the union (through specific officials or committees – care of subs 6(4) EA 1990) "'repudiate' unofficial strikes, in writing" (see Lyddon (2015) *Emp Rel* 739).

[1713] 739.

the transition to smaller, albeit less militant, official industrial action as a result of increased statutory regulation, was clear.[1714] Unofficial strike action still occurs in contemporary Britain – albeit with a marked downturn since the early 2000s to the point of single-figure percentages.[1715] However, given the current statutory regime and the negligible numbers involved, the effects thereof are far less impactful than was the case during the 1960s to 1980s.

Furthermore, the last decade has shown that, while industrial action and its effects remain at historical lows,[1716] experience shows that "striking [is] more of a public activity"[1717] in terms of awareness, but remains (due to low union density/organisation numbers) a "largely a public sector phenomenon".[1718]

6 4 3 Common law liability for industrial action

Collins et al – in quoting Kay LJ[1719] – state as follows:

> "In this country, the right to strike has never been much more than a slogan or legal metaphor. Such a right has not been bestowed by statute. What has happened is that, since the Trade Disputes Act 1906, legislation has provided limited immunities from liability in tort. At times the immunities have been widened, at other times they have been narrowed. Outside the scope of the immunities, the rigour of the common law applies in the form of breach of contract on the part of the strikers and the economic torts as regards the organisers and their union. Indeed, even now, the conventional analysis at common law is that by going on strike employees commit repudiatory breaches of their contracts of employment … No statutory immunity attaches to such individual breaches, although

[1714] 739. See further Deakin & Morris *Labour Law* 39.

[1715] See in this regard the statistics presented by Gall (2012) *Manag Revue* 332, Table 2.

[1716] Lyddon (2015) *Emp Rel* 743. On this point, J Kelly "Conflict: Trends and Forms of Collective Action" (2015) 37 *Emp Rel* 720 721-722 makes the interesting observation that, following 1984 and the introduction of the compulsory balloting requirements, there was an obvious "upsurge" in the number of ballots – so much so that between 2002 and 2011, "the number of ballots was approximately five times the number of strikes" (Kelly (2015) *Emp Rel* 722). As a result, a possible interpretation hereof "is that British labour statistics have overstated the decline in industrial conflict by failing to take into account the number of disputes that are resolved after a strike ballot, in effect a strike threat, but before recourse to a strike" – Kelly (2015) *Emp Rel* 722. With that being said, the author does concede that the average annual number of strike ballots in the aforementioned period, is still significantly lower than the average annual strike totals during the 1970s. See further Gall (2012) *Manag Revue* 332-333 on the interplay between the number of ballots versus that of strikes.

[1717] Lyddon (2015) *Emp Rel* 743.

[1718] Gall (2012) *Manag Revue* 333. See further ONS Digital "Five facts about … strikes" (12-08-2016) *Office for National Statistics (ONS)* <https://visual.ons.gov.uk/five-facts-about-strikes/> (accessed 12-09-2017), where is stated: "From 2006 to 2015, public sector strikes accounted for 85% of all strikes on average".

[1719] *Metrobus Ltd v Unite the Union* [2009] IRLR 851 para 118; [2009] EWCA Civ 829.

those who induce them are protected and, since 1999,[1720] the dismissal of those taking part in official, but not unofficial, industrial action will in defined circumstances constitute unfair dismissal … It helps to keep this history and conceptual framework in mind when construing and applying the detailed provisions of the statute."[1721]

As is therefore clear from the above and the discussion pertaining to the common law in the UK in chapter 5,[1722] workers who participate in a strike[1723] (or other forms of related industrial action) would essentially be acting in breach of their contract of employment.[1724]

In similar vein, where such action is at the behest of a trade union through its officials, the union and officials would in effect be calling for breach, or interference with the performance, of a contract (the contract being the one entered into between employer and employee, or a commercial contract between the employer and a third

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[1720] Section 16 of the ERA 1999 brought into effect Schedule 5 of the Act, it being entitled "Unfair Dismissal of Striking Workers", and accordingly amended TULRCA across a host of applicable provisions, key of which was s 238A, duly inserted into TULRCA.

[1721] Collins et al *Labour Law* 663-664.

[1722] See § 5 3 above.

[1723] In terms of s 246 of the TULRCA, a "strike" is defined as "any concerted stoppage of work". The latter has been (understandably) interpreted in light of the many possible variables to be found within the factual scenarios presented to the courts, with the Court of Appeal defining a strike as involving a "concerted stoppage of work by men done with a view to improving their wages or conditions or giving vent to a grievance or making a protest about something or other or sympathising with other workmen in such endeavours" – *Connex South-Eastern Ltd v RMT* [1999] IRLR 249 (CA), citing Denning LJ in *Tramp Shipping Corp v Greenwich Marine Inc* [1979] ICR 261 (CA).

[1724] Honeyball *Textbook* 387 state: "It is virtually impossible in modern Britain to take industrial action which is lawful. In some circumstances and for certain legal purposes immunities will be accorded to strikers and trade unions; but in particular contractual liability will almost always remain, giving the right to employers to sue their employees for damages caused by industrial action". Notwithstanding, Honeyball *Textbook* 388 state further:

> "The effect of strikes and industrial action on the individual contract of employment is, paradoxically, rarely of direct importance. Employers normally do not wish to disturb post-strike calm by resorting to the courts to sue individual workers, but it is still vital indirectly, for it provides the basis of the illegality which is central to the economic torts …"

The authors thus reason that Management might in this manner use the common law torts of intimidation, inducing breach of contract and the like, in order to seek restitution from the union or strike-leaders (unless, as will be discussed below, they are acting in contemplation or furtherance of a trade dispute). Collins et al *Text and Materials* 867 state:

> "British law has tended to take a narrow view of legitimate strike action. The position of the common law … has been unwavering, unequivocal and unmistakable. Industrial action – whatever its cause – has tended to be seen as unlawful, as violating the rights of the employer".

See further Collins et al *Labour Law* 664-665.

party).[1725] In terms of British common law, it is unlawful for a person or association[1726] to induce a person(s) to breach of contract,[1727] or to interfere with that person's ability to perform in terms of that contract, or to threaten to do either of the above.[1728]

Thus, all industrial action (in whatever form) would consequently be unlawful were it not for some form of immunity, which would allow the action to continue (subject to

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[1725] As stated by Deakin & Morris *Labour Law* 1040:

> "[T]hose who organise industrial action are highly likely to commit at least one of the 'economic torts'. The purpose of these torts is to protect interests in trade, business or livelihood. The principles which shape them were laid down in a series of decisions dating from the turn of the last century."

The "economic torts" are discussed in further detail, where applicable, below. With that being said, it would be appropriate at this point to clarify that any in-depth discussion of the complex judicial development surrounding the specific common law torts that arise in examining the relationship between union members and the unions themselves (on the one hand), and employers and third-parties (on the other) – fall outside the ambit of this study. The torts certainly play a crucial role in the broader question of union and union-member accountability and/or liability, but are not strictly speaking applicable to analysing accountability between union and member *inter se*. They do however provide a necessary mechanism in sketching the overall background to the law pertaining to industrial action and will be addressed as required in order to provide the requisite context.

[1726] The liability of unions, specifically, are discussed separately at § 6 4 6 below.

[1727] See Deakin & Morris *Labour Law* 1041-1044 for an overview of this tort.

[1728] At 1041-1054 the authors discuss the various union liability torts for individuals involved in industrial action, and categorise them as "torts based upon interference with the claimant's pre-existing rights" (which includes inducing breach of contract and liability for inducements other than to breach a contract); "causing loss by unlawful means"; and lastly, "conspiracy" (including lawful means conspiracy and unlawful means conspiracy). Honeyball *Textbook* 392-404 provide very useful examples of the various torts, and how these might be enacted in practice. H Carty "Unlawful Interference with Trade" (1983) 3 *Legal Stud* 193 193, in listing the "three established 'nominate' economic torts which share in common the defendant's intention to cause economic harm to the plaintiff", as being conspiracy (both forms – as above), inducing breach of contract, and intimidation. In explaining the breach of contract, Carty (1983) *Legal Stud* 194 states that it "extends to intentionally causing breaches of any type of contract and encompasses many different methods of achieving such interference" – but that the "original basis of this tort was the intentional causation of breach of the plaintiff's contract" [footnotes omitted]. Regarding intimidation, Carty (1983) *Legal Stud* 194 posits that it "involves the threat of an unlawful act (often the threat of a breach of contract) to cause economic harm to the plaintiff", and "usually arises in a three party situation to that the unlawful threat is directed at a third party in order to harm the plaintiff" [footnotes omitted]. For further discussion on the torts outlined above, see in general: KW Wedderburn "Inducing Breach of Contract and Unlawful Interference with Trade" (1968) 31 *MLR* 440 440-446; P Elias & K Ewing "Economic Torts and Labour Law: Old Principles and New Liabilities" (1982) 41 *Camb LJ* 321 321-358; DM Arden "Economic Torts in the Twenty-first Century" (2006) 40 *Law Teach* 1 1-22; B Simpson "Economic Tort Liability in Labour Disputes: The Potential Impact of the House of Lords' Decision in OBG Ltd v Allan" (2007) 36 *ILJ* 468 468-479; S Deakin et al *Markesinis and Deakin's Tort Law* 6 ed (2008) 571-603; S Deakin & J Randall "Rethinking the Economic Torts" (2009) 72 *MLR* 519 519-553; R Simpson "Economic Torts*"* in MA Jones et al (eds) *Clerk & Lindsell on Torts* 20 ed (2010) 1597-1747; and B Simpson "Trade Disputes Legislation and the Economic Torts*"* in TT Arvind & J Steele (eds) *Tort Law and the Legislature – Common Law, Statute and the Dynamics of Legal Change* (2013) 105.

certain conditions) in a manner free from the risk of common law proscription.[1729]

6 4 4 Statutory immunities in terms of section 219 of TULRCA

Statutory immunity, which allows for the organising of, and participation in, industrial action without fear of civil action being taken against the individuals or unions through the courts, is found in section 219 of the TULRCA, as the first provision under Part V ("Industrial Action"), entitled "Protection from certain tort liabilities".[1730] Of importance, however, is subsection 219(4) of the TULRCA, which subjects section 219 to three other key groups of provisions in TULRCA, namely: sections 222 to 225 (dealing with "action excluded from protection", as this section is entitled); section 226 (requiring a ballot prior to industrial action); and finally, subsection 234A (requiring the necessary notice of the industrial action to the employer). These provisions will all be discussed below.

As far as the exclusion of immunity for certain types of action is concerned, section 222 prohibits action taken against an employer for the purposes of enforcing union membership.[1731] Section 223 prohibits action taken against an employer if the underlying reason(s) is aimed at the employers' dismissal of workers who participated

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[1729] Deakin & Morris *Labour Law* 1061 make the further important point that "[t]his method of listing torts, rather than of giving a comprehensive immunity against civil liability, means that those organising industrial action have always been vulnerable to new nominate torts being created" – put differently, continued immunity is to a large extent dependent on a judiciary not extending or re-interpreting the existing torts as applicable to industrial action. As stated by Collins et al *Labour Law* 668:

> "This is one of the weaknesses of an immunity as a basis of protection for the freedom to strike: immunity can be provided only for those torts known to exist at the time the immunity is enacted. History has shown that, in an evolving and dynamic area of law, the immunity can quickly be outflanked by the emergence of new grounds of liability for which there is no protection."

[1730] Subsection 219(1)(a)-(b) of the TULRCA states that "[a]n act done in contemplation or furtherance of a trade dispute shall not be actionable in tort on the ground only – that it induces another person to break a contract or interferes or induces another person to interfere with its performance, or that it consists in his threatening that a contract (whether one to which he is a party or not) will be broken or its performance interfered with, or that he will induce another person to break a contract or interfere with its performance." As explained by Collins et al *Labour Law* 668, "[t]he foregoing provision [s 219 of the TULRCA] is designed to take a number of torts out of active service, notably inducing breach of contract (section 219(1)(a)), intimidation (section 219(1)(b)) and conspiracy (section 219(2))."

[1731] For example, where the employer has, or is believed to have, employed non-union members – or alternatively – is not treating union members more favourably than non-union members – subs 222(1) read with subs 222(2) of the TULRCA. Or the action is sought to compel the employer to either conclude contracts with union membership requirements as a condition, alternatively, refuse to deal/contract with persons who are not union members – subs 222(3) of the TULRCA.

in unofficial action (as per section 237 of the TULRCA – discussed below). These workers have no right to claim unfair dismissal in terms of the Act. Section 224 regulates industrial action that amounts to "secondary action" (support/solidarity strikes), which is prohibited with the exception of specific instances involving "lawful picketing" (regulated in terms of section 220).[1732] Lastly, section 225 regulates action aimed at enforcing/imposing a "union recognition requirement".[1733] In short, the intended action must not be of such a nature so as to promote union closed shop practices, or be designed to compel an employer to use the services of specific firms who are unionised, rather than conducting business with non-union enterprises.[1734]

Statutory immunity for industrial action depends on the exclusions highlighted above and the further two requirements pertaining to ballots[1735] and the strike notice[1736] However, according to subsection 219(1) of the TULRCA the immunity extends only to "an act done … in contemplation or furtherance of a trade dispute". A multitude of judgments have shaped and refined what is to be understood by this phrase. Below, a brief synopsis of the current position is provided.[1737]

[1732] See Selwyn *Employment* 657 for a succinct overview of the picketing requirements. See further Dukes & Kountouris (2016) *ILJ*, for a detailed overview of the impact that TUA 2016 will have on picketing requirements.

[1733] This is brought about through contravention of either s 186 or s 187 of the TULRCA, which voids any "term or condition of a contract for the supply of goods or services" where the said term/condition requires the party to recognise one or more trade unions in order for the agreement to proceed. Similarly (in terms of s 187) a party is prohibited from dealing with a supplier on the grounds that said supplier has not/is not likely to recognise one or more trade unions.

[1734] These are known as "union labour only" clauses, and any action to enforce them will not benefit from statutory immunity. See H Carty "The Employment Act 1990: Still Fighting the Industrial Cold War" (1991) 20 *ILJ* 1 2, who confirms that s 225 of the TULRCA was already introduced by s 12 of the EA 1982, whereas s 222 of the TULRCA was introduced by s 10 of the EA 1988.

[1735] Section 226 of the TULRCA.

[1736] Section 234A.

[1737] For a detailed review of the historical common law and judicial development to "trade dispute", see in general MJ Klarman "The Judges Versus the Unions: The Development of British Labor Law, 1867-1913" (1989) 75 *Virg L Rev* 1487 1487-1602 and J Saville "The Trade Disputes Act of 1906" (1996) *HSIR* 11 11-46. For a review of the position towards the end of the 1970s and 1980s – including the development of "contemplation" or "furtherance", see RC Simpson "'Trade Dispute' and 'Industrial Dispute' in British Labour Law" (1977) 40 *MLR* 16 16-30; K Ewing "The Golden Formula: Some Recent Developments" (1979) 8 *ILJ* 133 133-146; B Simpson "A Not So Golden Formula: In Contemplation or Furtherance of a Trade Dispute after 1982" (1983) 46 *MLR* 463 463-477 and B Simpson "Trade Disputes and the Labour Injunction After the Employment Acts of 1980 and 1982" (1984) 47 *MLR* 577 577-587. For a more general overview, including the contemporary position, see Deakin & Morris *Labour Law* 1032-1039 and Collins et al *Labour Law* 664-674.

6 4 5 The trade dispute and the golden formula

An individual or labour association who either requests, threatens to request, or in fact organises industrial action, benefits from statutory immunity only if acting in contemplation or furtherance of a trade dispute. In other words, a trade dispute must either be present or imminent, and the relevant action must be in contemplation, or in furtherance, of that particular dispute.[1738] This means that what is to be understood by "trade dispute", and the meaning of the phrase "contemplation or furtherance" are important. Subsection 244(1) of the TULRCA defines a "trade dispute" as meaning "a dispute between workers[1739] and their employer which relates wholly or mainly[1740] to one or more of the following": (i) Terms and conditions of employment;[1741] (ii) Engagement, non-engagement, termination or suspension of employment of one or more workers;[1742] (iii) Allocation of work and duties between workers or groups of workers;[1743] (iv) Disciplinary matters;[1744] (v) Membership or non-membership in trade unions;[1745] (vi) Facilities for officials of trade unions;[1746] and finally (vii) "Machinery for negotiation or consultation, and other procedures, relating to any of the above matters, including the recognition by employers… of the right of a trade union to represent workers in such negotiation".[1747] As is to be expected, the aforementioned provisions have also seen numerous cases where the courts have interpreted and clarified the scope and ambit of the individual subsections.[1748]

With regard to the meaning of "in contemplation or furtherance", Deakin and Morris

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[1738] In quoting Denning MR in the case of *Beetham v Trinidad Cement Ltd* [1960] AC 132; [1960] 1 All ER 274, Honeyball *Textbook* 407 state that a dispute "exists whenever a difference exists, and a difference can exist long before parties become locked in combat… It is sufficient that they should be sparring for an opening".

[1739] See Deakin & Morris *Labour Law* 1062-1063 for a discussion on the significance of the term "workers" being used, as opposed to "employees".

[1740] As explained by Deakin & Morris *Labour Law* 1065, this "requires a court to examine its predominant purpose." See further Selwyn *Employment* 646.

[1741] Subsection 244(1)(a) of the TULRCA.

[1742] Subsection 244(1)(b).

[1743] Subsection 244(1)(c).

[1744] Subsection 244(1)(d).

[1745] Subsection 244(1)(e).

[1746] Subsection 244(1)(f).

[1747] Subsection 244(1)(g).

[1748] See Deakin & Morris *Labour Law* 1063-1065 for a succinct overview of their meaning and application.

emphasise that "both the *timing* of the action and its *purpose* are relevant".[1749] In regards to the timing, "either the dispute is imminent and the act is done in expectation of and with a view to it, or… the dispute is already existing and the act is done in support of one side to it."[1750] In regards to the purpose of the dispute, the test is subjective in nature and involves considering whether or not the organiser (of the industrial action) "honestly thinks at the time that the action may help one of the parties to the trade dispute to achieve its objective and is done for that reason."[1751]

6 4 6 Trade union liability for industrial action

The preceding sections showed how workers or officials involved in industrial action avoid automatically falling foul of the common law. Conversely stated, the discussion showed how workers or officials are liable in terms of the common law, *but for* the statutory immunities that protect them. And the discussion also showed that the scope of these immunities has been the result of socio-economic and political forces and have varied over time. For example, whereas employers could, assuming the above-discussed immunities were not applicable, take legal action[1752] against a worker/union member[1753] or official, the early to mid-1980s Britain under the Conservative Government of Thatcher provided much more scope for employers to act against unions involved in the industrial action complained of.[1754]

[1749] Deakin & Morris *Labour Law* 1067, [their emphasis].

[1750] Deakin & Morris *Labour Law* 1067, citing *Conway v Wade* [1909] AC 506 512. The authors state at 1067 that where the dispute is not in existence, "whether it is sufficiently imminent will be a question of degree." See Deakin & Morris *Labour Law* 1067-1068 for further discussion surrounding the various permutations regarding the timing of the dispute.

[1751] 1068-1069, citing *Express Newspapers Ltd v McShane and Ashton* [1980] IRLR 35.

[1752] Or make use of legal remedies (such as injunctions – discussed at § 6 4 8 below) to prevent the damages from occurring in the first place. See in this regard Collins et al *Labour Law* 713.

[1753] Numerous sources make the valid point, however, that many employers would see this as a last resort, since this would signal (more often than not) a permanent and irretrievable breakdown in the employment relationship, which – for any number of reasons – would preferably be avoided. See for instance Honeyball *Textbook* 420 who writes:

> "Most employers are not concerned to claim damages from striking employees. The employer wants them back in order to work to prevent any further losses of production, rather than an ability to claim monetary judgments which would be difficult to enforce. He thus naturally turns to equitable remedies" [see below for the discussion on injunctions, the form that these "equitable remedies" most often take].

[1754] As was discussed at § 5 2 7 above, this was a Government that was operating from the perspective that the membership was being held ransom by the "militant few", and that the Government needed to "give unions back to their members". Says Deakin & Morris *Labour Law* 1036-1037 of this:

6 4 6 1 Liability in tort in terms of sections 20 and 21 of the TULRCA

As discussed in chapter 5, EA 1982 rewrote[1755] sections 20 and 21 of the TULRCA, which are of central importance in establishing the possible liability of trade unions.

Section 20 essentially consists of four parts: Firstly, subsection 20(1) outlines the tortious grounds that are imputable to unions for their acts;[1756] but subject to the act being deemed to have been done by them "only if it was authorised or endorsed by the trade union in accordance" with what is set out[1757] – secondly – in subsection 20(2). Subsection 20(2) outlines who the person(s) or organs of the union are that may authorise or endorse, namely "any person empowered in the rules to do, authorise or endorse acts of the kind in question",[1758] or by "the principal executive committee or the president or the general secretary",[1759] or "by any other committee of the union or any other official of the union (whether employed by it or not)".[1760] Thirdly, subsection

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"In 1980 it [the Conservative Government] began a process of restriction and regulation which, by degrees, confined lawful industrial action by reference to its protected purposes and scope and the procedures which must precede it. Thus, immunity was removed for secondary industrial action and secondary picketing (a technical exception apart); the concept of a 'trade dispute' was confined to disputes between workers and their own employer which related 'wholly or mainly' to a protected purpose; increasingly prescriptive and complex balloting (and, latterly, notification) requirements were imposed where liability for industrial action was attributable to a union; and unions lost their comprehensive immunity against liability in tort … This process of restriction occurred incrementally – the Conservative Government had not forgotten the experience of the Industrial Relations Act [of 1971] – and one should beware of viewing these reforms as the product of a preconceived agenda. Nevertheless the cumulative result of a series of statutes through the 1980s and early 1990s was a radical reversal of the collective laissez-faire tradition which brought in general terms a much greater willingness on the part of employers to resort to legal sanctions when faced with disputes" [footnotes omitted].

[1755] The relevant sub-provision was subs 15(2) of the EA 1982. Subsection 15(1) of the EA 1982 repealed s 14 of the TULRA 1974 (the trade union immunity clause) in its entirety.

[1756] These include where the act: [subs 20(1)(a)(i) of the TULRCA] "induces another person to break a contract or interferes or induces another person to interfere with its performance, or [subs 20(1)(a)(ii) of the TULRCA] consists in threatening that a contract (whether one to which the union is a party or not) will be broken or its performance interfered with, or that the union will induce another person to break a contract or interfere with its performance, or [subs 20(1)(b) of the TULRCA] in respect of an agreement or combination by two or more persons to do or to procure the doing of an act which, if it were done without any such agreement or combination, would be actionable in tort on such a ground".

[1757] Subsection 20(1).

[1758] Subsection 20(2)(a).

[1759] Subsection 20(2)(b).

[1760] Subsection 20(2)(c). In clarifying the last-mentioned provision above, subs 20(3) states that, in referring back to para (c) of subs 20(2), "any group or persons constituted in accordance with the rules of the union is a committee of the union [subs 20(3)(a)]; and [subs 20(3)(b)] an act shall be taken to

20(4) confirms the scope and enforceability of the preceding provisions by stating that they apply "notwithstanding anything in the rules of the union, or in any contract or rule of law" – but subject to what is contained in section 21,[1761] which regulates the repudiation of certain acts by the trade union.[1762] Subsection 20(7) clarifies what is to be understood by the "rules" of a union, this being: "[T]he written words of the union and any other written provision forming part of the contract between a member and the other members." Lastly, subsection 20(6) outlines the power of the courts "in proceedings arising out of an act" deemed to be one of the union (as per the aforementioned provisions) to either grant an injunction or interdict against the union in question.

Regarding the importance of sections 20 and 21, Wedderburn states as follows:

> "The new Act passed in 1906 was said by many lawyers to revive the status quo of ten years before, containing total protection for unions in tort, but for officials limited protection only in trade disputes. When eventually the Conservative government came to abolish the union protection in 1982, opening unions' assets to liability in damages or injunctions in strikes, with fines or sequestration for 'contempt of court', it expanded the employers' ability to obtain such remedies as interim injunctions before the industrial action began, in some modern cases dragging the judge out of bed or from his Sunday lunch to make the order. That law, amended in 1990, is the base of our modern law on the second, rather technical, but vital, question of 'vicarious liability'. A company is liable for the acts of an employee done in the course of his employment; but for whose act is a union liable? Obviously for anyone to whom the union had given authority to act; but, beyond that, how did this test work for, say, shop stewards?"[1763]

6 4 6 2 The authority to act by union officials

Given that a trade union can only act through its officials and members,[1764] and should a breach of the rules be committed, for whose acts could the union be sued?[1765]

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have been done, authorised or endorsed by, or by any member of, any group of persons of which he was at the material time a member, the purposes of which included organising or co-ordinating industrial action."

[1761] Section 21 is entitled "Repudiation by union of certain acts" (to be discussed at § 6 4 6 1 below), and duly regulates the circumstances under which a trade union can repudiate the actions taken by persons seemingly representing the union, so as to avoid the liability in terms of s 20.

[1762] Subsection 20(4).

[1763] Wedderburn (2000) *ILJ* 27.

[1764] B Hepple & S Fredman *Labour Law and Industrial Relations in Great Britain* 2 ed (1992) 228; Deakin & Morris *Labour Law* 1056.

[1765] P Elias & K Ewing *Trade Union Democracy, Members' Rights and the Law* (1987) 48.

As discussed above,[1766] the House of Lords in *Heaton's Transport*[1767] established a broad common law basis for union liability for the actions of its members. In that case, the union was held liable for the unofficial acts of its shop stewards, based on the principle that the stewards had a general authority and discretion to act on behalf of the trade union.[1768] In discussing the authority of the shop stewards, Wilbeforce LJ distinguished between needing to consider what powers or authority were assigned to them from "the top" (committees or officials higher up in the leadership of the union in question), as opposed to that delegated on them from "the bottom":

> "[Q]uestions of delegation… do not arise if authority to take industrial action has either expressly or implicitly been conferred directly upon shop stewards from 'the bottom', ie. the membership of the union, whose agreement is also the ultimate source of authority of the general executive council itself. One therefore looks first at the rule book to see what kinds of action the members of the union have expressly agreed may be taken on their behalf by shop stewards."[1769]

Consequently, it was held that the union could only have escaped liability if it had expressly forbidden its members (shop stewards) to take the action in question,[1770] evidence of a viewpoint – given that the general executive council itself takes its

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[1766] See § 5 2 4 10 1 above.

[1767] *Heaton's Transport (St. Helens) Ltd. v T.G.W.U* [1973] AC 15; [1972] ICR 308 HL; [1972] 3 ALL ER 101.

[1768] Hepple & Fredman *Industrial Relations* 421. D Newell "Trade Union Lay Representatives and Trade Union Rules" (1984) 35 *N Ir L Qrtly* 52 56, in quoting Wilbeforce LJ in the House of Lords decision, says [at 110 (alternatively, 100G-101A, *Heaton's Transport v T.G.W.U (H.L.(E.))* [1973] AC 78)] the following of the competency of shop stewards to act on behalf of their union:

> "[T]he original source of the shop stewards' authority is the agreement entered into by each member by joining the union, by that agreement each member joins with all other members in authorising specific persons or classes of persons to do particular kinds of acts on behalf of all the members, who are hereafter referred to collectively as the union. The basic terms of that agreement are to be found in the union's rule book. But trade union rule books are not drafted by parliamentary draftsmen. Courts of Law must resist the temptation to construe them as if they were; for that is not how they would be understood by the members who are the parties to that agreement … [I]t is not be assumed, as in the case of a commercial contract… that all the terms of the agreement are to be found in the rule book alone".

[1769] *Heaton's Transport v T.G.W.U (H.L.(E.))* [1973] AC 78 102H-103A.

[1770] Hepple & Fredman *Industrial Relations* 421. For more detail about this decision, see SR Engleman & AWJ Thomson "Experience Under the British Industrial Relations Act" (1974) 13 *Ind Rel J Econ Soc* 130 137-139; B Hepple "Union Responsibility for Shop Stewards" (1972) 1 *ILJ* 197; KWW "Will NIRC Expand Vicarious Liability?" (1973) 36 *MLR* 226 and J Shand "Making the Act Work" (1972) 30 *Camb LJ* 228. See *Heaton's Transport v T.G.W.U (H.L.(E.))* [1973] AC 78 111-112 for the consideration by Wilbeforce LJ, of the union's failure to properly forbid its shop stewards from continuing with the "blacking" of the Appellant companies.

authority from the general membership, as do shop stewards – that the union and its members can be viewed as one-and-the-same.

6 4 6 3 The union constitution and ultra vires actions

However, what must be kept in mind is that *Heaton's Transport* was decided a decade before the provisions now contained in sections 20 and 21 of the TULRCA were introduced in 1982. Despite this, one of the key questions remains whether or not the officials (or shop stewards, for that matter) were indeed authorised to act. This would require consideration of the union's constitution[1771] or its customs,[1772] or related evidence pertaining to interactions between the central leadership of the union and the officials or committee involved in the action complained of.[1773]

Should these factors point to liability of the trade union, the union will be held responsible regardless of the contents and requirements of its own constitution. In other words, the union cannot escape liability by claiming the act was *ultra vires* and not constituting an act by the union itself. The trade union will be found to have authorised the industrial action if it was endorsed by either its PEC, its General Secretary or President,[1774] any person authorised to do so in terms of the union's own constitution,[1775] or finally, any other committee[1776] or official of the union including officials who are employed by the union and those who are not (which would include, for example, shop stewards).[1777]

[1771] See subs 20(7) of the TULRCA, which clarifies what is to be understood by the "rules" of a union.

[1772] See in this regard the discussion above in the section on "The common law position" at § 5 3, regarding the supplementing of the union constitution through the customs of the union.

[1773] As such, cases where the Courts have had to consider the aforementioned factors, remain applicable, persuasive and potentially binding. Thus, despite these statutory union liability principles, the common law still plays a role. The legislative requirements for union liability only applied to central industrial relations torts, including inducing breach of contract, intimidation and conspiracy. The original common law concept as established in *Heaton's Transport* continued to apply in other cases, such as nuisance, or the tort of interference with business by unlawful means. See in this regard Hepple & Fredman *Industrial Relations* 228-229. This meant that if an employee of the union committed such a tort the usual principles of vicarious liability would apply, in other words, had the individual acted within the course of his employment, accountability would accrue to his employer, the labour association. See further R Kidner *Trade Union Law* 2 ed (1983) 163 and Deakin & Morris *Labour Law* 1059.

[1774] In terms of subs 20(2)(b) of the TULRCA.

[1775] Subsection 20(2)(a).

[1776] A committee of a union is categorised as any group of persons who are constituted in terms of the constitution (rule book) of that union – subs 20(2)(c) read with subs 20(3)(a) of the TULRCA.

[1777] Subsection 20(2)(c) of the TULRCA. See Selwyn *Employment* 658.

Therefore, the union was deemed liable in the above circumstances, "even if the rules do not empower these committees or officials to call for the industrial action".[1778] Furthermore, an act will be regarded as having been committed (that is, authorised or endorsed) by an official if it was done by a group of persons (or any member of that group) to which the official in question belonged at the material time, if the group's purposes included organising or coordinating industrial action.[1779]

6 4 6 4 Repudiation by the trade union

If the action, as authorised or endorsed by "any other committee of the union or any other official of the union (whether employed by it or not)",[1780] was effectively repudiated[1781] by that union's PEC, General Secretary or President (and *only* these persons/body), then the trade union will *not* be held liable as the act complained of was then performed by individuals acting contrary to the *bona fide* intentions of that union.

Stringent conditions must be met in order to properly bring about repudiation.[1782] Written notice of the repudiation must be given to the official or committee in question, without delay,[1783] and "the union must do its best to give individual written notice of the fact and date of repudiation, without delay"[1784] to every union member believed to be taking part in industrial action as a result of the act, and the employers of every

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[1778] Hepple & Fredman *Industrial Relations* 228. See further Kidner *Union Law* 162; Elias & Ewing *Union Democracy* 48-51 and Deakin & Morris *Labour Law* 1057.

[1779] In terms of subs 20(3)(b) of the TULRCA. Deakin & Morris *Labour Law* 1057 raise the interesting point that the aforementioned could result in a scenario where a shop steward or official, whilst being a member of a group at the material time – but who was motivating against the act/decision being taken – could still fall within the ambit of subs 20(3)(b).

[1780] This being the wording of subs 20(2)(c) – which is referred to by subs 21(1) of the TULRCA.

[1781] Repudiation of the act is regulated in terms of s 21.

[1782] By means of example, subs 21(5) states that an "act shall not be treated as repudiated" if the principal executive committee, president or general secretary behaves "in a manner which is inconsistent with the purported repudiation", "at any time after the union concerned purported to repudiate" the act in question. Furthermore, if a request for clarification as to whether repudiation did in fact occur from any person or group who is party to a commercial contract that either was, or could be, affected by the industrial action, was made within 3 months following the purported repudiation and such clarification is not provided by the union in writing, then in terms of subs 21(6) of the TULRCA the act will not be deemed as repudiated. Lastly, subs 21(1) speaks of the repudiation needing to happen "as soon as reasonably practicable after coming to the knowledge" of the PEC, General Secretary or President.

[1783] In terms of subs 21(2)(a) of the TULRCA.

[1784] In terms of subs 21(2)(b).

such member.[1785] The wording of notice is regulated by subsection 21(3), which states that the notice "must" contain the following statement:

> "Your union has repudiated the call (or calls) for industrial action to which this notice relates and will give no support to unofficial industrial action taken in response to it (or them). If you are dismissed while taking unofficial industrial action, you will have no right to complain of unfair dismissal."[1786]

6 4 6 5 Overlap between section 20 and 219 of the TULRCA

Understandably, questions arise about the possible overlap between sections 219 and 20 of the TULRCA. The TULRCA (and its predecessors) makes a clear distinction between the union having authorised the action (in terms of section 20 TULRCA) and its liability for torts committed by calling for the action. In other words, while section 20 reintroduced the possibility of a union being held liable under an action in tort, it was still subject to whether or not the union actually authorised the action and was accordingly liable through the actions of its representatives.

Section 219, on the other hand, remains focused on the immunities against the liability of workers, union members, union officials/representatives and by implication, given section 20, the unions themselves. Thus, where a union is found to have committed a tort in terms of section 20 (because the act could be imputed to the union), its immunity under section 219 of the TULRCA is conditional upon it having complied with all of the various preconditions thereto, such as section 226 (the balloting requirements) and 234A (notice).[1787] In short, for liability to accrue to a union – the following questions are posed:

(i) Does the industrial action being complained of involve a tort (section 20);
(ii) Has the union authorised/endorsed that action and *not* repudiated it (section 20 to 21);
(iii) Is the action complained of "in contemplation or furtherance of a trade dispute" (section 219); and finally,
(iv) Has the union (through its functionaries) complied with the necessary

[1785] In terms of subss 21(2)(b)(i)-(ii).
[1786] See subs 21(3).
[1787] With due acknowledgement to those torts that are not covered by the statutory immunities, such as nuisance.

requirements surrounding industrial action for the immunity to apply – such as balloting and giving of notice[1788] (section 219)?

The above therefore confirms that the relationship between the two sections (20 and 219) is best described as an initial and secondary step that cumulatively establishes liability for industrial action on the part of unions in Britain: section 20 addresses whether or not a tort was committed and the union is responsible for it; section 219 addresses whether the necessary immunities kick in to afford protection to the union against the (section 20) tort(s) being complained of. Nevertheless, the common law torts (and related liabilities) are first and foremost applicable to both those who participate in, and organise, industrial action – subject to the application of the statutory immunities.[1789]

Giving the interplay between sections 20 and 219, it is, therefore, appropriate to turn the discussion to a consideration of the procedural formalities as preconditions for immunity to exist. As mentioned above, two key grounds for exclusion of the statutory immunities are non-compliance with the requirements surrounding the ballot[1790] and the "notice to employers of industrial action".[1791]

6 4 7 Ballot and notice requirements

As was discussed above, subsection 219(4) of the TULRCA sets out the basis of statutory immunity and links such immunity to several further provisions in the Act, including sections 226 and 234A regulating ballots prior to industrial action and notice of industrial action. Therefore, as Collins mentions, "the scope of industrial action is thus highly restricted"[1792] by the law, which also places significant legal consequences on any failure on the part of a union to comply with the complex procedures surrounding balloting and notice to employers.[1793]

[1788] Discussed at § 6 4 7 below.

[1789] See in this regard Deakin & Morris *Labour Law* 1060-1061.

[1790] As regulated in terms of s 226 of the TULRCA.

[1791] As regulated in terms of s 234A.

[1792] Collins et al *Labour Law* 674.

[1793] Says Collins et al *Labour Law* 674 on this point:

"In recent years, the notice and ballot requirements have been hotly contested battlegrounds chosen by employers seeking court orders to ban industrial action. They have also been a good source of income for employer-side lawyers."

The balloting requirements were first introduced in 1984 through the TUA,[1794] while the regulation of notice to employers was introduced in 1993 by TURERA.[1795] Further amendments were made in 1999, 2004[1796] and 2016, which saw the promulgation of the TUA 2016.[1797] However, before considering the various procedural aspects required of the ballot, reference must again be made to the *SERCO* decision discussed earlier in this chapter.[1798] In that case the Court of Appeal found that the various procedural rules pertaining to ballots "should simply be construed in the normal way, without presumptions one way or the other".[1799] As a result, the present approach sees minor infractions of the statutory requirements being ignored, provided they would not have meaningfully affected the outcome of the ballot.[1800] Even so, the process of holding a lawfully recognised ballot in Britain is anything but a straightforward and simple endeavour.

The point of departure is section 226 (as amended),[1801] which states that an act

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[1794] Specifically, ss 10-11 of Trade Union Act 1984.

[1795] Specifically, s 21 TURERA 1993, which inserted s 234A into TULRCA. See in this regard Collins et al *Labour Law* 674.

[1796] Collins et al *Labour Law* 674.

[1797] Mention must furthermore be made of the applicable Code of Practice on Industrial Action Ballots and Notice to Employers (March 2017). See the Department for Business, Energy & Industrial Strategy website, available at <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594781/Code_of_Practice_on_Industrial_Action_Ballots_and_Information_to_Employers.pdf> (accessed 04-02-2018).

[1798] *National Union of Rail, Maritime and Transport Workers v SERCO Ltd*; *Associated Society of Locomotive Engineers and Firemen v London & Birmingham Railway Ltd* [2011] IRLR 399; [2011] EWCA Civ 226.

[1799] As per Elias LJ, [2011] EWCA Civ 226 para 9. This in response to his earlier reasoning, that it "is for Parliament to determine how the conflicting interests of employers and unions should be reconciled" [para 9], and that any presumption that there was an intention for the interests of employers to hold sway unless the legislation clearly dictated otherwise, was incorrect in the context of modern-day Britain.

[1800] To be noted is the point that the approach of *Serco*, which was widely seen as an important step in alleviating the administrative burden placed on unions in terms of the various statutory instruments, was *in spite of* the presence of a statutory exemption in this regard, in terms of s 232B of the TULRCA – "Small accidental failures to be disregarded". However, the scope of the protection/exemption was very limited, in being of application only in the context of subss 227(1) [who is entitled to vote]; 230(2) [how all who are entitled to vote must receive a voting paper]; and 230(2B) [voting papers for merchant seamen]. As such, whilst mention was made of the provision – and it no doubt assisted the court in its finding to, for all intents and purposes, extend the principle of this exemption more broadly – it was not of direct application in the fats before the court. See Novitz (2016) *AJLL* 230-231 for further information on this point.

[1801] Section 226 is entitled "Requirement of ballot before action by trade union".

"done by a trade union to induce a person to take part, or continue to take part, in industrial action",[1802] "is not protected unless the industrial action has the support of a ballot".[1803] The section furthermore makes internal reference to sections 226A,[1804] 226B,[1805] 227,[1806] 228,[1807] 229,[1808] 231A,[1809] 231B,[1810] 232A,[1811] and 233[1812] of the TULRCA with the associated requirements that the ballot comply with them, where necessary.

When these provisions are viewed collectively, any ballot involving a decision to commence with industrial action needs to meet the necessary requirements of, firstly, the appointment of an independent scrutineer to oversee the process and ensure that the voting and counting was done fairly and free from any undue interference.[1813]

[1802] In terms of subs 226(1) of the TULRCA.

[1803] In terms of subs 226(1)(a). In this regard, subs 219(4) specifically states that "not protected" (in the context of those sections it refers to – including herein sections 226 and 234A) means "excluded from the protection afforded" in terms of s 219 of the TULRCA – with same being applicable *mutatis mutandis* in those instances where it is applicable to a person (ie, that person is also excluded from the protection).

[1804] Subsection 226(1)(b) referencing s 226A of the TULRCA – "Notice of ballot and sample voting paper for employers".

[1805] Subsections 226(2)(a)(i) and 226(2)(b)(i) referencing s 226B of the TULRCA – "Appointment of scrutineer".

[1806] Subsection 226(2)(a)(ii) referencing s 227 of the TULRCA – "Entitlement to vote in ballot".

[1807] Subsection 226(2)(a)(ii) referencing s 228(1) of the TULRCA – applying to ballots being held in separate workplaces, "if the members entitled to vote … do not all have the same workplace".

[1808] Subsection 226(2)(a)(iii) referencing subs 229(2) of the TULRCA – regarding the contents of the voting paper.

[1809] Section 226(3A) referencing s 231A of the TULRCA – "Employers to be informed of ballot result".

[1810] Subsection 226(2)(b)(ii) referencing s 231B of the TULRCA – "Scrutineer's report".

[1811] Subsection 226(2)(bb) referencing s 232A of the TULRCA – "Inducement of member denied entitlement to vote".

[1812] Subsection 226(2)(c) referencing s 233 – "Calling of industrial action with support of ballot".

[1813] Subsection 226(2)(a)(i) requires that the provisions set out in s 226B of the TULRCA "so far as applicable before and during the holding of the ballot were satisfied". Section 226B in turn regulates the appointment of the scrutineer. Where a ballot involves more than 50 members (in terms of s 226C of the TULRCA), the union must appoint a sufficiently qualified person to act as an independent scrutineer and overseer of the ballot in question. Regarding which person (or body/association) would be qualified, various legislative enactments (such as The Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993 (Amendment) Order 2002 (No. 2267)) are updated with a list of requirements and names of suitably qualified persons or bodies, that has to be complied with or used. Examples of suitable persons or bodies include, *inter alia*, solicitors (as in attorneys), accountants and private companies (who offer a "scrutineering" service). Interestingly, the *union* bears the further onus – in terms of subs 226B(2)(b) – of ensuring (for the purposes of having the ballot comply with requirements) that the union has no grounds for believing either that the scrutineer will not carry out their duty otherwise than competently, or that the scrutineer's independence will not reasonably be called into question. Furthermore, the scrutineer must (in terms of subs 226B(1)(b) of the TULRCA) produce a

Secondly, notice of the ballot, along with examples of the voting paper – and compliance with the different requirements pertaining to its contents[1814] – needs to be provided timeously to affected employers.[1815] Thirdly, all union members are to be allowed to participate in the ballot and no inducement in the exercise of that member's

report within four weeks following the holding of the ballot, and in addition, the union is obliged to provide a copy of the report to any employer (of the members) who requests one, within 6 months of the holding of the ballot (this in terms of subs 231B(2) of the TULRCA). In terms of subss 226(3)-(4) of the TULRCA, the union and its officials are not to interfere in any manner with the performance of the scrutineer's duties, and are to comply with all reasonable requests from the scrutineer, in the performing of his/her functions.

[1814] In this regard (as regulated by s 229), the voting paper must contain, *inter alia*, the following information: The name of the independent scrutineer; be clearly distinguishable from other voting papers by virtue of having an individual, consecutive number allocated to each paper (all of these in terms of 229(1A) of the TULRCA); clearly stipulate what type of industrial action or industrial action short of a strike is being planned (subs 229(2) and subs 229(2C) of the TULRCA); and finally, clearly identify who – as representative of the union (in terms of subs 20(2) read with s 223 of the TULRCA) – is authorised to call for the commencement of industrial action to which the ballot paper relates, in the event that such action is in fact voted for (subs 229(3) TULRCA). Importantly, these persons are accordingly "for whose acts the union is taken to be responsible" – subs 229(3) of the TULRCA. The member must be able to vote in secret (as per subs 230(4)(a) of the TULRCA – which, by virtue of the ballot taking place via postal vote, is implicit), without any duress or influence from external parties, such as the union itself. In terms of s 229 of the TULRCA, the voting paper must contain specific question(s) of whether or not to participate in the related action, which must be phrased in such a manner that the member can answer each question with a simple "yes" or "no", and yet still be specific and complete enough so as to eliminate any misunderstanding as to what exactly is being agreed to (or not). See in this regard subs 229(2), read with subs 229(2B) – requiring a summary of the matter or matters in issue. Furthermore, in terms of subs 229(4) of the TULRCA, the following statement must appear on every voting paper, unqualified and unchanged: "If you take part in a strike or other industrial action, you may be in breach of your contract of employment. However, if you are dismissed for taking part in a strike or other industrial action which is called officially and is otherwise lawful, the dismissal will be unfair if it takes place fewer than twelve weeks after you started taking part in the action, and depending on the circumstances may be unfair if it takes place later".

[1815] In terms of subs 226A(1) of the TULRCA, the union responsible for the ballot "must take steps as are reasonably necessary to ensure" that the affected employer(s) are provided with the required information pertaining to the ballot. The union is expected to provide written notice containing this information not later than the seventh day before the so-called "opening day" of the ballot (that is, the first day when a voting paper is sent to any person who is entitled to participate in the ballot) – see subs 226A(1)(a) of the TULRCA. The information provided must include, *inter alia*: confirmation that the union intends holding a ballot; the date which the union reasonably believes will be the opening day of the ballot; a list of categories of employee to which the affected employees belong, including the numbers of employees in each of those categories in such a manner as to enable the employer to ascertain exactly how many (and what types of) employees will be affected by the potential industrial action (this in terms of subss 226A(2)-(2D) of the TULRCA). In addition, in terms of subss 226A(1)(b) read with 226A(2F), not later than the third day before the intended opening day of the ballot, a sample of the aforementioned voting paper must be provided to the affected employer(s).

choice is permitted[1816] (unions have to meet this requirement for separate workplaces – should that be applicable[1817]). Fourth, the scrutineer has to issue a report on the ballot[1818] and "all persons entitled to vote" and the affected employers are to be notified of the outcome of the ballot in a timeous fashion.[1819] Lastly, the turnout of the ballot needs to meet the appropriate threshold, as does the number of persons who voted in favour of the call to action.[1820] The ballot requires a turnout of at least 50% of those who could vote and then (with one noteworthy exception) – of those who voted – a majority is required.[1821]

With regard to the form the ballot takes, section 230 of the TULRCA states that so

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[1816] Regarding who is permitted to participate in the ballot – as regulated in terms of s 227 read with s 232A of the TULRCA – in general the category of entitled members consists out of all those whom the union can reasonably expect to be induced to take part in, or continue with, the industrial action. Furthermore, the ballot will be invalid if a particular person(s) is denied entitlement to vote, only to subsequently be called on to participate in the industrial action. Two exceptions to this state of affairs is where the originally excluded workers were not members at the time of the ballot, or who were members but it was not reasonable of the union to have expected that they would be called upon to act. The above issue regarding invalidity of the ballot is not at all clear-cut, as pointed out by B Simpson "Trade Disputes and Industrial Action Ballots in the Twenty-First Century" (2002) 31 *ILJ* 270 276-279.

[1817] In terms of ss 228-228A of the TULRCA.

[1818] The requirements of what must be contained in the Report, including that the scrutineer "was able to carry out the functions conferred in him under section 226B(1) without any interference from the trade union or any of its members, officials or employees", is regulated in terms of s 231B of the TULRCA.

[1819] In terms of ss 231 and 231A of the TULRCA, following the successful conclusion of the ballot, the union is obligated – as soon as is reasonably practicable – to inform the aforesaid of the outcome of the ballot. As per subss 231(a)-(g) of the TULRCA, the notice must, *inter alia*, provide information on the total number of persons who were entitled to vote, how many did in fact vote, how many spoiled voting papers there were (if any), the total number that answered "yes" to the required question(s), and the total "no" answers that were provided. Importantly, TUA 2016 added requirements pertaining to whether or not the requisite majority was attained (subss 231(f)-(g) of the TULRCA).

[1820] This was one of the key changes introduced by TUA 2016. Before the 2016 amendment, s 226 of the TULRCA simply had as requirement (in terms of subs 226(2)(a)(iii)) that the majority voting in the ballot, answered "yes" to the applicable question posed. TUA 2016 however introduced (in subs 2(1) of the TUA 2016) the further requirement in subs 226(2)(a)(iia) of the TULRCA, that "at least 50% of those who were entitled to vote in the ballot did so" – and that (following the amendment to subs 226(2)(a)(iii), by subss 3(1)(2) of the TUA 2016) – "the required number of persons" in terms subss 226(2A)-(2C) of the TULRCA, answered "yes" to the applicable question.

[1821] This in terms of subs 226(2)(a)(iia) read with subs 226(2A) of the TULRCA. The exception spoken of, was also introduced by TUA 2016, namely that if the majority of those entitled to vote are normally engaged in the provision of important public services (see subs 226(2E) of the TULRCA for the applicable categories that important public services apply to), then apart from a turnout of at least 50 per cent being required, "[t]he additional requirement" is that at least 40% *of those who were entitled to vote in the ballot*, also answered 'yes' to the relevant question – this in terms of subss 226(2B)-(2C) of the TULRCA [my emphasis]. Therefore, in the case of important public services, the threshold required is effectively far above the 50 per cent requirement.

far as reasonably practicable the persons entitled to vote must be "given a convenient opportunity to vote by post"[1822] – and in such a manner so as "to be enabled to do so without incurring any direct cost to himself".[1823] Of further interest is that section 4 TUA 2016 introduced the possibility of electronic (as opposed to postal) balloting, subject to a feasibility review and pilot scheme.[1824] In this regard, Novitz says:

> "An industrial action ballot must be 'secret' and, for the time being, take place by post. The legislation is framed around each individual's discrete choice, rather than collective deliberative processes. There is little scope to rally support for voting in the workplace, so as to secure large numbers of returns. Rather, this is a discrete atomised process, in which each individual is responsible for their own return of the voting paper by mail. There is to be an independent review commissioned regarding introduction of electronic balloting, which unions hope would enhance turnout. However, the Secretary of State is not obliged to accept the results of any such review, but merely to publish the response laid before parliament."[1825]

With regard to the timing of the ballot, prior to the TUA 2016 the industrial action needed to commence within four to eight weeks (with possible extension to twelve weeks in the event of legal intervention) following the conclusion of the ballot for the action to be protected.[1826] In 2016 these time limits were removed and replaced with a so-called "sunset rule",[1827] which limits the period after which the ballot becomes effective to that of six months (with proviso of an agreement to extend it to nine months). After this, it automatically expires.[1828]

As far as industrial action following on a vote in favour of such action is concerned, section 234A[1829] introduces the next procedural requirement – that of the strike notice:

> "An act done by a trade union to induce a person to take part, or continue to take part, in industrial action is not protected as respects his employer unless the union has taken or takes such steps as

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[1822] In terms of subs 230(2) of the TULRCA. Subsection 229(1A)(b) requires that the voting paper must "clearly specify the address to which, and the date by which, it is to be returned".

[1823] Subsection 230(1)(b) of the TULRCA. The implication hereof effectively sees the union being required to include self-addressed envelopes along with the voting paper, to allow the member to return their vote/reply, without incurring additional costs.

[1824] See subs 4(1)-(3) of the TUA 2016.

[1825] Novitz (2016) *AJLL* 230.

[1826] See 230, describing the position prior to the amendment, in terms of subss 233(3)(b) read with 234(1)(a)-(b), 234(2) and 234(6) of the TULRCA.

[1827] Dukes & Kountouris (2016) *ILJ* 349.

[1828] 347. See further Novitz (2016) *AJLL* 230.

[1829] Entitled "Notice to employers of industrial action".

are reasonably necessary to ensure that the employer receives within the appropriate period a relevant notice covering the act".[1830]

Furthermore, in terms of subsection 234A(4)(b) as amended by the TUA 2016,[1831] the time period within which notice of the industrial action must be given to employers commences from the day on which the notice of the ballot outcome was provided[1832] until fourteen days prior to the *start of the action*, unless otherwise agreed.[1833] The justification for these changes – along with the "sunset rule" referred to above – was to afford unions and employers as much time as possible to negotiate towards a settlement of the dispute[1834] and to ensure the "'ongoing' support for industrial action".[1835]

As is evident from this, the organising and implementation of a ballot for the purposes of industrial action involves a myriad of regulations and steps requiring compliance. Furthermore, two separate instances of notice to employers are prescribed in addition to the provision of sample voting papers and informing members and employers of the ballot outcome. And it is within this minefield of procedural observance that the most fertile ground for preventing industrial action from ever commencing lies – by means of the injunction process.

6 4 8 Injunctions

Injunctions play a central role in the British industrial relations system, particularly in the context of strike action (or the lack thereof).[1836] Wedderburn states the following on the use of injunctions in British labour law:

"There is law. And there is what Laski called the 'law behind the law' for trade unions. The key

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[1830] Subsection 234A(1) of the TULRCA.

[1831] This change introduced by subs 8(1) of the TUA 2016.

[1832] This in terms of s 231A, read with s 231 of the TULRCA.

[1833] Subsection 234A(4)(b) allows for seven days prior to the start of the action, if agreed between the union and the employer. This (seven day) period was the original time frame, prior to being amended and by TUA 2016 and extended to the fourteen day limit, thereby effectively giving an employer a minimum of two weeks' notice about the intended industrial action.

[1834] Dukes & Kountouris (2016) *ILJ* 349.

[1835] 349.

[1836] Lyddon states in this regard that "[g]rounds for injunctions change over time, but balloting irregularities and deficiencies in ballot and strike notices loom large" – Lyddon (2015) *Emp Rel* 742, [references omitted].

> instrument in this class phenomenon has long been the interim (erstwhile 'interlocutory') injunction… Every labour law student knows why. The interlocutory labour injunction has long been at the guts of our legal scheme for trade unions… [T]his remedy fashioned in 1901 and underpinned by stern judicial penalties for contempt of court… continued to be the indispensable legal tool, in actuality and in threat, for the restriction of union activities …".[1837]

But why injunctions?[1838] Deakin and Morris explain that injunctions "can be granted in interim proceedings, if necessary at short notice, to halt allegedly unlawful activity pending full trial of an action".[1839] And herein is one of the underlying salient features of the injunction's appeal – given that the period between the initial proceeding and the subsequent trial could be one of "months or even years" – "the interim proceedings effectively decide the issue".[1840] Furthermore, since any breach of the initial interdict amounts to contempt of court with potentially dire consequences,[1841] the effect is one where "the ultimate penalties in civil law may differ little from those which may be imposed under the criminal law, with fewer procedural safeguards for respondents."[1842]

It is furthermore a relatively easy remedy to seek.[1843] Collins et al state:

> "So far as granting an application for interim relief is concerned the landmark case is *American Cyanamid Co. v. Ethicon Ltd*, where Lord Diplock said that, in determining whether interim relief should be granted, it is not necessary for the applicant to show a '*prima facie* case' or a 'strong *prima*

[1837] B Wedderburn "Recent Cases – Commentary: Underground Labour Injunctions" (2001) 30 *ILJ* 206 206, [footnotes omitted].

[1838] This English legal concept is similar to that of the interim or interlocutory interdict procedure in South Africa. See in general the commentary in DE Van Loggerenberg "Interdicts" in DE Van Loggerenberg & E Bertelsmann (eds) *Erasmus: Superior Court Practice Volume 2 – Uniform Rules and Appendices* (RS 5 2018) *D6 Interdicts* 6-1 6-4, 6-16A-6-22, along with the host of caselaw listed under n 134, for the general requirements applicable to interim interdicts in South Africa.

[1839] Deakin & Morris *Labour Law* 1035.

[1840] 1035.

[1841] 1035 state in this regard that the penalties could include "an unlimited fine; where appropriate, imprisonment; and possible sequestration of a defendant's assets."

[1842] 1035.

[1843] 1975 saw the key decision of *American Cynamid Co. v Ethicon Ltd* [1975] AC 396, where the House of Lords, on appeal from the Court of Appeal, fundamentally altered what was required to be established by the applicant in terms of the grounds for the injunction being sought. As explained by Wedderburn:

> "The judges' special procedural rules of 1975 on interim injunctions, introduced for purposes of patent law [as per the *Cynamid* facts], but applicable everywhere – on the common law principle 'one size fits all' whatever the social consequences – shored up the labour injunction by lowering the claimant's burden to an obligation to prove not a *prima facie* case, but only an arguable case" – Wedderburn (2001) *ILJ* 207, [footnotes omitted, their emphasis].

facie case', but simply that 'there is a serious issue to be tried'.[1844] He continued by saying that, 'unless the material available to the court at the hearing of the application for an (interim) injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought".[1845]

As is apparent – and in the words of Collins et al – "this is a very low threshold for issuing an interim injunction".[1846] When this is viewed in light of the discussion above about the many procedural aspects where unions could potentially fall foul of statutory requirements, the injunction provides a very effective weapon[1847] in the hands of an employer who is not favourably inclined towards the union in question, or collective bargaining in that instance or in general.[1848] To this may be added that the British judiciary has been amenable to granting these orders.[1849]

Section 221 of the TULRCA, entitled "Restrictions of grant of injunctions and interdicts", requires the court that is approached for the injunction to exercise its discretion in having regard to the likelihood of the respondent succeeding at the trial of the action in establishing a defence in terms of the protections offered by sections

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[1844] Howell *Trade Unions* 158 puts it even more bluntly: "These injunctions could be issued at hearings, on the grounds simply that an employer's case against the union's action might have merit."

[1845] Collins et al *Labour Law* 713-714. See further Novitz (2016) *AJLL* 231, who states: "In the UK, the ready availability of injunctive relief has become notorious. Where employers think they have a prima facie case that the substantive or (more commonly) procedural requirements for statutory immunity were not met, then they can (under American Cyanamid principles) seek an injunction on the balance of convenience. Given the likely costs of industrial action to an employer, this 'balance' almost invariably would favour the employer", [footnotes omitted].

[1846] Collins et al *Labour Law* 714.

[1847] See Gall (2016) *BJIR*.

[1848] Howell *Trade Unions* 158 provides some insight into the effectiveness of the injunction process, by means of the numbers of full trials that were pursued upon the interim interdicts having been granted: "Once issued, and the action stopped, the injunction alone was usually sufficient. It was extremely rare for employers then to pursue the case in order to get compensation. Thus of 201 legal actions against unions between 1980 and 1995, 166 were injunctions of this type, and further legal action was taken in only 9 cases."

[1849] See in general N Countouris & M Freedland "Injunctions, Cyanamid, and the Corrosion of the Right to Strike in the UK" (2010) 1 *Eur Lab LJ* 489 489-507 and R Dukes "The Right to Strike under UK Law: Not Much More than a Slogan? Metrobus v Unite The Union [2009] EWCA Civ 829" (2010) 39 *ILJ* 82 82-91, for a succinct discussion of recent, prominent cases involving injunctions – in particular, the *Metrobus* decision which is argued to have "herald[ed] a new era of judicial formalism and judicial legalism in applying the statutory balloting requirements" as found in Part V of TULRCA [Countouris & Freedland (2010) *Eur Lab LJ* 490]. Briefly stated, as per Lyddon (2015) *Emp Rel* 742, "the Court of Appeal upheld an injunction because the employer was not informed of a ballot result for 47 hours (at the same time as being given a strike notice), as this was not 'as soon as reasonably practicable'."

219 of the TULRCA (protection from tort liabilities) and 220 (peaceful picketing). As stated by Collins et al, the provision was essentially aimed both at "discourag[ing] the granting of *ex parte* injunctions",[1850] and "rais[ing] the standard for the granting of interim injunctions in such cases to a level beyond *American Cyanamid*".[1851] However, how this provision was interpreted by the courts (at least during the 1970-1980s) was not aligned with the intention behind it and the "undiluted form" of *Cyanamid* continued to be applied.[1852]

From this part of the discussion, the primary observation is that unions in Britain are required to operate within an incredibly complex procedural environment while facing a situation where a slight oversight may lead to unlawful industrial action. Put differently, and despite receiving the backing of its members through a ballot, if an injunction is granted on the basis of non-compliance, the union might, for example, be forced to repeat the entire ballot process again in order to proceed with the original intended action. Faced with those choices, it is no wonder that modern British unions have become far more adept at statutory compliance. This particular point, and the overall impact of such a highly regulatory industrial relations system on organised labour, will be explored in more detail in the Conclusion below.

6 4 9 Non-compliance with statutory requirements

What remains to be examined are the potential consequences of non-compliance with the statutory requirements[1853] relating to either the ballot or the provision of the required notice to the employers (apart from an injunction).

Selwyn makes the point that if "a trade union calls for a strike or other industrial action in violation of the balloting provisions of the Act, or for a reason which is not permitted by the Act, it can be sued, and will not have the immunity conferred by s 219" of the TULRCA.[1854] With this in mind, the primary remedy available to parties that claim to have been negatively affected by a union's industrial action is – apart from the injunction – a claim for damages.[1855] In this regard, Deakin and Morris state:

[1850] This in terms of subs 221(1) of the TULRCA.
[1851] Collins et al *Labour Law* 715.
[1852] Collins et al *Labour Law* 717. See Collins et al *Labour Law* 715-717, for a general overview of the caselaw surrounding these developments.
[1853] As outlined in ss 226-234A of the TULRCA.
[1854] Selwyn *Employment* 659.
[1855] Deakin & Morris *Labour Law* 1089.

> "Damages are awarded according to the general principles applicable to the law of tort, aiming to put the claimant in the position he or she would have been in had the tort not been committed. It is conceivable that exemplary or aggravated, as well as compensatory, damages may be awarded if the court considers that the defendant's conduct warrants this, although the circumstances when exemplary (punitive) damages may be awarded have been restricted by the courts. As usual, it is necessary to provide that the defendant's act caused the damage in question …"[1856]

Regarding who these "parties" could be, it could either involve the employer involved, a customer or supplier of the employer, or even – in terms of section 235A TULRCA – an individual member of the public (who could claim that the effect or likely effect of the industrial action would prevent or delay the supply of goods or services to him, or alternatively, reduce the quality of the goods or services so supplied).[1857] Furthermore, with the exception of any failures on the part of the union to comply with the provision of notice (to employer) requirements, the above factors can also serve as grounds for a cause of action by the union's members, against the union itself.[1858]

Apart from non-compliance with TULRCA in the first place, any failure to comply on the part of the union with an injunction, will see the union in contempt of court – with the possible consequences of a fine, imprisonment or sequestration of property.[1859]

[1856] 1089, [footnotes omitted]. The authors [at 1089] make the further point that, up and to 2012 (at the time of their writing), "there have been no reported cases on this point as yet in English law", a situation which remains the case to present day.

[1857] The section is duly entitled "Industrial action affecting supply of goods or services to an individual" – as also discussed under the CPAUIA section at § 5 2 7 8 1 above. Subsection 235A(1) confirms that the individual in question has the option to apply for an order in terms of this section from either the High Court or Court of Session. Furthermore, as mentioned above, in terms of subs 235A(3) of the TULRCA, it is "immaterial" whether or not the individual "is entitled to be supplied with the goods or services in question". Subsection 235A(4) outlines what the court is to do in the event of finding that the claim is well-founded, whilst subs 235A(5) allows for the issuing of interlocutory relief, as considered appropriate. Lastly, in terms of subs 235A(6) of the TULRCA, "an act of inducement shall be taken to be done by a trade union if it is authorised or endorsed by the union; and the provisions of section 20(2) to (4) apply for the purposes of determining whether such an act is to be taken to be so authorised or endorsed" – with the aforementioned also being applicable to any non-compliance with such a court order (in other words, for the purposes of contempt of court proceedings).

[1858] The primary example hereof being the *Taylor v NUM* decisions, which saw members taking suit against their unions for alleged non-compliance with the union's own rules, in regards to the strike action taken during the mid-1980s in Britain.

[1859] See Selwyn *Employment* 659, and his reference to: *Solihull Metropolitan Borough Council v National Union of Teachers* [1985] IRLR 211 – regarding an application for injunction, duly granted partially on the basis of the balance of convenience being in favour of granting the injunction sought as future damages could not compensate for the detriment suffered by the pupils at the SMBC's schools, should the SMBC succeed at subsequent trial; *Express & Star Ltd v National Graphical Association*

Furthermore, as explained by Deakin and Morris, where the injunction covers the torts as outlined in terms of section 20 TULRCA, then those statutory principles apply. But failing this,[1860] "the situation is governed by common law principles of vicarious liability, so that the union will be liable for persons acting within the scope of the express or implied authority."[1861]

Should liability be imputed to the union and the union be successfully sued in tort, section 22 TULRCA and the statutory limitations for the amount of damages that may be imposed come into operation.[1862] This section is entitled "limit on damages awarded against trade unions in tort" and regulates the amount of damages that may be claimed.[1863] At the time of writing, the amounts are as follows: Unions with a membership totalling less than 5,000, can have a maximum damages award of £10,000 against them. Unions with a membership of more than 5,000 but less than

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[1985] IRLR 455; [1986] ICR 589, [1986] IRLR 222 (affirmed on appeal) – which involved contempt proceedings (and the NGA being held vicariously liable and subsequently fined £15,000), given that whereas the NGA appeared to comply with the Order on paper, in practice, made it clear to be in support of the acts taken by members in contempt thereof; and finally, *Kent Free Press v National Graphical Association* [1987] IRLR 267 – where the NGA was again held vicariously liable for contempt, for the actions of its members who delayed (by approximately 3 days) to implement the contents of the injunction Order. See further the justified criticism of the use of the vicarious liability doctrine, by *Heaton's Transport* by R O'Dair "Recent Cases – The Law of Industrial Conflict: Trade Union Liability" (1986) 15 *ILJ* 271 271-274.

[1860] As explained by Collins et al *Labour Law* 729:

> "Nevertheless, liability for losses caused by industrial action will arise if the action is unprotected by the immunity for whatever reason (an unprotected tort, not in contemplation or furtherance of a trade dispute, or immunity withdrawn because it constitutes secondary action, or because the balloting and notice provisions have not been complied with)."

[1861] Deakin & Morris *Labour Law* 1096. The authors state further [at 1096]:

> "If a union knows that breaches of the law are occurring it must take active steps to secure compliance; in the case of union officers this may entail the union withdrawing their credentials. Even if a union is not named in the interim order, it may be in contempt if it knowingly acts in breach of its terms or knowingly 'aids and abets' a respondent to commit a breach (as indeed may any third-party)" [footnotes omitted].

[1862] In the words of Collins et al *Labour Law* 729, the statutory limit accordingly does not "apply to liability in tort that is unrelated to industrial action, such as (a) proceedings for personal injury as a result of negligence, nuisance or breach of duty; (b) proceedings for breach of duty in connection with ownership, occupation, possession, control or use of property; and (c) proceedings brought by virtue of Part I of the Consumer Protection Act 1987 (product liability)" [footnotes omitted].

[1863] In this regard, Deakin & Morris *Labour Law* 1089 state: "Before 1982 it was rare for employers to sue for damages, one reason doubtless being that such claims could be brought only against union officers and not against trade unions. This immunity was removed in 1982 [in terms of EA 1982], although the implications for unions of unlimited liability were partially recognised in that the amount of damages which could be awarded in any proceedings in tort was subject to statutory maxima".

25,000, face a maximum claim of £50,000, while membership of more than 25,000 but less than 100,000 sees the maximum award at £125,000. Finally, unions with more than 100,000 members, can see a maximum damages award of £250,000 instituted against them.[1864]

Importantly, however, and as made clear by Selwyn:

> "These limits are applicable in each claim brought against the union, and are not global limits on each incident.[1865] Thus, if a trade union calls a strike in circumstances where it lacks legal immunity under s 219, each employee who has suffered damage may sue the union for the maximum sum, depending on the number of members it has".[1866]

Furthermore, Deakin and Morris raise the following points in support of their argument that the protection offered by section 22 "is less extensive than it may appear": apart from not covering any possible awards of interest on the damages (which could be significant),[1867] "the limits do not apply to actions outside the law of tort, such as restitution, not to fines for contempt of court or to legal costs which unions may be required to pay".[1868]

6 4 10 Impact of industrial action on members/employees

Despite the statutory immunities, the participation of workers and union members in industrial action still poses a considerable threat to the continued employment of participants. Essentially, employees are putting their jobs at risk. In the words of Collins et al, "by calling on its members to take industrial action, a trade union will invariably be calling on its members to take action in breach of the contracts of

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[1864] As per subs 22(2) of the TULRCA.

[1865] Deakin & Morris *Labour Law* 1090 state in this regard that "if there are multiple claimants suing in relation to a single act, each may claim to the limit, although if a single claimant issued several claim forms for different torts, or in respect of different acts, the union could ask for the proceedings to be consolidated."

[1866] Selwyn *Employment* 659, who cites as example a 2003 decision [*Willerby Holiday Homes Ltd v Union of Construction*, *Allied Trades and Technicians* [2003] EWHC 2608 (QB)] where an award of £130,000 was made (after an initial claim of the maximum amount of £250,000), for non-compliance in respects of the notice of ballot (s 226A of the TULRCA), the notice of the intended strike action (s 234A of the TULRCA), and the access of all members to the ballot (in terms of subs 227(1) of the TULRCA).

[1867] The authors, similar to Selwyn, also make the point that s 22 does not apply to multiple claimants in respect of a single act (in other words, the protection only applies to a "single set of proceedings") – see Deakin & Morris *Labour Law* 1090.

[1868] Deakin & Morris *Labour Law* 1090.

employment".[1869] Employers are entitled to enforce various measures at their disposal during periods of industrial strife. The most serious of these is the dismissal of those workers and trade union members[1870] given the fact that under certain circumstances employees lose their right to claim unfair dismissal. This clearly impacts significantly on the choice made by any trade union member when faced with a ballot in order to determine whether or not to answer a call to industrial action. As such, it requires closer examination.

As outlined by Selwyn,[1871] dismissal in case of industrial action sees five different scenarios at play: Firstly, in instances where the employer imposes a lockout;[1872] secondly, the dismissed person(s) participated in industrial action not authorised or endorsed by their union, in other words, an unofficial strike;[1873] thirdly, the employees

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[1869] Collins et al *Labour Law* 732.

[1870] Says Collins et al *Labour Law* 734 in this regard:

> "Perhaps a more serious concern for workers involved in a dispute is the risk of dismissal. At common law, a worker who takes part in a strike or other industrial action will normally be liable to dismissal without notice. In view of the fact that the striker will be failing to perform a fundamental term of the contract, it is unlikely that a remedy will be available for wrongful dismissal, not that this would in any event provide much security."

[1871] Selwyn *Employment* 608.

[1872] Under these circumstances, duly regulated in terms of subs 238(1)(a) of the TULRCA – the ET is *not* permitted to determine whether or not the dismissal in question was fair or not, *unless* subss 238(2)(a)-(b) apply. The latter has as requirements that one or more of the relevant employees, working at the same employer imposing the lockout, were not dismissed (in other words, selective dismissal took place) – or – one or more of the relevant employees have been offered re-engagement within three months of the dismissal date, but the complainant in question has not (in other words, selective re-employment took place).

[1873] This being regulated in terms of section 237 of the TULRCA, aptly entitled "Dismissal of those taking part in unofficial industrial action" – where is stated in subs 237(1) that an "employee has no right to complain of unfair dismissal if at the time of dismissal he was taking part in an unofficial strike or other unofficial industrial action". Thus, the action complained of is not protected by any of the statutory immunities accorded to official action. The effect hereof is applicable, as stated by Collins et al *Labour Law* 743, "even if he or she has been selectively dismissed or others have been selectively re-engaged." Furthermore, since unofficial action does not meet the protection provided in terms of section 238A of the TULRCA, as such – in the words of Collins et al *Labour Law* 742 – "[i]n these circumstances, we fall back on the law in force before the Employment Relations Act 1999, with the relevant provisions now to be found in TULRCA 1992, sections 237 and 238" (s 238 of the TULRCA is entitled "Dismissals in connection with other industrial action"). Regarding s 238, Collins et al *Labour Law* 743 states of its application: "[I]n effect [it] confers a conditional immunity on employers. The immunity is extremely wide in scope, and applies (i) regardless of whether the employer is at fault in provoking the strike, (ii) regardless of whether the strike is caused by the unlawful or unreasonable conduct of the employer; and (iii) regardless of whether the conduct of the employees in taking industrial action involves a breach of contract on their part" [footnotes omitted].

involved in the strike action are not union members;[1874] Fourthly, the industrial action is authorised or endorsed by the union in question, but falls outside the protections of section 219 of the TULRCA[1875] and amounts to official *un*protected industrial action;[1876] and, lastly, a protected strike is called for, with all the necessary compliance with statutory provisions in which case any dismissal falls under section 238A of the TULRCA, which sees "dismissed employees enjoy much greater protection".[1877]

Section 238A provides (in subsections 238A(3) read with (7A) to (7B)) for a so-

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[1874] In the words of Selwyn *Employment* 608:

> "This is not an unofficial industrial action, and clearly is not official industrial action. Here, a dismissed employee can only complain of unfair dismissal if the 'no picking and choosing' rule [selective dismissal or re-employment] has been violated (s 238(2))".

As explained further [at 609], the action does not amount to official action, as it does not involve a union, and does not amount to unofficial action, "presumably because there is no-one to make it official" – "[i]t is just industrial action". Therefore, any employees participating in such action will only have recourse before the ET in the event of there being issues pertaining to selective re-employment/dismissals, in terms of subs 238(2) of the TULRCA. In this regard, Selwyn *Employment* 610 states:

> "It will be recalled that a strike is a breach of contract by the employee which entitles the employer to dismiss him. Provided the employer dismisses all the strikers, or offers all of them re-engagement after the strike is over within three months, the employment tribunal has no jurisdiction to hear any complaint … But if an employer is selective in his dismissal or offers of re-engagement, those employees who have been excluded may bring claims in the employment tribunals."

However, compare this with the views of Collins et al *Labour Law* 747, where is said:

> "An unofficial strike is thus one which is not authorised or endorsed by a union, which would lead to dismissal of both union members and non-union members alike, provided of course that those dismissed were participating in the action. But what happens if *none* of those taking part is a member of a trade union? … Spontaneous action will be dubbed official and the workers will be protected, even though it has not been balloted (and does not fall within the definition of a trade dispute), giving rise to nice questions about statutorily authorised discrimination against trade unionists. If spontaneous unballoted action by non-members can be protected, why can't spontaneous unballoted action by members of a trade union equally be protected? And how can we justify a rule that says that the non-members will lose their protection if, unknown to them, there is an inactive trade unionist lurking amongst them in a workplace otherwise closed to trade union activity?" [their emphasis; footnotes omitted].

How indeed. See in this regard, the reference to subss 237(2) and (6) of the TULRCA.

[1875] The typical examples of industrial action not being afforded the s 219 protection, is that of a improperly-held ballot (non-compliance with any of ss 226-234 of the TULRCA), or the action in question amounting to secondary strike action (which is explicitly excluded from protection in terms of s 224 of the TULRCA). The other grounds for exclusion of the statutory protection, are those covered for in terms of ss 222 (a strike to enforce union membership), 223 (striking in support of the dismissal of unofficial strikers), 225 (strike to impose union recognition), or 234A (failure to provide notice to the employer) of the TULRCA – see Selwyn *Employment* 611-612.

[1876] Here again, the subs 238(2) rules against selective re-employment/dismissal apply – see Selwyn *Employment* 612.

[1877] Selwyn *Employment* 608.

called "protected period" of twelve weeks.[1878] Subject to the provisions contained in subsections 238A(3) to (6)[1879] a claim would lie to the ET for unfair dismissal where an employee is dismissed within twelve weeks following the first day of the protected industrial action. Therefore, in the words of Collins et al, "[t]he right not to be unfairly dismissed applies specifically in the context of 'protected industrial action'".[1880] The effect hereof is a "symmetry" between the liability of the union and the individual member/worker, in that "[w]here the trade union is protected from liability in tort, the worker is protected from dismissal".[1881] A further important point, however, is that "[e]ven in the case of protected industrial action, British workers who are unfairly dismissed are not entitled to be reinstated against the wishes of the employer, the only remedy being compensation".[1882] Thus, bluntly put, workers who strike still face the risk of losing their jobs, albeit with the possibility of payment in compensation (but only in case of a protected strike).[1883]

6 4 11 Lessons from the regulation of strike action

This discussion of the regulation of strike action serves as a powerful illustration of the changed fortunes of organised labour in Britain. While any number of areas could

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[1878] An employee will be considered to have been unfairly dismissed, if the reason/principal reason for the dismissal is that the employee took protected industrial action – and that subsections 238A (3)-(5) apply – with the latter making reference to the "protected period" and its calculation relative to the dismissal date, as read with what is outlined in subss 238A(7A)-(7B) of the TULRCA. As noted by Collins et al *Labour Law* 739, this was extended from an initial period of eight weeks by s 26 ERA 2004.

[1879] A key provision herein, regulated in terms of subs 238A(5)-(6), considers whether or not – in specific circumstances – the employer in question taken reasonable procedural steps to resolving the dispute. In this regard, as per subs 238A(7), the ET will however not consider the merits of the dispute, but will merely have regard to whether or not the employer and union had complied with any procedures and regulations laid out in terms of any applicable collective agreement. Furthermore, with regards to the period following the commencement of the industrial action, the ET will consider whether the union and employer had either – in terms of subs 238A(6): (i) Offered or agreed to start or restart negotiations; (ii) Unreasonably refused a request by the other party (that is, either union or employer) to make use of conciliation services; (iii) Unreasonably refused a request by the other party to make use of a mediation service in relation to the procedures expected to be used in resolving the dispute; or lastly, (iv) If mediation or conciliation services had been agreed to, whether the parties had complied with the additional requirements introduced according to s 238B of the TULRCA (entitled "Conciliation and mediation: supplementary provisions"). See further Collins et al *Labour Law* 739; Deakin & Morris *Labour Law* 1147.

[1880] Collins et al *Labour Law* 738.

[1881] 738.

[1882] 742.

[1883] 742.

have been chosen as an example of that change (for instance, the complex statutory recognition procedures required of unions), the regulation of industrial action contextualises the union movement in Britain today. Lyddon writes:

> "Although the number of strikes and days lost remain at record lows, a series of national public-service stoppages has significantly increased the number of strikers (especially women) from its nadir in the 1990s. It has also made striking more of a public activity. This has provoked the newly elected Conservative government into promising legislation to impose high minimum thresholds for the turnout in strike ballots. One potential consequence is that, to secure enough votes, unions will have to campaign much more vigorously within and beyond the workplace, thus raising their profile, which the government and employers may come to regret. Another is that failure to meet the threshold may result in unofficial strikes breaking out. Where workers cannot easily be replaced, unofficial strikers are in a strong position".[1884]

The research of Elgar and Simpson in their analysis of the small-scale survey amongst national union officers conducted during 2013-2014 (which built on their earlier research done during the 1990s)[1885] confirms that despite the fact that increased statutory regulation of industrial action requires significant resources on the part of the union[1886] and demonstrates increased uncertainty regarding the judicial interpretation or reaction to application for injunctions brought by employers,[1887] there were certain positive aspects to be found as well.[1888]

Central to this is that balloting (properly done) provides a form of legitimacy to union claims.[1889] Put differently, it provides the union with additional bargaining power in their negotiations with employers: where (in light of the onerous administrative procedures surrounding the ballot)[1890] a union and its members were nonetheless prepared to proceed with industrial action (and its potential serious consequences for employees),

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[1884] Lyddon (2015) *Emp Rel* 243.
[1885] Elgar & Simpson (2017) *ILJ* 19.
[1886] 19.
[1887] 20.
[1888] 12.
[1889] 10-11. See further Novitz (2016) *AJLL* 234, where she states the following in regards to the Government's approach during the 1980s, regarding the increased statutory regulations applicable to balloting and the like: "The Conservative Party strategy did, however, backfire in one respect. Where unions could overcome the difficult hurdles of meeting all the detailed technical procedural requirements, and nevertheless achieved a majority in the ballot, which was very difficult, they had gained a hard won legitimacy for their action. When on strike, workers could claim a form of democratic entitlement" [footnotes omitted].
[1890] Elgar & Simpson (2017) *ILJ* 11-12.

it spoke of serious concerns and fulsome support regarding the issues at hand and could facilitate the ensuing negotiations.[1891] It also drove professionalisation amongst unions, since the procedural burden necessitated a preparedness underpinned by two things – union officials that were more organised and who were dependent on a union-office administrative system that could provide the necessary information, and checks and balances, to allow proper operation within the statutory framework.[1892]

This is not to suggest that there are no significant challenges facing British unions in regard to industrial action. Recent research that sought to retrospectively apply the new turnout thresholds to "158 strike action ballots held by 28 trade unions between 1997 and 2015", saw only approximately half of these ballots meet the current 50% level, while "only 55 of 90 met the 40% support threshold".[1893] Put differently, had these new threshold levels been in place, "they would have prevented 3.3 *million* workers from exercising their right to strike."[1894] Clearly, unions in the UK are still in a very precarious position with regards to the exercise of one of their key mandates and bargaining weapons. In concluding this section on industrial action, it is perhaps apt to finish with the views of the British Government in their motivation for the changes brought about by TUA 2016:

> "[T]his Bill is not a declaration of war on the trade union movement. It is not an attempt to ban industrial action. It is not an attack on the rights of working people ... It is simply the latest stage in the long journey of modernisation and reform. It will put power in the hands of the mass membership; bring much-needed sunlight to dark corners of the movement; and protect the rights of everyone in this country – those who are union members and those who are not, and those hard-working men and women who are hit hardest by industrial action".[1895]

Regardless of the intent behind the TUA and its actual effect, what remains clear is that unions and union conduct in Britain are highly regulated. Despite this, they have

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[1891] See further R Undy et al *Managing the Unions: The Impact of Legislation on Trade Unions' Behaviour* (1996) 228, where is said: "In well-organized bargaining units involving single-union negotiations with co-operative or neutral employers the imposed balloting provisions caused few problems for the trade unions. Indeed, they may have aided union negotiations by giving a new legitimacy to their claims and thus helped secure better settlements.

[1892] See further Undy et al *Managing the Unions* 229-230.

[1893] Dukes & Kountouris (2016) *ILJ* 353.

[1894] 353, [their emphasis].

[1895] 361, quoting Sajid Javid, the British Secretary of State at the second reading of the Trade Union (Act) Bill.

mostly managed to adapt to that regulation. What this might mean in the context of South Africa, will be explored in greater detail in the further chapters of this dissertation.

6 5 Conclusion

The discussion in this chapter focused on the final development of the regulation of trade unions in Britain up to the current position. The discussion provides important insights for this study, of which perhaps the primary lesson relates to the role of the CO.

The first point to highlight relates to the obvious change in the relationship between the Labour Party and organised labour in Britain which was clearly demonstrated by New Labour not doing much in terms of restoring the pre-Thatcher legislative model.

In a sense, this insight affirms how radical the changes in Britain have been in the decades following the 1980s. Simply put, what is demonstrated is the entrenched nature (this despite political change) of the shift in approach from collectivism to individualism in modern British labour relations in general, and in viewing organised labour, in particular.

Closely related to this is the developing notion of unions as “service-providers” and prospective members participating in “union-shopping” to find an association that offers the closest alignment with what that individual worker is hoping to receive, *service-wise*, from a union (as discussed at § 6 2 2). While this change reflects the aims of the British Government in the mid-2000s – in terms of what it thought the direction of organised labour should be – it also, in itself, raises the spectre of an interesting trade union concept as the potential basis for future intervention (while also demonstrating union adjustment in response to the wholesale changes in their traditional markets).

The chapter also examined the TUA 2016 and what appears to be the hallmarks of a new governmental approach of “direct State coercion” over organised labour. The actual significance of the Act lies in the fact that it bears testimony to how the British Government continues to view organised labour as an impediment to their proposed economic and labour market reforms. This means *more* regulation, not less.

The overview provided of how TULRCA regulates trade unions offers several valuable insights. Firstly, it provides for complex union recognition procedures which

bear testimony to the regulatory intricacy to be navigated by modern British unions. Secondly, it provides for the reporting and auditing requirements expected of unions, which include the use of external parties (the "assurer") for seemingly innocuous reasons (such as the union membership list). Thirdly, Chapter V of the TULRCA outlines the rights of trade union members and, as such, illustrates, as the first of the comparative jurisdictions considered in this study, the statutory manifestation of the readjustment phase (as discussed in chapter 5).

The chapter also considered the various statutory bodies whose functions impact on trade unions and trade union accountability. Despite the obvious importance of the CO, the discussion also illustrated the relevance of ACAS, the CAC and the Employment Tribunals (in particular its role in unjustifiable union discipline and union exclusion or expulsion).

As this chapter illustrated, the ET and its involvement in the so-called settlement agreement mechanism is also of significance. With regard to this process, the use of a "relevant independent adviser" was considered, which phrase includes trade union representatives who have been certified in writing by their union as being competent to give advice and were authorised to do so. It was also pointed out that the applicable legislation requires insurance/indemnity to be in place in the event that any claims arise from the provision of such advice.

As far as the Office of the CO is concerned, the following aspects are of particular significance for the remainder of this study: (i) The role of the CO in relation to the internal functioning of unions, and their relationship with their members; (ii) How the increased scope of the CO involvement in union internal affairs was ostensibly premised on individual member rights but was in reality underpinned by the Government's economic objectives requiring increased control over unions; (iii) The effects of the TUA 2016 as the politicising of the CO and the associated shift to the CO being seen as a regulator; (iv) The nature and scope of the various internal union procedures that fall under oversight by the CO, or which may be the subject of investigation in case of a complaint (bearing in mind those instances where the CO has the discretion to investigate without complaint); and, finally, (v) The possibility of a trade union levy to offset the expenses incurred in the funding of the Office of the CO.

All of these issues were addressed in this chapter. Suffice it to point out that the CO does offer a very real example of an existing office – with significant similarities to that

of the Registrar of Labour Relations in South Africa – that has seen continuous development in Britain. The extent to which this affects the broader focus of this study will be addressed in the further chapters of this dissertation.

The chapter also examined the regulation of industrial action in Britain. Industrial action not only remains the main weapon in the arsenal of trade unions, but also poses significant risks to trade union members. As such, it is an area where trade union accountability is brought into sharp focus. This is especially so in case of complex regulation as a precondition for the protection of trade unions and their members during industrial action, as is the case in Britain. In this regard, the chapter discussed the statutory immunities, but also the procedural technicalities for these immunities to kick in – especially that of strike balloting (including the use of "scrutineers" and ballot thresholds).

Lastly, and perhaps most notably, the examination of industrial action regulation in Britain brings to light that the regulation of trade unions and their accountability is not a constant, but subject to an ebb and flow resulting from socio-economic and political forces. In this regard, this and the previous two chapters showed that the judiciary initially could be viewed as anti-union, which required the legislative immunities to be introduced for the first time, predominantly at the behest of the Labour Party. This occurred in a class-based context characterised by an initial opposition to trade unions and the collectivisation of worker rights. During the middle part of the twentieth century, the context changed to one dominated by the closed-shop system, which saw a judicial response sympathetic to the individual worker/member, in opposition to the powerful unions. This response was largely rights-based. The judicial intervention of the 1960s would see a legislative response in the form of immunities to offset the judicial intervention, *or* the removal/tempering of these immunities (depending on which political party was in power). Then came Thatcher and a decade and more of a Conservative Party government using legislation to systematically dismantle all that had come before as far as trade union influence was concerned. This was followed by a further decade of New Labour that hardly changed anything, which, in turn, was followed by further attempts at increased regulation of trade unions. While still few and far between, there are indications of a judiciary more prepared to find in favour of a severely weakened organised labour against the increasingly regulatory governments of the day. All in all, the three chapters in which the development and current regulation of trade unions and their accountability in Britain were discussed show how, by and

large, an industrial relations system always seeks to find some form of equilibrium – an equilibrium informed and formed by socio-economic forces, political change and the nature and use of the two legal pillars of common law principle and legislation to facilitate that equilibrium.

CHAPTER 7: EARLY TRADE UNIONISM IN THE USA – FROM INCEPTION TO LEGAL ASSIMILATION

"The history of the American worker is the history of the American Nation".[1896]

7 1 Introduction

As was the approach with Britain, this chapter is the first of the three chapters examining the regulation of trade unions and trade union accountability in the USA. Again, in line with the hypothesis informing this dissertation (that this is the product of historical forces and shows distinct historical phases) and also in line with the pattern established in chapter 4 above (the first chapter that dealt with Britain), the specific goal of this chapter is to consider the regulation of trade unions in the USA from inception, through prohibition to the point where it may be said that trade unions were assimilated (also in the legal sense) in the USA.

Specifically, the chapter will commence with a discussion of the early history of American trade unions and their interaction with the judiciary, which constituted the first phase of prohibition/proscription. After this, and against the backdrop of the increasing growth of unions and the growth of the American economy following the Civil War, the focus will shift to a consideration of the anti-monopoly Sherman Act and its impact on organised labour. This will be followed by a discussion of the Clayton Act and its impact on the fledgling union movement, seen in light of the legal challenges facing unions during this period (in particular, the use of injunctions by employers). The intervention of the US Supreme Court at this stage is also considered as a signal of the growing acknowledgement/assimilation of unions in America.

After this, the chapter addresses the impact of the First World War on the (good) fortunes of organised labour as well as the increased use of the courts by employers as a means to combat union growth and influence. Closely related to this is a consideration of the changes evident in the structure and categorisation of American organised labour itself during this period. The Great Depression is then placed front and centre as the key event leading to the significant reversal of trade union growth. The chapter concludes with a consideration of the slew of legislation adopted in the aftermath of the Great Depression, culminating in the Wagner Act. This Act is

[1896] SM Kaynard "Deregulation and Labor Law in the United States" (1988) 6 *Hof Lab LJ* 1 2 [citing WJ Usery "The US Department of Labor Bicentennial History of the American Worker" (1976)].

examined in detail, inasmuch as its existence confirms the overall assimilation of organised labour in the broader American society.

At this stage, it is also important to recognise that Britain was the genesis of the union movements that were to take hold in the USA (and South Africa). The detailed exposition of the British approach to unions and their accountability (in chapters 4 to 6) served to establish a framework against which both the USA and South African positions may be analysed. One significant difference between the USA and Britain (and also South Africa) is that the USA has not seen statutory changes to its primary labour relations legislation for close to 60 years. This already means that the structure and format of the three USA chapters are, out of necessity, somewhat different to the chapters on Britain and South Africa (both of these jurisdictions have seen (fairly) recent changes made through legislation). These differences will be highlighted in the introductions and conclusions of this and the following chapters. Furthermore, it should be emphasised that the focus in the discussion will be on developments at federal level in the USA and not state level. Where applicable, the interaction between state law and federal law will be considered.

Compared to Britain, it may already be said that the USA experience of trade union assimilation is significantly different in its reliance (as shown in this chapter) on the actual role players involved – employers and trade unions. Of particular importance is the strength of organised labour – or lack thereof – at key points during the phases of prohibition and assimilation in the USA. The discussion will show a much more direct role of the countervailing forces of the unions (and their members/workers) in opposition to capital/employers (and their lobbyists) in shaping the development of the law (compared to Britain). Put differently, while development of the law regulating trade unions and their accountability show similar phases across jurisdictions, the discussion in this chapter will already show that the catalyst and institutional factors and forces in society responsible for this development may well differ across countries (and will, in turn, shape the possible use of the law for further development).

7 2 The prohibition and proscription of trade unions in America

7 2 1 Early unionism in America

The development of union influence in the USA was not as immediate and constant as in Britain. In spite of this, the sheer size of mechanisation that swept through large

parts of the USA (especially the North-Eastern regions) from early in the nineteenth century meant that millions of workers soon faced the same challenges as their British counterparts. While the founding and development of unionism in Britain can largely be ascribed to the advent of the industrial revolution, the development of trade unions in the USA was also characterised by the multinational infusion of its new, immigrant, labour force.[1897] The earliest formal acknowledgement of trade unions in the USA was during the mid-1790s.[1898] These early unions "generally operated as fraternal organizations that pledged their members to work only under standards of pay and working conditions established by the organisation and only side-by-side with fellow union members".[1899] The USA, however, also shared the early concerns held in Britain about organised labour. The American courts engaged in an initial attitude that any concerted employee action, even where it was a simple attempt to raise wages, could constitute a criminal conspiracy.[1900] This was so despite the fact that many of these

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[1897] M van der Linden *Transnational Labour History: Explorations* (2003) 144, in his study of the "cross-pollination" of union concepts and models in various countries across the world explains:

> "On several occasions, American labour organizations have served as role models for workers in other countries. Transnational diffusion of American organizational models took place through migration and remigration, sailors, cross-border activities and conscious 'foreign policy.'"

See further AL Goldman *Labor and Employment Law in the United States* (1996) 2 who states:

> "American labor law undoubtedly owes its unique characteristics to its historical experience which combined industrial development with territorial expansion. This included the partial blending of culturally diverse peoples arriving in large waves of immigration. Extraordinary upward social, economic and political mobility, the destruction of the caste-based slave system, and the widespread adoption of the ideals of individual liberty and of the free market system were additional vital aspects of that historical experience."

[1898] Goldman *Labor and Employment Law in the United States* 30. According to P Hardin et al (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 1* 4 ed (2001) 3, the "first" labour-related case to appear before the US Courts, was known as the 1806 Philadelphia Cordwainer's case (*Commonwealth v Pullis, Mayor's Court of Philadelphia* (1806); 3 Doc. Hist. Am. Ind. Soc. 59 (2d ed. Commons 1910). For further discussion of this judgement, see in general W Nelles "The First American Labor Case" (1931) 41 *Yale LJ* 165. For further background, see O Swartz "Defending Labor in Commonwealth v. Pullis: Contemporary Implications for Rethinking Community" (2004) 8 *Holy Cross JL & Pub Pol* 79.

[1899] Goldman *Labor and Employment Law in the United States* 30.

[1900] GH Jordan "Commonwealth v. Hunt (1842)" in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 291 291 states:

> "The elite denounced labor societies, citing two main objections. First, it claimed that such collectives violated the individual worker's right to contract. Second, it argued that by organizing on issues of pay and work hours, the collectives interfered with the free market. To destroy the associations, the elite solicited state district attorneys to prosecute workers who organized for criminal conspiracy."

However, compare this with the views of CL Tomlins "Criminal conspiracy and early labor combinations: Massachusetts, 1824–1840" (1987) 28 *Lab Hist* 370, who in analysing the contextual background to

cases rather (and at best) involved coercion or some other category of offence in terms of the American common law.[1901] Crain and Matheny state in this regard:

> "During the nineteenth and early twentieth centuries, courts displayed open hostility toward labor unions and labor organizing. Unions were characterized as semi-outlaw organizations that threatened production and the market order, and later became associated in the judicial mind with violence and anarchy."[1902]

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the application of the common law to "labor conspiracies" during this period in the various States, reasons that "[h]istorians should avoid assuming the law's routine availability as a counter to the journeymen's associated activities" [Tomlins (1987) *Lab Hist* 381], given the varied outcome of many of the cases that were before the courts at this time. Regardless, what remains clear, is that – in similar fashion to that of Britain – as worker organisations were to become more prominent and formalised, mechanisms would develop through which their effects would be managed.

[1901] The 1842 case of the Commonwealth v Hunt [4 Met. 111 (1842)] was what signified the commencement of the gradual decline in the criminal sanction of the "conspiracy doctrine", instead being replaced by the "judicial use of civil remedies to regulate union activity", as per Hardin et al *Developing Labor Law I* 4-5. Regarding the nature of judicial intervention in the wake of the *Commonwealth v Hunt* decision, A Cox et al *Labor Law: Cases and Materials* 13 ed (2001) 17 state:

> "On the civil side, however, the volume of labor litigation sharply increased … [and] it seems fair to say that when the labor disputes engendered by the conflict over union organization were taken to the courts, the judges were substantially free, despite the scattered precedents, to create new law appropriate to the new occasion, guided only by the vague "principles" which emerged from rulings upon more familiar situations."

See Jordan "Commonwealth" in *Working-Class* 291, who states: "The landmark case of Commonwealth v. Hunt (1842) was the first instance when a state supreme court ruled that laborers could lawfully organize." See further BW Poulson "Criminal Conspiracy, Injunctions and Damage Suits in Labor Law" (1986) 7 *J Leg Hist* 212 214-215, for a brief overview of both the *Commonwealth v Hunt* and *Commonwealth v Pullis* cases.

[1902] MG Crain & K Matheny "Beyond Unions, Notwithstanding Labor Law" (2014) 4 *UC Irvine LR* 561 565. See further Poulson (1986) *J Leg Hist* 212, who writes, in remarkably similar fashion to commentary made in chapter 4 of the early attitude of the British judiciary:

> "[T]he courts did not function as an independent judiciary, but rather as an appendage of propertied interests legitimizing their suppression of labor organizations. Judges drawn from the upper class reflected a pro-business ideology and were responsive to propertied interests in cases involving labor unions. The objective of labor law, in that view, was to create a hostile legal environment for labor unions making it difficult for unions to organize workers and bargain collectively with employers."

However, a complete over-simplification of the judicial approach based on an "us and them" paradigm, must be guarded against. Says C Fisk "Still "Learning Something of Legislation": The Judiciary in the History of Labor Law" (1994) 19 *Law & Soc Inq* 151 158, in her excellent review of three books released in the early 1990s that focused on the role of the judiciary in unionism history:

> "More generally, these books suggest that the evisceration of labor legislation through judicial interpretation did not stem merely from hostility to labor or favoritism for capital *simpliciter*. Rather, it was a complicated and subtle process involving the judiciary's view of its relationship to the legislature and its unease in its role as arbiter of the disputes between workers and business" [their emphasis].

However, this view is not universally held. See for instance CW Baird "American Union Law: Sources

During the nineteenth century, the American legal system was influenced by what was taking place in Britain,[1903] where the gradual transition away from the common law doctrine of criminal conspiracy to that of civil remedies based on the law of torts (which was confirmed in 1901 in *Quinn v Leathem*)[1904] was underway. However, it took several more years before this transition was completed in the USA.[1905] This period of transition was furthermore filled with significant historical events, none the least of which was the American Civil War. The Civil War had a dramatic impact on organised labour – stimulating growth within businesses and unions alike[1906] – while 1886 saw the formation of one of the most prominent bodies to advocate worker rights, namely the American Federation of Labor ("AFL").[1907]

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of Conflict" (1990) 11 *J Lab Res* 269 270-272, who reasons that much of the initial judicial opposition against the early unions was not focused on the right to unionise *per se*, but rather when organised labour went beyond that mandate in attempts to prevent other, non-union members, from gainful employ:

> "From the very beginning courts recognized the right of workers to join unions and undertake concerted actions, including peaceful and nonobstructive strikes, through them. But the courts insisted that unionized workers not trespass against the rights of nonunionized workers and employers" [Baird (1990) *J Lab Res* 271].

[1903] See in this regard H Harris "Between Convergence and Exceptionalism: Americans and the British Model of Labor Relations, c. 1867–1920" (2007) 48 *Lab Hist* 141 142, where he states:

> "The period during which Americans were interested in Britain's developing industrial relations system as a model can be dated quite precisely. It began in the late 1860s, during the first post-Civil-War peak in trade union activity. As some Americans sought solutions to labor unrest, they discovered that Britain had been down this rocky road before and had found ways to smooth it out. A Royal Commission on Trade Unions sat in Britain from 1867 to 1869, exploring the place of unions within industry and before the law. Its findings were well-publicized" [footnotes omitted].

As discussed at § 4 3 3 above, it was the Royal Commission on Trade Unions Report of 1869, that was to give rise to the Trade Union Act of 1871.

[1904] See § 4 3 4 above.

[1905] See in this regard the discussion by Poulson (1986) *J Leg Hist* 215-219.

[1906] Regarding the Civil War (fought between 1861 and 1865), MC Harper et al *Labor Law: Cases, Materials, and Problems* 5 ed (2003) 32 state of this period:

> "The strong demand for labor and the inflation accompanying the Civil War promoted the growth of established unions and the formation of new ones, both nationally and locally … The Civil War also accelerated developments that were to influence significantly the workplace and union development. War profits laid the basis for increased capital formation and industrialization. New technology further stimulated two great capital-goods industries – iron-steel and machinery. Industrial establishments increased in size, and larger enterprises were employing a larger proportion of the workers."

See further EE Witte "Role of the Unions in Contemporary Society" (1950) 4 *ILRR* 3 4 who writes that "[b]y the time of the Civil War [America] had a truly national labor movement, with some unions in all or nearly all northern states."

[1907] See in this regard, and in general, J Rees "American Federation of Labor" in E Arnesen (ed)

7 2 2 The National Trade Union Act of 1886

That same year (1886) also saw a failed legislative attempt at "federal incorporation of trade unions" – as explained by Kamin[1908] – by means of the National Trade Union Act of 1886 ("NTUA 1886").[1909] The Act was promulgated (it was a mere five sections in length) in an attempt to allow for unions to be registered in the District of Columbia as a "National Trade Union".[1910] The Act specified the effects of incorporation,[1911] provided for a trade union constitution and rules[1912] and regulated certain internal

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Encyclopedia of US Labor and Working-Class History (2007) 74 74-77 for a useful overview of the AFL, and E Fones-Wolf & K Fones-Wolf "Rank-and-file rebellions and AFL interference in the affairs of national unions: The Gompers era" (1994) 35 *Lab Hist* 237 241, for a detailed analysis of its internal procedures in regards to its affiliate unions under the leadership of Samuel Gompers. For background regarding the associations that preceded the AFL, specifically the so-called "Knights of Labor" (discussed further at § 7 2 2 below) and the 1881 Federation of Organized Trades and Labor Unions, see Anonymous "Historical Review of Trade-Union Incorporation" (1935) 40 *Mon L Rev* 38 39-40, CB Craver "The Historical Foundation of American Labor" in CB Craver (ed) *Can Unions Survive? The Rejuvenation of the American Labor Movement* (1995) 10 13-19, CD Wright "An Historical Sketch of the Knights of Labor" (1887) 1 *Q J Econ* 137 137-168 and D Kemmerer & ED Wickersham "Reasons for the Growth of the Knights of Labor in 1885-1886" (1949) 3 *ILRR* 213 213-220. See further S Parfitt "A Nexus Between Labour Movement and Labour Movement: The Knights of Labor and the Financial Side of Global Labour History" (2016) 58 *Lab Hist* 288 288-302, for a discussion of the Knights and their branches in the UK (and in several other burgeoning markets – including South Africa), along with the underlying reasons for their eventual demise. Lastly, compare the aforesaid with the views of JR Commons "Labor Organization and Labor Politics, 1827-37" (1907) 21 *Q J Econ* 323 323-329, and his contention that modern unionism originated in America: "England is considered the home of trade unionism, but the distinction belongs to Philadelphia" [at 323].

[1908] A Kamin "The Union as Litigant: Personality, Pre-Emption, and Propaganda" (1966) *Sup Ct Rev* 253 256.

[1909] 24 Stat. 86 (1886). See further Anonymous (1935) *Mon L Rev* 40-41 for an overview of the background to the introduction of the Bill before Congress, where is said: "In short, these early trade unionists saw in incorporation a useful instrument for the solution of many of labor's problems and the improvement of conditions".

[1910] In terms of sections 1 and 2 of the Act, the unions were defined as "having two or more branches in the States or Territories of the United States for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of sick, disabled, or unemployed members, of the families of deceased workers, or such other object or objects for which working people may lawfully combine, having in view their mutual protection or benefit".

[1911] In terms of s 2, incorporation resulted *inter alia* in a union that "shall have the right to sue and be sued, to implead and be impleaded, to grant and receive, in its corporate or technical name, property, real, personal, and mixed, and to use said property, and the proceeds and income thereof, for the objects of said corporation as in its charter defined".

[1912] S 3 in turn provided that such an incorporated union "shall have power to make and establish such

union procedures.[1913] Kamin states of the underlying rationale for the Act, that unions at the time (including the AFL, led by Samuel Gompers)[1914] "believed that official recognition of the legality of unions by the government of the United States would help persuade employers to recognize unions and deal with them" and that the Act provided for "an efficient and economical method [or incorporation by means] of avoiding multistate enrollment".[1915] The Act never saw a single trade union incorporated in terms of it.[1916]

7 2 3 The growing awareness of organised labour

The reason for this was a dramatic change in attitude on the part of organised labour to the role of state intervention and, by implication, statute. Forbath points to the fact that trade unions in the USA showed the same attitude as in Britain – that of a union movement not wanting any part of, or favour from, the State or its regulatory mechanisms.[1917] Kamin states:

> "[S]tate court injunctions made labor leaders fearful of judicial regulation of their affairs. The *Taff Vale* decision in 1901, holding that registered unions in Britain were suable and their treasuries subject to damage judgments, obliterated any prospect of voluntary incorporations of American labor organizations. The unions began to resist demands for their compulsory incorporation. For while the unincorporated union had legal disabilities, it enjoyed legal immunities which were believed to

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constitution, rules and by-laws as it may deem proper to carry out its lawful objects, and the same to alter, amend, add to, or repeal at pleasure".

[1913] In terms of s 4:

> "That an incorporated National Trade Union shall have power to define the duties and powers of all its officers, and prescribe their mode of election and term of office".

[1914] See Anonymous (1935) *Mon L Rev* 41, in citing Gompers in his 1901 AFL annual report, relaying how "[b]eyond question the advocates of that bill really believed they were doing the organized workers a real service; but at the time".

[1915] Kamin (1966) *Sup Ct Rev* 256.

[1916] As stated in Anonymous (1935) *Mon L Rev* 41:

> "The records of the labor movement for several years after 1886 scarcely mention the incorporation policy, and no trade union made any effort to take advantage of the law of 1886 by securing a national charter."

The Act was repealed in 1932, see Kamin (1966) *Sup Ct Rev* 257 n17 and Anonymous (1935) *Mon L Rev* 43, explaining how the Act was increasingly being used by insurance companies, in an attempt to avoid state regulation – which ultimately triggered its ignominious, albeit anti-climactic, repeal.

[1917] WE Forbath "The Shaping of the American Labor Movement" (1989) 102 *Harv L Rev* 1109 1205, citing Gompers from 1901 (see n427), where was said by the AFL leader: "Labor … does not depend on legislation. It asks … no favors from the State. It wants to be let alone and to be allowed to exercise its rights".

outweigh the disabilities. Incorporation had become synonymous with regulation."[1918]

Despite these sentiments, unions were increasingly moving from the fringes of the labour market to its centre. The formation of the United States Industrial Commission in 1898, tasked with making "a comprehensive study of the industrial life of the nation, including working conditions and labor relations",[1919] saw the nineteen-volume release of its Final Report in 1902,[1920] which also said the following about unions and collective bargaining:

"The union is a democratic government in which (the worker) has an equal voice with every other member. By its collective strength, he is able to exert some direct influence upon conditions of employment. As a part of it, the individual worker feels he has a voice in fixing the terms on which he works."[1921]

At the same time, two important statutes adopted around the end of the nineteenth century – the Sherman Act of 1890[1922] and the Clayton Act of 1914[1923] – laid the groundwork for bringing the issue of the regulation of organised labour to the forefront of American industrial relations.[1924]

[1918] Kamin (1966) *Sup Ct Rev* 257-258. Anonymous (1935) *Mon L Rev* 42 explains further how, in light of the *Taff Vale* decision, "a movement sprang up in [the United States] to make incorporation of American trade unions compulsory", in light of the acceptance of the *Taff Vale* judgment serving "as precedent in establishing the legal responsibility of trade unions for the acts of their members". See Anonymous (1935) *Mon L Rev* 42-43 for an overview of organised labour's response to these attempts.

[1919] CW Summers "From Industrial Democracy to Union Democracy" in S Estreicher et al (eds) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 45 45.

[1920] As per Summers "Industrial Democracy" in *Internal Governance* 46 n1, in reference to the Final Report of the United States Commission on Industrial Relations, Sen. Doc. No. 380, 57th Cong. 1st sess. (1902) ("1902 Report").

[1921] As per Summers "Industrial Democracy" in *Internal Governance* 46 n2, in citing the 1902 Report 805 vol. 19. Summers "Industrial Democracy" in *Internal Governance* 47 states that this sentiment was again echoed by the 1916 Report, in emphasising the importance of organised labour through trade unions – with the National War Labor Board (started under the orders of President Wilson to expedite the industrial production required for the war effort) promoting the notions of the broader "industrial democracy" as one of the cornerstones of increased production.

[1922] Ch. 647, 26 Stat. 209 (1890), (15 U.S.C. §§ 1 et seq.) (2017).

[1923] Ch. 323, 38 Stat. 730 (1914), (15 U.S.C. §§ 12 et seq.) (2017).

[1924] Further mention, albeit not directly related to the narrative being relayed below, must be made of the passing of an Act to create the American Department of Labor, namely 37 Stat. 736 (1913), (29 U.S.C. §§ 551-568) (2017), as approved on 4 March of that year. With this being said, the original form of the Department, was initially under the charge of a "Commissioner of Labor", which was first brought into existence in 1888, by Ch. 389, 25 Stat. 182 (1888) – before being changed to the Bureau of Labor

7 2 4 The Sherman Act of 1890

7 2 4 1 Background to the Act

The Sherman Act was designed to prevent the monopolisation of trade and commerce[1925] and declared a contract, combination or conspiracy in restraint of trade or commerce illegal,[1926] with the ultimate aim of protecting consumers.[1927] By way of brief context, until the promulgation of the Act there was almost no federal control of commerce.[1928] Watkins described the situation as follows:

> "The great mass of the business transacted over state boundaries remained subject solely to regulation by the states, however, in so far as regulation was not deemed burdensome by the federal courts. By the [Sherman Act] … Congress for the first time exerted its paramount authority so as to make every species of business conducted in the national sphere subject to a common rule. The subject matter of that common rule was the method of organizing trade and industry."[1929]

The Sherman Act was brought about in no small manner due to changes in the production techniques utilised by many of the mega-corporations that underpinned the

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in 1904, by Ch. 716, 33 Stat. 136 (1904). See JG Getman & TC Kohler "The Common Law, Labor Law, and Reality: A Response to Professor Epstein" (1983) 92 *Yale LJ* 1415–1434 1423-1424 n31. The 1913 Act included the formation of the Bureau of Labor Statistics, in terms of s 3, and what was to become the US Conciliation Service, in terms of s 8 (by virtue of the powers afforded the Secretary of Labor).

[1925] Section 2 of the Act states:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony …".

For a general overview of the Act, and the judicial background to its promulgation, see D Dewey "The Common-Law Background of Antitrust Policy" (1955) 41 *Virg L Rev* 759.

[1926] Section 1 of the Act reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared illegal shall be deemed guilty of a felony …".

[1927] MW Watkins "The Sherman Act: Its Design and Its Effects" (1928) 43 *Q J Econ* 1 23.

[1928] The precursor and exception to this state of affairs, was that of the Interstate Commerce Act of 1887 (24 Stat. 374 (1887)) – the first example of a Federal act focusing on inter-state commerce, in this case, regulating the railways to ensure improved and unrestricted transport of goods between States. See in general H Hovenkamp "Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem" (1988) 97 *Yale LJ* 1017, regarding the legislative attempts at (and judicial intervention in) managing the US rail system during this time period.

[1929] Watkins (1928) *Q J Econ* 2-3, [footnotes omitted].

development and expansion of America during the "Gilded Age",[1930] specifically the horizontal and vertical integration of the businesses of, for example, John D Rockefeller's Standard Oil and JP Morgan's United States Steel.[1931] In many instances, these "trusts" effectively controlled the entire manufacturing process of their products, from sourcing material, through initial production to the transportation and distribution of the final product.[1932] As stated by Daykin, the Sherman Act "was the result of the public's fear of the coercive power of large industry and massed capital" and was, therefore "concerned mainly with the preservation of legitimate competition by maintaining free markets".[1933]

7 2 4 2 Application of the Act

Despite this goal, questions surrounding the ambit of the Act were present from the outset and remained the subject of academic debate – and judicial consideration – far longer than any of its originators would have thought likely.[1934] Daykin states:

[1930] See in general Hovenkamp (1988) *Yale LJ* 1017-1072, for a discussion of the various regulatory measures, both statutory and legislative, that were brought about as a result of the rapid economic and industrial development of the late 1800s/early 1900s.

[1931] HS Giusto "Sherman Anti-Trust Act*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 1241 1241.

[1932] States GH Jordan "Clayton Antitrust Act (1914)*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 260 260 in this regard:

> "In the last decades of the nineteenth century, industrial workers, tradesmen, and reformers protested an economy that privileged the wealthy and disadvantaged the laboring classes. In the 1880s, they fostered a movement in opposition to trust building, the practice that allowed a small number of companies to gain disproportionate control over the economy. These trusts, broadly defined, included those business owners who forged agreements with owners of similar businesses in order to eliminate other competitors and monopolize the market. A few powerful companies, like Standard Oil, took control of businesses that supplied all services involved in their industry, providing them with an advantage over less-integrated competitors."

[1933] WL Daykin "The Status of Unions Under Our Antitrust Laws" (1960) 11 *Lab LJ* 216 216. S Dike-Wilhelm "Norris-LaGuardia Federal Anti-Injunction Act*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 1010 1010 speaks of the purpose of the Act as being "conceived as a means of controlling predatory business monopolies".

[1934] Readings of the literature commentating on this era and after, will demonstrate a not-insignificant divide in opinion on the question of whether or not it was the intention of the Legislature that the Sherman Antitrust Act was to be applied beyond combinations/monopolies of corporate America to include organised labour. See in this regard Anonymous "Labor and the Sherman Act" (1940) 49 *Yale LJ* 518 518 n3, which in analysing the Sherman Act, cites several sources that argue both for and against the very point of "Congress' intent to include labor within the Sherman Act", before concluding that "it is definitely established that union activity is subject to the Sherman Act" – Anonymous (1940) *Yale LJ* 518. However, see RK Winter "Collective Bargaining and Competition: The Application of

> "Prior to, and immediately after, the passing of the law, many questions relative to coverage and exemptions arose. Chief among these were the ones having to do with the status of labor unions and their behavior under statute. The main issue here was whether or not the law had jurisdiction over the activities of labor unions and, if so, to which of the activities could the law be applied and what was the extent of such application."[1935]

Simply put, the question raised was whether the Act was only applicable to "business combinations or large trusts", or also to "labor or the personal relations of labor and management"?[1936] The federal courts and the broader judiciary were soon to answer this by interpreting the provisions of the Act to include labour unions within the meaning of a "combination… or conspiracy, in restraint of trade"[1937] – premised essentially on the notion that if Congress intended to exclude unions from the effects of the Act, it would have done so explicitly.[1938]

Antitrust Standards to Union Activities" (1963) 73 *Yale LJ* 14 14 who in contrast hereto, states:

> "The applicability of the Sherman Act to union activities has been one of the most disputed legal issues of this century... Even today, 73 years after passage of the Sherman Act and 49 years after the last legislation explicitly directed to the labor-antitrust problem [in reference to the Clayton Act, at § 7 2 5 below], the debate goes on."

See further EF Cheit "Public Policy Towards Trade Unions: Antimonopoly Laws" (1958) 9 *Lab LJ* 705 705-708. Regarding the legislative and judicial background surrounding and preceding the promulgation of the Act, see AA Sloane & F Witney *Labor Relations* 5 ed (1985) 99, who state:

> "In view of the present scope of labor legislation, it is somewhat ironic that little more than five decades ago, employers were virtually unrestrained by law from dealing with unions as they saw fit. There was … almost no statutory treatment of labor-management relations from the days of the American Revolution until the Great Depression of the 1930s. Instead, individual judges exercised public control over these relations. And the courts' view of union activities was, for the most part, as unsympathetic as was that of most businessmen of the times".

[1935] Daykin (1960) *Lab LJ* 216-217.

[1936] 217. With this being said, RL Rabin "Federal Regulation in Historical Perspective" (1986) 38 *Stan L Rev* 1189 1216-1217 makes the important point that Congress appeared to be anything but clear on how the Sherman Act was to be implemented in practice: "More generally, though, Congress's failure to chart a course for implementation of the new legislation appears to have reflected the lack of clear agreement on the nature of the 'trust problem' at the time the Sherman Act was passed. Although everyone was concerned about bigness, no consensus existed on whether size was evil per so, or only when utilized for 'unfair advantage'" [footnotes omitted].

[1937] Section 1 of the Sherman Act.

[1938] Daykin (1960) *Lab LJ* 217 states in this regard:

> "[T]he [Sherman Act], as originally passed, contained no language expressly exempting any labor union activity from coverage. Prior to the passing of the statute, labor requested specific exemption from the coverage of the law. The fact that this request was either ignored or simply never acted upon indicates that Congress intended to apply the law to all illegal combinations. Therefore, it was argued that the law covered all classes of people and all combinations, including unions, if their activities or behavior patterns interfered with or interrupted the free flow of goods in interstate

The extension of the Act to trade unions was to have a dramatic impact on the fledgling union movement.[1939] It was against the backdrop of this development that two key events further shaped the role and influence of organised labour.[1940] The first of these was the so-called Pullman strike of 1894.

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commerce… The federal courts have accepted the reasoning that Congress intended to apply the law to all illegal combinations and, therefore, the activities of labor unions, under specific circumstances, come within the meaning and intent of the statute."

See further Baird (1990) *J Lab Res* 272.

[1939] See Anonymous (1940) *Yale LJ* 523 who states:

"Much of the explanation for this judicial ban of widespread union activity lies in the economic temper of the times … a dominant majority of the public and the judiciary were prone to view with alarm, even active resentment, the collective bargaining practices of labor. The union was regarded as a rather alien and vicious institution, whereas employers' property rights were conceived as absolute. Consequently, although labor unions per se were granted both statutory and judicial recognition, most of their weapons for combating or inducing employer action were blunted by the [Sherman Antitrust] Act of 1890".

See Winter (1963) *Yale LJ* 30-38 (in particular for a concise yet detailed discussion of the relevant cases involving unions in terms of the Sherman Act, between the period 1890-1931), and Watkins (1928) *Q J Econ* for a measured consideration of the balance in focus between employer and labour associations in terms of the Act's effect.

[1940] Consequently, an important point to be made is that merely by virtue of specific historical events being focused on, countless others are – by necessity – being relegated to the background. By way of example, see W Churchill "From the Pinkertons to the PATRIOT Act: The Trajectory of Political Policing in the United States, 1870 to the Present" (2004) 4 *CR* 11-37 for a storied discussion of the almost inconceivable (when viewed from the modern context) history of the Pinkerton National Detective Agency, and their role in "the war against organized labor" [at 11], at the turn of the nineteenth century. Their use by prominent employers as strikebreakers, and their quasi-judicial functioning within the fledgling American federal system, serves as a remarkable example of both the lengths to which the machinery of capital was prepared to go in opposing the collective voice of the American workforce – as well as the complexity to the underlying labour relations' narrative that is merely touched on in the main text of this study. The aforementioned includes the radical, yet influential "Wobblies", in reference to the Industrial Workers of the World, or IWW – see Churchill (2004) *CR* 27-37 – and the violence meted out towards both the IWW (and organised labour in general) in attempts to quash its influence. See further Anonymous "Employer Interference with Lawful Union Activity" (1937) 37 *Colum L Rev* 816 831, where is said:

"Professional strikebreaking is an American art. Its basic technique consists of sending to the scene of trouble, in short order, an army of strikebreakers who simulate work and guards who are supposed to protect the strikebreakers and the property. But violence is often promoted rather than subdued, since it not only means more business to the agency but is used as a regular procedure to discredit the strikers in order to lay the basis for an injunction, and to terrorize them. A not uncommon substitute or corollary of the strikebreaker guard, authorized by [state] statute, is the use of special police or deputies" [footnotes omitted].

Regarding the numbers of deaths associated with strike action in America during this period, see Anonymous (1937) *Colum L Rev* 832-833 n120 for a "partial list" of twelve separate strike-incidents between 1892 and 1922, involving 110 fatalities.

7 2 4 3 The Pullman Strike – the use of injunctions and the Sherman Act against unions

While the US had seen numerous earlier labour disputes that were larger in scale,[1941] the industrial action affecting the Pullman luxury train-coach manufacturer was the first of its kind essentially initiated by a union[1942] and widely supported through secondary boycott action by members of other unions.[1943] After almost 2 months of striking, 34 people had died in various cities across the US,[1944] with the use of the injunction confirmed as the primary judicial means by which the actions of unions could be combatted,[1945] to the point (in the case of the American Railway Union – the ARU)

[1941] One of the main examples being the Great Railway Strike of 1877, described as the "first truly nationwide strike" [M Rathbone "Trade Unions in the USA" (2005) 53 *Hist Rev* 1 2], with Craver "Historical Foundation" in *Can Unions Survive?* 13 stating:

> "The railroad strikes during the summer of 1877, precipitated by wage reductions, were particularly violent. Federal troops and state militia were called out to restore order. These tumultuous work stoppages provided the public with graphic evidence of the dire consequences associated with deteriorating labor-management relationships. Americans began to recognize that they could not escape the conflicts between labor and capital that had begun to challenge the governments of various European nations".

Importantly however, whereas the 1877 events did involve, in some instances, unions as representatives of workers – as stated by P Taft "Rank-and-File Unrest in Historical Perspective" in J Seidman (ed) *Trade Union Government and Collective Bargaining: Some Critical Issues* (1970) 80 84, "[a]lthough the center of the disturbance stretched everywhere on the railroads, the strikes must be regarded as a series of isolated events", with "each local strike [having] its own cause".

[1942] Forbath (1989) *Harv L Rev* 1161.

[1943] 1162-1163.

[1944] Giusto "Sherman" in *Working-Class* 1241-1242.

[1945] HA Millis & EC Brown *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* 1 ed (1950) 7-8 state in this regard:

> "In the United States a court order to restrain strikers came first in the railway strike of 1877. In the next decade of rapid upswing of labor organization … and of extensive and bitter strikes, injunctions were widely used … Their use was thoroughly established after the Massachusetts Supreme Judicial Court in 1888 expressly approved an injunction to restrain picketing and after the United States Supreme Court approved a lower court's action in finding Eugene V. Debs in contempt of court order the great Pullman strike of 1894. From then on injunctions were very frequent until in the thirties a real effort was made to limit their use in labor disputes. Their great significance was that labor controversies were brought increasingly into the courts, and court-made law came to dominate the field" [footnotes omitted].

The Supreme Court case referred to, was that of *In re Debs* 158 US 564 (1895), with Eugene Debs being the leader and founder of the American Railway Union (ARU). Forbath (1989) *Harv L Rev* 1156-1160 and DL McMurry "The Legal Ancestry of the Pullman Strike Injunctions" (1960) 14 *ILRR* 235 also provide a useful discussion of injunction cases surrounding, and preceding, the Pullman Strike – with the latter furthermore stating [at 235]:

> "The 'sweeping' or 'blanket' injunctions issued by federal courts in the great boycott and strike of the American Railway Union in 1894 resulted in accusations that the judges were exceeding the proper

of virtual extinction.[1946] The Pullman strike showed the federal judiciary's willingness to apply the Sherman Act to labour union "combinations" – primarily by means of an injunction[1947] – but also by means of force.[1948] The Pullman strike was noteworthy for a further reason. It signified the first signs of a fundamental change in the underlying structure and organisation of American trade unions – a movement away from the craft- and trades-specific unions of the past towards the industry-wide unions of the future. In this regard, Forbath distinguishes the various older "craft" unions (the so-called "brotherhood" unions)[1949] from the Knights of Labor and the ARU (the new breed

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functions of a court of equity, violating the constitutional rights of individuals, infringing upon the proper powers of the legislative branch of the government by making, in effect, new criminal law enforced without trial by jury, and in general, establishing 'government by injunction'".

[1946] See Taft "Rank-and-File" in *Union Government* 86; Forbath (1989) *Harv L Rev* 1163.

[1947] Baird (1990) *J Lab Res* 272 points to the decision of the Federal Appeals Court in *US v Debs* [64 Fed. 725 (1894)], and states:

"[T]he Circuit Court for the Northern District of Illinois held that Eugene V. Debs, the President of the American Railway Union, violated the court's earlier injunction against the violent activities of the union during the infamous Pullman Strike of 1894. The court claimed proper jurisdiction to issue its injunction on the basis of the Sherman Act."

Whilst the Supreme Court did not consider the application of the Sherman Act – favouring instead the "interstate commerce clause of the Constitution" [Baird (1990) *J Lab Res* 272] – the highest US Court was to find such application some thirteen years later (as discussed below). However, compare the above with the views of McMurry (1960) *ILRR* 256, who states:

"The great extent and severity of this strike, the damage, excitement, and fear it caused, and the publicity it received, all tended to focus attention on the Pullman strike injunctions. This probably accounts for the impression that they were innovations, ushering in a new era of 'government by injunction'. When viewed from the angle of their legal background, however, they appear, not as a beginning, but as a culmination of a series of legal developments from 1877 to 1894, piling up precedents at an accelerating rate, until the results were consolidated at the end of this period in one set of injunctions. The principal innovation, the great area covered by these orders, was only the response to a labor dispute of unprecedented magnitude."

See further WH Dunbar "Government by Injunction" (1897) 13 *L Q Rev* 347 347-367 for (as it was then) contemporary discussion of the use of injunctions during this period – and who furthermore appears to have coined the term "government by injunction" [at 348].

[1948] Says Giusto "Sherman" in *Working-Class* 1241 in this regard:

"United States Attorney General Richard Olney obtained an injunction against the strikers, claiming the strike prevented mail delivery and violated the Sherman Anti-Trust Act by restricting commerce. Persuaded by Olney and fearful of violence, President Grover Cleveland authorized the use of US marshals and federal troops to protect the trains operated by the strikebreakers. Violence increased with the arrival of the troops; railroad property was attacked and burned, and fights broke out in the streets of Chicago between the authorities and strikers".

See McMurry (1960) *ILRR* 246 on the jurisdiction of the circuit courts, as well as the Attorney General – with the latter being required to "institute proceedings in equity to prevent and restrain such violations".

[1949] Forbath (1989) *Harv L Rev* 1161 states:

"In 1894 the ARU was a fledgling industrial union, created by Eugene Debs and other former railroad brotherhood leaders to overcome the older brotherhoods' often divisive craft boundaries and their

of "industrial" union) and states:

> "The broad-based sympathy strikes of the Pullman Boycott crystalized a growing sentiment among railway workers. The strikes were waged to support the hard-pressed employees of the Pullman company, but they also constituted a more general assertion… [T]he sympathy strike 'had taken deep root in the industrial experience of the railroad men'. By federating their separate crafts – frequently under the Knights of Labor – and by wielding the sympathetic strike, these railroad workers had begun to assert and win 'rights' that craft organizations had failed to gain, even for their narrower constituencies."[1950]

This was only the first step in the growing awareness of the power of broad-based union organisations as opposed to that of the more delineated craft-focused unions.[1951] As such, a divide had been drawn, with the ARU (created by Eugene Debs) seeing that "independent labor politics and public control over the railways and other industries were indispensable to building broad, inclusive unions", while Gompers, the AFL and its supporters, saw "broad, class-based strategies and industrial ambitions [as] too costly and self-defeating", particularly in light of the "brutal repression – now resoundingly endorsed and encouraged by the Supreme Court".[1952] It was this divide that was to feature prominently in the organised labour movement of the USA in the decades to follow.

7 2 4 4 The Danbury Hatters case – the Supreme Court intervenes

The second key event during this period was the so-called Danbury Hatters case,

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exclusion of the railways' masses of unskilled workers."

[1950] 1162-1163 [footnotes omitted].

[1951] Given the extent of the judicial and federal response to the strike action, the old Brotherhood unions considered their decision not to actively support the ARU as having been prudent, and "denounced" those of their members who had participated in the boycott. Furthermore, this non-involvement was to yield other rewards, in that the railroad management was to increasingly view the "old" brotherhoods as a means to "police a new era of industrial peace in return for a guarantee of their survival" – see Forbath (1989) *Harv L Rev* 1163. However, the further point raised by Forbath needs to be made – which is that this new "bargain" was to exclude those very workers who had seen opportunity in representation by the likes of the ARU: "But the masses of less skilled workers were left out of the bargain between the brotherhoods and the managers, and the *Debs* decision and 'government by injunction' led to the scrapping of the only major weapon by which the broader organization of railroad men had been able to assert the rights of the skilled and unskilled alike" [Forbath (1989) *Harv L Rev* 1163-1164, footnotes omitted]. As could be expected, this scenario – of unskilled workers not enjoying representation of their own – would not last long, as per the discussion to follow below. Similarly, the AFL was not prepared to extend the effect of the Pullman, by means of sympathy strikes of boycotts.

[1952] Forbath (1989) *Harv L Rev* 1164, [footnotes omitted].

namely *Loewe v Lawlor*,[1953] which served as the first instance where the US Supreme Court confirmed the application of the Sherman Act to organised labour.[1954] The court also held that secondary boycotts were in contravention of the Act, thereby nullifying one key weapon of organised labour.[1955] But the Danbury Hatters case was important for a further reason – it confirmed the unincorporated status of trade unions at the federal level in America. Says Kamin in this regard:

> "So thoroughly accepted was the notion that a labor organization was not a legal entity that in the *Danbury Hatters* litigation, which commenced in 1902 and terminated in 1917, civil liability for treble damages under the Sherman Act was not imposed upon the labor organization but only upon individual officers and members of the United Hatters of North America who could be located in the federal judicial district in which the action was commenced."[1956]

[1953] 208 US 274 (1908).

[1954] See Baird (1990) *J Lab Res* 272 – "In *Loewe v. Lawlor*… better known as the *Danbury Hatters* case, the US Supreme Court first applied the Sherman Act to a labor dispute" [his emphasis]. See further Forbath (1989) *Harv L Rev* 1175 who states:

> "In 1908, *Loewe v. Lawlor*, the Supreme Court's first Hatters opinion, confirmed what a majority of lower federal courts had held: the Sherman Act applied to combinations of workers. It then held that the hatter's urging consumers 'through the common newspapers and union prints' to boycott goods which had cross state lines was illegal both under the Act and at common law, as was boycotting retailers who handled the hats. In its second Danbury Hatters opinion several years later [Lawlor v Loewe 235 US 522 (1915)], the Court upheld the federal trial court's ruling that enabled Loewe to collect treble damages from some 248 Connecticut members of the hatters unions" [footnotes omitted, their emphasis].

[1955] Baird (1990) *J Lab Res* 273. Daykin (1960) *Lab LJ* 218 states how, following secondary boycotts being found unlawful in *Danbury Hatters*, it was again confirmed in *Gompers v Buck Stove & Range Company* 221 US 418 (1911), this time in a case involving the AFL itself.

[1956] Kamin (1966) *Sup Ct Rev* 258-259, [footnotes omitted] – his emphasis. The "treble damages" being spoken of here, was in terms of s 7 of the Sherman Act, which – prior to being superseded within s 4 of the Clayton Act – provided that persons or parties injured in terms of a violation of the Sherman Act, would see an automatic trebling of any damages claims awarded. See in general Anonymous "Standing to Sue for Treble Damages under Section 4 of the Clayton Act" (1964) 64 *Colum L Rev* 570 571, for the background to the Sherman Act provision, it being subsumed into the Clayton Act that followed, and the overall difficulty the courts have had interpreting the provision. See further Anonymous (1940) *Yale LJ* 530-531 for examples of case law, where "treble damages" were implemented, and where is stated:

> "Despite this protection, labor is still threatened by private action under the Sherman Act in the form of a treble damage suit. By express rulings of the Supreme Court, both the unincorporated union and its individual members are liable to a damage action under the Anti-Trust Law. Partly because the injunction was so quick and so thorough a remedy, there have been but few treble damage suits in the past. Those that were successfully prosecuted dragged on in the courts for years and finally resulted in actual recovery of comparatively small damages. Notwithstanding these discouraging results, the number of treble damage suits is on the increase. Haunted by the desolate picture of the Danbury Hatters, whose homes were attached in execution of a judgment for treble damages, labor might well abandon a boycott under threat of such a suit long before the courts pronounced the particular activity illegal. Moreover, once a substantial judgment for damages is obtained, it can

It was not until 1922 – as discussed below at § 7 3 2 – that unions were to be viewed any differently by the federal courts. But these events also saw the American labour relations system fast approaching a crossroads regarding what was to be done with, or about, trade unions. In explaining the paradox present at the time, Cohen states as follows:

> "Seeing unions as unlawful conspiracies, businessmen refused to offer labor any form of legal recognition. But without 'standing' or state-sponsored corporate form, unions could only be sued as mere associations of individuals. Under these conditions, even a successful claim like Loewe's [*Danbury Hatters*] proved impossible to collect, requiring as it did thousands of lawsuits for nonpayment.[1957] Modern collective bargaining emerged from this paradox, as many Americans began seeing legally enforceable labor contracts as a middle ground between individualism and the closed shop. Reformers, stability-minded businessmen, and some unions began working to construct frameworks under which workers exchanged strikes, boycotts, and violence for arbitration, higher wages, shorter hours, and employer recognition."[1958]

While the reaction of "big business" to this (and subsequent) interpretation of the Sherman Act was not particularly favourable – largely due to the uncertainty surrounding its application[1959] – organised labour was increasingly convinced that the answer to their concerns laid in legislative intervention.[1960]

7 2 5 The Clayton Antitrust Act of 1914

Organised labour's political lobbying culminated in the promulgation in 1914 of the

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serve both as a weapon for compelling concessions and as a means of draining a union's strength. In view of the uncertainties inherent in obtaining a jury verdict and of the expenses of litigation, however, it seems unlikely that employers will push this remedy very far. Nevertheless, the treble damage suit remains a thinly concealed threat to the ranks of labor."

[1957] See in this regard SJ Schwab "Union Raids, Union Democracy, & the Market for Union Control*"* in S Estreicher et al (eds) *The Internal Governance & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 385 426.

[1958] AW Cohen "Law and Labor*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 782 788.

[1959] See in this regard Rabin (1986) *Stan L Rev* 1217-1223.

[1960] See JR Stockham "The Hutcheson Case" (1940) 26 *Wash U LQ* 375 377 and Millis & Brown *National Labor Policy* 9.

Clayton Act.[1961] Despite the high hopes that Labour had in the Clayton Act,[1962] in particular, the declaration that antitrust law provisions were not applicable to labour organisations,[1963] the Act was criticised for being too vague, specifically in defining the actual conduct that unions and their members could partake in so as to be exempt from judicial interference.[1964] In this regard, Jordan states:

> "The Clayton Act tentatively attempted to fix loopholes in the Sherman Act … The Act, however, left ambiguous what union activities were permissible, allowing for the possibility of judicial regulation of labor organizations."[1965]

[1961] See § 7 2 3 above. Baird (1990) *J Lab Res* 273 states in this regard: "The AFL was so incensed at the Supreme Court's action in the *Danbury Hatters* case that it mounted an effective special interest campaign aimed principally at Democratic politicians with the intent of getting itself exempted from antitrust laws. In 1912 the Democratic Party promised to enact such legislation if its candidate for President, Woodrow Wilson, was elected. He was, and in 1914 the Clayton Antitrust Act became law" [their emphasis]. See in general J Greene "'The Strike at the Ballot Box': The American Federation of Labor's Entrance Into Election Politics, 1906–1909" (1991) 32 *Lab Hist* 165, for an overview of the ties between the AFL and the Democratic Party. In particular, Greene (1991) *Lab Hist* 185 speaks of how, at national level, these ties were formalised in 1908, whilst at local union level, "the links between Democrats and workers went back decades" – Greene (1991) *Lab Hist* 185 n47.

[1962] Crain & Matheny (2014) *UC Irvine LR* 570, in providing context to the underlying view of the new act, state:

> "Samuel Gompers, founder of the AFL, declared the Clayton Act to be 'the Magna Carta upon which the working people will rear their structure of industrial freedom'".

[1963] Section 6 read as follows:

> "The labor of a human being is not a commodity or article of commerce. Nothing contained in the antitrust laws shall be construed to forbid the existence and operation of labor… organizations, instituted for the purposes of mutual help, and not having capital stock or conducted for profit, or to forbid or restrain individual members of such organizations from lawfully carrying out the legitimate objects thereof; nor shall such organizations, or the members thereof, be held or construed to be illegal combinations or conspiracies in restraint of trade, under the antitrust laws."

[1964] See for instance Anonymous "The Labor Provisions of the Clayton Act" (1917) 30 *Harv L Rev* 632 632 where is stated:

> "The labor sections of the Clayton Anti-Trust Act were intended, according to the Judiciary Committees of the Senate and House, respectively, 'to exempt labor… organizations from the operation of the anti-trust acts,' and 'to constitute for labor a complete bill of rights in equitable proceedings in the United States Courts.' Organized labor is naturally relying upon the Act as a charter of immunities. Some current criticism, however, holds the Act entirely futile, a mere declaration that what is lawful is lawful" [footnotes omitted].

[1965] Jordan "Antitrust Act" in *Working-Class* 261. Says S Cohen "An Analytical Framework for Labor Relations Law" (1961) 14 *ILRR* 350 357 in this regard:

> "The realignment of political power and influence made possible the enactment of Sections 6 and 20 of the Clayton Act which supposedly would provide unions with immunity from Sherman Act proceedings and with some protection against the free and easy use of injunctions during labor-management contentions. The legal 'victory' had certain technical flaws which Gompers' socialist enemies were quick to point out. Sections 6 and 20 were cryptically worded and could mean

And, in a similar fashion to their British counterparts, the American courts were all-too willing to restrict the immunities organised labour was hoping for. As explained by Jones, the Supreme Court in the 1921 decision in *Duplex Printing Co. v Deering*[1966] interpreted section six of the Act to mean that there was "nothing in the section to exempt such an organization or its members from accountability where it or they depart from its normal and legitimate objects and engage in an actual combination or conspiracy in restraint of trade".[1967] Put differently, the highest court in the USA – and this a mere seven years after the promulgation of the Clayton Act – held that the Act and its trade union exemption applied only in case of the "*lawful* carrying-out of *legitimate* objects."[1968] Summers, in speaking of the optimism held by Gompers towards the Clayton Act, states that "[h]e soon discovered, however, that the workers had acquired no new rights under the Clayton Act and that the courts continued to protect the industrial barons".[1969]

Despite these judicial attempts to thwart organised labour, the early trade unions solidified their presence.[1970] Their focus shifted between attempts at political action in

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whatever one chose to read into them."

[1966] 254 US 445 (1921).

[1967] DL Jones "The Enigma of the Clayton Act" (1956) 10 *ILRR* 201 214-215.

[1968] Millis & Brown *National Labor Policy* 9, [their emphasis]. The authors state further:

> "In other words, the law had not been changed, and still in the individual cases courts would decide whether the particular activity was lawful in its objects and in its means. In fact, the Clayton Act, by permitting suits for injunctions to be brought by private parties, increased the use of labor injunctions in the federal courts" – Millis & Brown National Labor Policy 9-10, [my emphasis].

See further Baird (1990) *J Lab Res* 273-274 for a brief summary of the facts of the case. Regarding the outcome of the case, Craver "Historical Foundation" in *Can Unions Survive?* 21 states as follows:

> "[T]he Court severely restricted the application of the immunity provided by section 20 [regulating the issuing of injunctions] of the Act. It ruled that the antitrust and injunctive exemptions only applied in situations in which the disputing parties had a direct employer-employee relationship. Because secondary boycott activity necessarily involved participation by persons employed by parties not involved in the immediate labor-management dispute, such conduct was automatically beyond the scope of the Clayton Act exemption."

Regarding s 20, Forbath (1989) *Harv L Rev* 1226 states as follows:

> "[T]he first paragraph of section 20 had a final qualifying clause. No injunctions were to be issued, it concluded, 'unless necessary to prevent irreparable injury to property, or to a property right, of the party making the application.' The 'unless' helped undo what the previous language had seemed to accomplish. Courts continued to find that employers had a property right in the ongoing labor of their employees, and anti-strike injunctions continued to be granted."

[1969] CW Summers "Industrial Democracy: America's Unfulfilled Promise" (1979) 28 *Clev St L Rev* 29 31.

[1970] BE Kaufman "The Future of US Private Sector Unionism: Did George Barnett Get It Right After All?"

order to facilitate changes to harsh working conditions (and legislation) and promoting change through the vehicle of collective bargaining.[1971] Regarding this period, Sloane and Witney state:

> "The employers' traditional weapons for fighting labor organizations – such as formal and informal espionage, blacklists, and the very potent practice of discharging 'agitators' – were normally left undisturbed by the judges. However, if the members of the judiciary believed that union activities were being conducted either for 'illegal purposes' or by 'illegal means,' they were generous in extracting money damages from the unions and in ordering criminal prosecution of labor leaders … Through the 1920s … [t]he courts, viewing their primary role as that of protecting property rights, allied themselves with few exceptions squarely with the employer community to neutralize the economic power of organized labor."[1972]

7 3 The assimilation of trade unions in America

7 3 1 The Supreme Court and union acceptance

Cohen, in discussing the AFL leadership's apparent "naïveté" in not appreciating the extent of problems associated with the Clayton Act,[1973] writes as follows:

> "If the labor leadership was naive, it was not because of its failure to scrutinize legislative phraseology, but because of its unawareness of the fact that a congressional statute was but a first step toward labor's ultimate legal goal. Final victory would come when the Supreme Court conceded the legitimacy of labor's attempts to modify management's divine right to manage, and this concession would involve more than the wording of the law. In the 1930's, when labor legislation

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(2001) 22 *J Lab Res* 433 434 – in considering union density and membership numbers in America during this time-period, states that up to the mid-1920s, two features were being demonstrated, namely short-term cyclical movements connected to industry/business cycles and long-term membership increases. As the author explains [at 434], "the average level of union density in the decade 1901-1910 was 9.7 percent, which increased to 11.1 percent in 1911-1920."

[1971] Goldman *Labor and Employment Law in the United States* 30; P Ross "The Role of Government in Union Growth" (1963) 350 *Ann Am Acad Pol Soc Sci* 74 77. This is not to suggest however that organised labour was no longer facing heavy-handed reactions from both employers and the state – as evidenced by the events surrounding the so-called 'Ludlow Massacre', of 20 April 1914. See in general BB Jensen "Woodrow Wilson's Intervention in the Coal Strike of 1914" (1974) 15 *Lab Hist* 63, for a discussion of the tragedy.

[1972] Sloane & Witney *Labor Relations* 99. The "criminal prosecution" spoken of here, is in reference to the charges of Contempt of Court, brought against Gompers and two other leaders of the AFL, in the 1911 *Gompers v Buck Stove & Range Company* case (at § 7 2 4 4 above). Regarding the 'body-blows' subjected on organised labour by the courts, see Cohen (1961) *ILRR* 357, who furthermore states: "The plight of organized labor at this point can be summarized very simply. The labor movement was being disadvantaged by a conservative judiciary".

[1973] Cohen (1961) *ILRR* 357.

was more carefully worded, it was not phraseology that finally won court approval but the fact that the Supreme Court could not remain permanently insulated from the currents that were sweeping the times."[1974]

However, before this point was reached – and despite legislation that compelled American courts to acknowledge the role of organised labour – a number of key judgments were to serve as milestones along the road to broad acceptance. The first of these judgments was the so-called *Coronado* decision in 1922.[1975]

The gradual process of the acceptance of organised labour and its associated role in collective bargaining has two themes in the context of the USA. On the one hand, there is the theme of judicial intervention and how the right to organise eventually trumped even the staunchest defence of capital's "divine right to manage"[1976] in the courts. On the other hand, there were changes wrought both in the structures and approach of organised labour itself as well as in the legislative domain as a response to those changes. But there also were contradictions in this process. While trade unions were beginning to see their hard-fought gains translate into broader acceptance, this period also saw a trade union movement struggling to increase its membership and density levels. This was a result of a further contradictory state of affairs. While the courts were arguably developing the law to allow for organised labour to "take their place at the table" of collective bargaining, they were simultaneously allowing the most effective weapon of the employer, the injunction, to be used against organised labour. As such, this period shows a post-war decline in union numbers, membership (and union) renewal, both layered over judicial development of the status of unions and the simultaneous judicial expansion of the scope of injunctions against collective labour. All of this culminated in internal changes to labour and in legislative reaction to socio-economic conditions that finally heralded the acceptance of organised labour and collective bargaining in the United States.

[1974] 358.

[1975] *United Mine Workers of America v The Coronado Coal Company* 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922). Says WL Roberts "Labor Unions, Corporations – The Coronado Case" (1923) 5 *Ill L Q* 200 200 of the case:

"Few decisions of the United States Supreme Court since the famous Dred Scott case of 1857 [dealing with the legal status of American slaves before the US courts] have called forth as much discussion on the part of the man in the shop or the street as the holding in the case of United Mine Workers of America v. Coronado Coal Company, decided June 5, 1922" [footnotes omitted].

[1976] Cohen (1961) *ILRR* 358.

7 3 2 The Coronado judgments – the Supreme Court opens the door

7 3 2 1 Coronado – the background

The underlying cause of the decision in *United Mine Workers of America v The Coronado Coal Company*[1977] was an industrial dispute between the workers and management of three coal companies in 1914.[1978] Initially, the lower court awarded treble damages (under the Sherman Act) against the United Mine Workers of America ("UMWA"), their district branch as well as against the local unions involved.[1979] However, the Supreme Court under Chief Justice William Howard Taft[1980] overruled this decision, finding that "the strike was merely a local matter not ordered, maintained, or ratified by the International Board of the Union,"[1981] "that the United Mine Workers could not be held responsible,[1982] [and] that there was no intent on the part of the unions to restrain interstate commerce".[1983]

It was a consideration of the second question that was before the court, namely whether the "unincorporated associations, the International Union, District No. 21, and the local unions, [were] suable in their names",[1984] that led to the most far-reaching

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[1977] 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922).

[1978] VLK "Corporations: Suability of a Labor Union as a Legal Entity: Liability of a Labor Union for Unauthorized Acts of Its Members" (1922) 10 *Calif L Rev* 506 506. For an overview of the facts, see in general JB McDonough "Liability of an Unincorporated Labor Union under the Sherman Law" (1924) 10 *Virg L Rev* 304 305-307.

[1979] VLK (1922) *Calif L Rev* 507. The damages in question amounted to $745,000 (as per N Cole "The Civil Suability, at Law, of Labor Unions" (1939) 8 *Ford L Rev* 29 42) – a significant amount of money for the period – with the final amount being confirmed on appeal, set at $600,000 (as per McDonough (1924) *Virg L Rev* 307).

[1980] An interesting side-note is that Taft is the only person to have held both office of Chief Justice of the Supreme Court (tenth, 1909-1913) and President of the United States (27th 1921-1930). A further historical quirk sees his son – Senator Robert Taft – make a prominent appearance in the discussion to follow at § 8 3 1 below.

[1981] See *United Mine Workers of America v The Coronado Coal Company* 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922) 393.

[1982] 395.

[1983] VLK (1922) *Calif L Rev* 507 – as per *United Mine Workers of America v The Coronado Coal Company* 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922) 413.

[1984] See *United Mine Workers of America v The Coronado Coal Company* 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922) 383. The court explained further [at 383] that whilst UMWA was "a national organization", "because it embraces Canada, it is called the International Union". For an overview of international/national unions, and the interplay with local unions during this period, see in general GE Barnett "The Dominance of the National Union in American Labor Organization" (1913) 27 *Q J Econ* 455 455-481.

aspect of the ruling.[1985]

7 3 2 2 The suability of unions

In similar fashion to that of the legal position in Britain prior to 1901, unions in the USA historically were *not* seen as being separate legal entities to that of their members. As one commentator explained:

> "Before this decision, except in equitable proceedings, as bills for injunctions, and in the absence of statutes specifically providing for the suability of such organizations, it has been held that labor unions and other unincorporated associations could not, as such, sue or be sued. 'A party litigant must be either a natural or artificial person, and ... there is no such entity known to the law as an unincorporated association,' such associations being held to have no legal existence distinct from their members".[1986]

In the *Coronado* decision, the court considered the functioning of the (inter)national union in terms of its constitution[1987] and its constitutional procedures for managing and responding to strike action,[1988] before finding that, given its financial obligations (in running a union with over 450,000 members), an "extensive financial business is carried on … and in every way the union acts as a business entity, distinct from its members".[1989] After reviewing various cases decided before state courts,[1990] favourably comparing the 1901 decision reached by the House of Lords in *Taff Vale*,[1991] and examining state legislation and procedures[1992] as well as federal

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[1985] McDonough (1924) *Virg L Rev* 307.

[1986] VLK (1922) *Calif L Rev* 507, [footnotes omitted].

[1987] See *United Mine Workers of America v The Coronado Coal Company* 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922) 383-384.

[1988] 384-385.

[1989] 385. The court furthermore considered the position of unincorporated associations, stating:

> "Undoubtedly at common law an unincorporated association of persons was not recognized as having any other character than a partnership in whatever was done, and it could only sue or be sued in the names of its members, and their liability had to be enforced against each member".

[1990] 385.

[1991] In this regard, Anonymous "Unions as Juridical Persons" (1957) 66 *Yale LJ* 712 715-716 states: "In 1922 the Supreme Court incorporated *Taff Vale* into American federal law in *United Mine Workers v. Coronado Coal Co.*, and on the basis of *Coronado* later promulgated Federal Rule of Civil Procedure 17(b) governing suability of unincorporated associations" [footnotes omitted, their emphasis]. See further SL Cohn "Problems in Establishing Federal Jurisdiction Over an Unincorporated Labor Union" (1958) 47 *Geo LJ* 491–530 493, for a succinct discussion around the implementation of Rule 17(b).

[1992] See *United Mine Workers of America v The Coronado Coal Company* 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922) 387-388.

legislation (the Clayton and Sherman Acts),[1993] the Supreme Court found that "[i]n this state of federal legislation, we think that such organizations are suable in the federal courts for their acts, and that funds accumulated to be expended in conducting strikes are subject to execution in suits for torts committed by such unions in strikes."[1994]

7 3 2 3 The common law status – and organised labour's response

Therefore, the *Coronado* decision serves as the first instance where the Supreme Court properly grappled with the common law legal status of unions in the USA and in a similar fashion to Britain sent proverbial tremors running through organised labour in America.[1995] However, unlike the reaction in Britain – which involved a statutory response a mere five years later (and the formation of the British Labour Party)[1996] – unions in the USA during the 1920s were operating under far different circumstances to what had been the case two decades before in Britain.

Nonetheless, *Coronado* was the first step towards the (legal) reshaping of

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[1993] See 391 and 392, respectively.

[1994] 391 – read further with 392.

[1995] The point that must be emphasised is that *Coronado* did not definitively finalise the standing of unions in the context of their unincorporated nature. Says GJ Amster "Labor Union Bankruptcy" (1978) 2 *Wash U LQ* 341 354 in this regard:

> "Although Coronado's broad holding acknowledged the union's corporate nature, the Court's reliance on statutory recognition cast doubt on its factual existence. The decision consequently did not deter the states from continued reliance on the common law rule. As labor attained greater economic power, the disparity between the union's legal and functional status became more evident."

See further Anonymous "Responsibility of Labor Unions for Acts of Members" (1938) 38 *Colum L Rev* 454 456-460, and the discussion around how *Coronado* did not appear to alter the substantive law (as opposed to procedural) beyond that which had already been in place in terms of national and state legislation. This was instead to be done through continued adjustments brought about through later Supreme Court decisions, and the gradual formalisation of their status through legislation – as discussed below. Millis & Brown *National Labor Policy* 13 state in this regard: "Labor organizations, therefore, before the significant changes in governmental policy in the thirties, were substantially restricted in their activities under the common law, the antitrust laws, and various state statutes." See further Daykin (1960) *Lab LJ* 220. Writing in 1954, thus more than 25 years after *Coronado*, MD Forkosch "The Legal Status and Suability of Labor Organizations" (1954) 28 *Temp L Q* 1 1 states: "The still-evolving attitudes of state legislative and judicial bodies toward labor organizations, especially with respect to their status and suability characteristics, require periodic re-evaluations of statutes and decisions" [footnotes omitted].

[1996] This being the Trade Disputes Act of 1906, as at § 4 3 7 above.

organised labour in the USA[1997] as an entity separate from its members,[1998] capable of being held responsible for its actions and, equally, holding others accountable for theirs.[1999] The decision reached in *Coronado* is also significant for another reason: *Coronado* was indicative of a court showing a measure of restraint and displayed a studied approach, which took as its point of departure the examination of the constitutions of the international and district unions and a consideration of the facts before the court, before concluding that there was no link between the parent-unions and what transpired in the Arkansas coal fields.

However, what was to follow a mere three years later, was continued evidence of a judicial system still coming to grips with the presence of organised labour in the USA. In this regard, mention must be made, albeit briefly, of the *second* Coronado decision: *Coronado Coal Co. v United Mine Workers of America*.[2000] This time (on the new facts presented), the Supreme Court found that the union *was* acting in contravention of the antitrust laws in regard to interstate trade, a decision which came "perilously close to outlawing national unions entirely".[2001]

One question raised by these events is why American unions could not muster the

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[1997] F Frankfurter & N Greene "The Use of the Injunction is American Labor Controversies. III – The Scope of Labor Injunctions and their Enforcement" (1929) 45 *L Q Rev* 19 21-22 state as follows regarding the approach of the American law, in light of *Coronado*: "By virtue, then, either of statutory or judicial innovation, legal theory has been conforming to industrial reality and now subjects a collectivity acting as such to responsibility for tortious acts or ratified by the entity. The technique for bringing litigants formally before a Court has required a dialectic adjustment between common law conceptions concerning legal personality and the modern industrial phenomena of concerted group action." [footnotes omitted].

[1998] Kamin (1966) *Sup Ct Rev* 259.

[1999] As stated by Anonymous "The Coronado Coal Case" (1922) 32 *Yale LJ* 59 62:

> "However much the advisability of the court's resorting to judicial legislation as the medium through which to reach its final decision may be doubted, there can be little if any doubt that the end sought and attained, namely, a group responsibility for the wrongful acts of combinations as powerful as labor unions, was a most desirable one. To deny the existence of labor unions as legal entities for purposes of accountability for obligations assumed and wrongs committed by them, and in the same breath to recognize them as such for purposes of receiving privileges under various legislative acts, is neither more nor less than permitting such associations, through proper agents, to enjoy all the advantageous rights, powers, privileges, and immunities of the law without bearing the burdensome duties, disabilities, no-rights, and liabilities that other persons are compelled to endure. There is no reason in logic or policy why such highly organized bodies, controlling so much wealth, so many human beings, and so freely engaging in all phases of business activity should be immune from a group responsibility for contractual and tort obligations."

[2000] 268 US 295 (1925).

[2001] As per Winter (1963) *Yale LJ* 37. See Winter (1963) *Yale LJ* 36-38 for a brief discussion of *Coronado 2*.

same response as that which was seen in Britain in the aftermath of Taff Vale? The answer to this lies in their diminished prominence in the American labour relations system at the time. In turn, the reason for this lies in the historical events playing out around the world. Therefore, before further exploring the role played by the American courts during this period, mention must be made of the impact of World War 1 on organised labour and its membership in the post-war years.

7 3 3 The First World War and its impact

Initially, one of the key factors in fortifying the presence of organised labour in the US labour relations system was that of the First World War.[2002] In similar fashion to Britain (and also earlier in the USA during the Civil War) it had a striking impact on union membership numbers. Boyle states as follows:

> "[A]fter the United States entered World War 1, Wilson launched what one historian has called 'a mini-legal revolution' in collective bargaining. Desperate to bring order to a chaotic wartime economic mobilization, the president created a National War Labor Board (NWLB) to adjudicate industrial disputes. Directed by a cadre of progressives, the board used its power to support workers' right to unionize without employer interference, to promote workplace democracy through formal systems of shop-floor representation… Such vigorous government policy helped to trigger a surge in union membership from 3 million workers in 1917 to over 5 million in 1920, a 70% increase in three years."[2003]

Part of these gains could be ascribed to a further Commission on Industrial Relations, initiated in response to the increasing unrest in the American labour relations system immediately prior to the war.[2004]

[2002] Regarding union membership in the years preceding America's entry into the War, see in general GE Barnett "Growth of Labor Organization in the United States, 1897-1914" (1916) 30 *Q J Econ* 780 780-795.

[2003] K Boyle "Politics and Labor, Twentieth Century*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 1101 1102.

[2004] Says RC Hartley "The Framework of Democracy in Union Government" (1982) 32 *Cath U L Rev* 13 40 in this regard: "During the next decade, another governmental commission, the Commission on Industrial Relations of 1913-1915, echoed this view [of the 1898-1902 Commission, as above], stressing that 'the only hope for the solution of the tremendous problems created by industrial relationship lies in the effective use of our democratic institutions and in the rapid extension of the principles of democracy to industry'". The 1915 Commission Report, is listed by Hartley (1982) *Cath U L Rev* 40 n132 as follows: Final Report of the United States Commission on Industrial Relations, S. Doc. No. 415, 64th Cong., 1st Sess. 62 (1916) (1916 Report).

At its peak following the war, union density was at 17%, resulting in contemporary observers at the start of the 1920s being "guardedly optimistic" about expected union growth.[2005] The war's impact on organised labour was important. Brody, in his analysis of the impact of the concessions made regarding collective bargaining and organised labour during this period, reasons that the impact of the war was felt in four key areas, namely: (i) The "enduring legitimacy" of the right to organise;[2006] (ii) Posing the question as to what "kind" or "type" of collective bargaining was to be favoured in the USA (be it by means of unions, or shop-floor employee committees); (iii) Answering the broader question of what must be done to solve the organised labour problem by means of allowing workers to decide "by representatives of their own choosing" and thereby establishing the "kernel of a state-mandated regime of collective bargaining";[2007] and finally, (iv) Planting the notion of representatives of their own choosing into the broader societal mind-set and eventual (legislative) public policy.[2008]

However, in the years after 1919 organised labour was not able to maintain either this advantage or its membership gains. The reasons for this are explored next.

7 3 4 Post-war membership decline

Union membership numbers declined as swiftly upon the ending of the war as they had increased during it.[2009] As stated by Boyle:

> "[T]he bold experiments of the war years did not last. In 1919, businessmen and their conservative allies launched a political offensive that shut down the NWLB, reversed the labor movement's great surge forward, and triggered a [Communism] Red Scare so ferocious that it eviscerated the radical left. By the early 1920s, organized labor was reeling, whipsawed by a Republican ascendancy that had no interest in its agenda, a judiciary once again willing to wield the cudgel of injunctions, and a business community determined to re-assert its absolute authority over the workplace".[2010]

[2005] Kaufman (2001) *J Lab Res* 434.

[2006] D Brody "Collective Bargaining" in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 275 278.

[2007] Brody "Collective Bargaining" in *Working-Class* 278.

[2008] See the discussion of the Norris-LaGuardia Act at § 7 3 9 below.

[2009] Ross (1963) *Ann Am Acad Pol Soc Sci* 78. See further Millis & Brown *National Labor Policy* 17 regarding the period immediately after the war, and the dramatic increase in strike action – most prominently the coal strike of 1919 (and its defeat at the hands of an injunction issued by the Attorney-General) – with it being "clear that the wartime truce was over and that employers were prepared to challenge the position of the unions". Regarding the nature and scope of this injunction, see Frankfurter & Greene (1929) *L Q Rev* 34.

[2010] Boyle "Politics and Labor" in *Working-Class* 1102. See further Millis & Brown *National Labor Policy*

Central to this decline was the *type* of collective bargaining in the war-effort industries as envisaged by the NWLB. Collective bargaining revolved primarily around shop-floor representation that, despite what might have been expected, did not necessarily involve trade unions. In this regard, Summers states:

> "Although the National War Labor Board adopted the principle of 'the right of workers to organize and bargain collectively through chosen representatives,' it refused to allow unions to take advantage of the war to force recognition. Instead, the Board encouraged the establishment of employee representation committees and insured representation rights for non-union employees. Unions were recognized as but one among many ways in which workers might find industrial democracy, and by 1919 there were more than two hundred employee representation plans covering a half million workers. The unions did not protest the creation of these representation committees but hoped to convert them into union organizations at the end of the war."[2011]

This did not happen as expected. American employers[2012] doubled-down on initiatives to promote the formation of these "company unions", preferring this to the alternative of "powerful, independent union officials".[2013] Union numbers accordingly dropped from their peak in 1920 of around 4.5 million, to 3.3 million by 1929 – with the associated trade union density at only 10.5%.[2014]

17, who state that a "changed 'public temper' toward the unions was apparent, too, related in part to the fear of revolutionary influences in the 'red hysteria' of 1919-1920".

[2011] Summers (1979) *Clev St L Rev* 32, [footnotes omitted].

[2012] See Millis & Brown *National Labor Policy* 15-16 for a succinct discussion of employer organisations, and their effectiveness, in the decade *preceding* the War.

[2013] Summers (1979) *Clev St L Rev* 33. The author states further [at 33] that by 1928, more than 1.5 million workers were covered by the "company unions", with these to swell to nearly 2.5 million workers by 1935.

[2014] Kaufman (2001) *J Lab Res* 434. Kaufman (2001) *J Lab Res* 434-435 ascribes the decline in the initial stages of the 1920s to the "successful 'open-shop' campaign by employers" that were initiated during the war. Millis & Brown *National Labor Policy* 18 describe this as taking the name of the "American Plan", describing it as follows: "Comparable in some respects to the antiunion drive of the early 1900's, this campaign emphasized more positive aspects such as employee representation plans and welfare programs… the open-shop associations often assisted their members [employers] by supplying strikebreakers and by other services designed to help maintain a nonunion position". However, compare these membership numbers to that of Harper et al *Labor Law* 67, who states:

> "Union membership declined from 5 million in 1920 to 3.4 million in 1929 – a 23 percent decrease. Unions covered only fragments of the workforce, primarily in the traditional crafts with some penetration in basic industries such as coal, construction, and the railroads. In manufacturing and mechanical industries, unions were present only in printing, clothing, and shoe manufacturing, with almost no organization in steel, automobiles, electrical equipment, rubber, oil or cement. Union membership in manufacturing fell from 1.9 million in 1920 to less than 800,000 by 1929, a decline

Kaufman[2015] identifies the following factors that contributed to this decline: (i) "Occupational/industrial shifts in employment" (which saw employment growth in fields outside the traditional union industries); (ii) "Technological change" (work automation reducing the reliance on labour); (iii) "Steady prices and increases in real wages" (reducing the need for workers to seek assistance in wage improvements from unions); (iv) "Shortcomings of unions" (this being a reference to the AFL's continued focus on craft unionism despite the changes to industry, which was seeing the craft skills become increasingly side-lined);[2016] and, finally, (v) "Loss of public support" (given improved wages, and the "disappearance of the more glaring abuses" on the part of employers,[2017] coupled with increasingly aggressive unions).

But herein lies a contradiction: While the First World War and the factors highlighted in the preceding section served as precursors for what was to happen in the 1930s, it is precisely because of the significant decline in membership numbers and union influence that there was no substantive response to *Coronado*. American unions were facing decreasing membership numbers, increasing employer hostility and adverse court rulings. A further factor raised by Kaufman is that of "legal obstacles" underpinned in the main by "the attitude of the courts to the right of voluntary association among the workers".[2018] This attitude was based on "two legal devices given sanction by the courts and used by employers in the 1920s with increasing frequency to undercut union organizing and strikes".[2019]

7 3 5 Judicial intervention

7 3 5 1 The background to the intervention

The legal devices Kaufman speaks about were the so-called "yellow-dog

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of nearly 60 percent."

[2015] Kaufman (2001) *J Lab Res* 434-439

[2016] A further factor, as explained by Kaufman at 435, was that entirely "new" industries were forming, that had never seen unionisation before: "Equally notable, organized labor was unable to make any inroads in the new mass production industries, such as autos, rubber, and electrical equipment, that were the centers of employment growth in the "new economy" of the 1920s."

[2017] 439.

[2018] 437.

[2019] 437.

contract"[2020] and the injunction.[2021] Ross explains that "[n]o understanding is possible of the stagnation of union growth in the 1920s without an awareness that the withdrawal of government wartime aid was followed not by neutrality but by active government intervention against unions."[2022] This is echoed by the words of Frankfurter and Greene in the final of their three-part examination of labour injunctions during this period:[2023]

> "The organized labor movement in the United States reached its peak immediately following the World War. But for twenty years injunctions had paralleled growth in union membership."[2024]

This means the narrative of the gradual acknowledgement of organised labour is brought back to the role of the US courts. As evidenced by the earlier discussion, the use of injunctions never abated. In fact, by all accounts, it *escalated* after the promulgation of the Clayton Act in 1914.[2025]

[2020] 437, where Kaufman explains it as "an employment agreement in which the worker promises as a condition of continued employment to not join a union".

[2021] Which, in similar fashion to how it was/is used in the UK, amounts to "a court order obtained by employers enjoining a union from carrying out a strike, boycott, or other economic pressure tactic if it threatens harm to the employer's property interests in the business" [Kaufman (2001) *J Lab Res* 437]. Says RK Winter "Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia" (1960) 70 *Yale LJ* 70 72-73 in this regard: "The injunction, however, did not suffer from these handicaps and provided relatively swift and comprehensive relief. A temporary restraining order against the union could be obtained within a matter of hours. Because decrees often enjoined a broad class of persons and a wide range of activities, including even peaceful persuasion and leaving the job, these prohibitory clauses served as a vehicle for detailed judicial policing of labor disputes. Moreover, violators of the order might be subject to criminal and civil contempt proceedings held without a jury and before the same judge who had issued the original decree."

[2022] Ross (1963) *Ann Am Acad Pol Soc Sci* 78.

[2023] See in general F Frankfurter & N Greene "The Use of the Injunction in American Labor Controversies. I – The Allowable Area of Economic Conflict" (1928) 44 *L Q Rev* 164 164-197; F Frankfurter & N Greene "The Use of the Injunction in American Labor Controversies. II – The Procedure and Proof Underlying Labor Injunctions" (1928) 44 *L Q Rev* 353 353-380; Frankfurter & Greene (1929) *L Q Rev* 19-59.

[2024] Frankfurter & Greene (1929) *L Q Rev* 57. However, see further Forbath (1989) *Harv L Rev* 1219-1222 in terms of what was happening at State level, regarding the promulgation and use of both anti-injunction, and anti-conspiracy legislation. This serves as evidence of how certain State legislatures were far more willing in acceptance/accommodation of organised labour, than others/Federal law – and that, as is to be expected, America presented anything but a homogeneous picture.

[2025] Says Frankfurter & Greene (1929) *L Q Rev* 34 in this regard:

> "The Clayton Act, notoriously intended to restrict the Federal Chancellor's power of decretal invention, has apparently served to stimulate it. Certainly, the ambit of restraint has been greatly extended by Federal labor injunctions since 1914."

7 3 5 2 The use of injunctions and "yellow-dog" contracts

Frankfurter and Greene's research – despite acknowledgement of the difficulty in constructing reliable figures[2026] – points to the use of injunctions as numbering in the high hundreds[2027] (if not higher).[2028] When this is considered in light of their examination of the particular wording and (in many instances, almost unlimited) scope of the restraining clauses that many of these injunctions were issued with,[2029] the associated resentment harboured by organised labour towards much of the legal systems' interaction with unions becomes all the more understandable.[2030]

But the "yellow-dog contract" was also important. Dating back to the 1840s, but emerging as a "common anti-union tool" in the 1870s, Case speaks of its legality being "consistently upheld" by the American courts between the 1880s and 1932, with its use being justified by employers on the ideological grounds of the "freedom to run one's business unhindered by outsiders".[2031] Given the impact of this type of contract

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[2026] Frankfurter & Greene (1928) *L Q Rev* 356.

[2027] The key issue is that in many instances, injunctions were normally only reported in the event that they were "challenged by motions for discontinuance, on appeal or through contempt proceedings" – Frankfurter & Greene (1928) *L Q Rev* 355. See Frankfurter & Greene (1928) *L Q Rev* 355-357, who list the following figures from Federal or lower-courts (with year-period in brackets thereafter) – with due acknowledgement to the possibility of overlap: 102 (1903-1928); 35 (*circa* 1894); 116 (*circa* 1915); 389 (*circa* 1918-1928); 63 (1923-1927); 260 (1898-1916) – a total of 965, spanning approximately two decades. As mentioned, the authors imply this to be a number on the decidedly conservative/understated side.

[2028] See Hartley (1982) *Cath U L Rev* 37 n109, who says the following by way of summation of the research done by Professor Witte, one of the primary sources relied on by Frankfurter & Greene, in their aforementioned study: "While lack of complete court records thwarts precise determination of the number of labor injunctions issued, Professor Witte's exhaustive search verified that up to 1931, state and federal courts had issued 1,845 labor injunctions." Compare this with Forbath (1989) *Harv L Rev* 1227, who states: "During the 1920s, courts issues over 2100 anti-strike decrees and the proportion of strikes met by injunctions to the total number of strikes reached an extraordinary 25%. The proliferation of injunctions prompted articulate disobedience on an unprecedented scale. Never before was the labor movement so riveted upon the rights and liberties denied by the legal order" [footnotes omitted].

[2029] See in general the examples offered by Frankfurter & Greene (1929) *L Q Rev* 24-37.

[2030] Frankfurter & Greene (1929) *L Q Rev* 57-58. More specifically, see Frankfurter & Greene (1929) *L Q Rev* 58 in quoting William Green, the then "Conservative President of the American Federation of Labor", who had to following to say to the American Senate in 1928: "I say to you gentlemen that I know of no procedure in America that is fanning the flame of discontent to a greater degree than this misuse of the equity [injunction] power".

[2031] TA Case ""Yellow-Dog" Contract*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 1556 1556.

on attempts to organise workers[2032] – coupled with the willingness of judicial enforcement[2033] – Case reasons that they "served as the basis for at least 10% to 15% of the injunctions issued between 1917 and 1932".[2034]

7 3 5 3 The effects of judicial intervention

The earlier discussion gives a taste of the nature and extent of the disputes between organised labour and employers – and how these played out in the American courts.[2035] But the far-reaching impact of these developments is perhaps better conveyed by Crain and Matheny:

> "Suppressing labor pickets and especially the secondary boycott had predictable effects on union power. During the 1920s, the labor movement came close to disappearing. The results were equally predictable – appalling working conditions and a rapid rise in economic inequality. Although most sectors of the economy experienced wage stagnation, long hours, and unsafe working conditions,

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[2032] See in this regard J Seidman "The Yellow Dog Contract" (1932) 46 *Q J Econ* 348 348.

[2033] Millis & Brown *National Labor Policy* 14. The leading case, which set the tone for what was to follow, was the Supreme Court decision of *Hitchman Coal & Coke Co. v Mitchell* 245 US 229; 38 Sup. Ct. 65 (1917) – see in this regard Seidman (1932) *Q J Econ* 349. Says RA Epstein "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation" (1983) 92 *Yale LJ* 1357 1373, in describing the judgment as being "the key case upholding the legality of the yellow dog contract in the pre-New Deal era", with the union being prevented from organising in the West-Virginia coal mines, seeing the UMWA again being targeted. See further Forbath (1989) *Harv L Rev* 1193-1194.

[2034] Case "Yellow Dog" in *Working-Class* 1557.

[2035] Considering this, an entire subject not touched on in any manner in the preceding pages, is that of the American railways system, and the associated details pertaining to employers, employees, their unions, and the extent of judicial and legislative involvement. By way of the briefest background, see Ross (1963) *Ann Am Acad Pol Soc Sci* 78-79; BW Justice *Unions, Workers, and the Law* (1983) 12-13; Hardin et al *Developing Labor Law I* 19-21 and Harper et al *Labor Law* 80-82. For a broader overview, see DP Twomey *Labor & Employment Law: Text and Cases* 15 ed (2013) 41-57. In this regard, the labour law applicable to those involved in the rail industry (and extended to the airline industry in 1936 – Twomey *Labor & Employment* 41), is regulated in terms of the Railway Labor Act of 1926 (Ch. 347, 44 Stat. 577 (1926); 45 U.S.C. §§ 151-164 and 45 U.S.C. §§ 181-188) ("RLA"), which is an entire species of labour regulation distinct in form and function from that of the National Labor Relations Act (and associated legislation) discussed in more detail below. Specifically, as explained by Twomey *Labor & Employment* 52: "The [NLRA] excludes from the definition of 'employer,' contained in Section 2(2) of the NLRA, 'any person subject to the Railway Labor Act.' The [NLRB] usually declines jurisdiction over cases in which the employer meets the definition of 'carrier' set forth in the RLA." In the words of BS Feldacker *Labor Guide to Labor Law* 4 ed (1999) 37, the Act "was the first comprehensive federal statutory regulation of labor-management relations" that "specifically recognized the right of employees to engage in collective bargaining". Nonetheless, the organised labour history and development as surrounding America's rail and airline networks, and its means of administration – under the asupices of the National Mediation Board – would justifiably warrant a chapter on its own, and as such, falls outside the immediate scope of this study.

perhaps the worst conditions existed in the coal fields of Kentucky, West Virginia, Ohio, and Pennsylvania. Destitution, child labor, wages below the subsistence level, and even starvation afflicted miners and their families."[2036]

By the end of the 1920s organised labour in America was essentially "losing the war" against injunctions.[2037] However, things were about to change. But before exploring this change in fortune it is necessary to enquire into the changes being wrought within organised labour itself.

7 3 6 Craft, industrial and business unionism

Millis and Brown state as follows:

"On the whole, therefore, except for the brief period of the war, and with some variations among the states, the influence of government and the courts had for decades given support to employers in labor disputes and allowed them a large degree of freedom to fight unions, while unions, on the other hand, were liable to attack in the courts if they used methods which were effective, even peaceful ones. The American Federation of Labor with its traditional structure and methods, trying to adapt itself to the temper of the twenties by emphasizing co-operation and promising increased productive efficiency as a basis for increased wages, was unable to make progress or to do more than hold its existing membership in a few better-organized fields."[2038]

It became apparent that organised labour needed to undergo internal change as dramatic as that experienced by the burgeoning industries that arose in the shadows of the Great war. One key characteristic of the early American trade unions was that they were situated mostly amongst workers within specific skilled trade areas.[2039] In

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[2036] Crain & Matheny (2014) *UC Irvine LR* 571. On the point of the labor movement coming close to disappearing, the authors state [at 571 n69] further as follows:

"In 1920, 19.4% of the nonagricultural workforce was unionized; by 1930, only 10.2% was unionized … Some unions, such as the once-powerful United Mine Workers, had almost totally disappeared by the end of the decade… By 1929, strikes were extremely rare" [references omitted].

[2037] Regarding the various efforts – predominantly led by the AFL – at fighting back against the use of injunctions, see in general Forbath (1989) *Harv L Rev* 1214-1227 – with this taking on initially, a form of a defiance-campaign, before turning again to pressuring for legislative change. A final point to be made, is that – despite unions' obvious resentment of labour injunctions – this did not stop them from occasionally making use of the legal-device themselves, when deemed appropriate. See in this regard EE Witte "Labor's Resort to Injunctions" (1930) 39 *Yale LJ* 374 374-387; Frankfurter & Greene (1929) *L Q Rev* 40-42 and Forbath (1989) *Harv L Rev* 1195-1202.

[2038] Millis & Brown *National Labor Policy* 18.

[2039] Goldman *Labor and Employment Law in the United States* 225 explains that with the exception of the short-lived "Knights of Labor", (as at § 7 2 1 above) most initial trade associations in the US were

general, the early stages of unionism in the US saw a demarcation of membership to only include workers who possessed particular trade skills,[2040] which was a characteristic inherited from the original craft unions found in Britain.[2041]

But other forms of unionism also existed. As early as 1914, Hoxie had categorised several distinct union-types, from craft unions[2042] (and their federations),[2043] to industrial,[2044] "labor"[2045] and business unionism[2046] in the American labour relations system. Furthermore, as touched on above, the likes of the Knights of Labor and the short-lived ARU constituted further evidence of the potential membership-power residing with organizations that cut across industries, rather than being focused on specific trades (particularly in light of the broader direction of the economy).[2047] Furthermore, industrial unionism was potentially better placed to attract members with

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focused along the membership of workers within specific trade (job skills) lines. See further G Friedman *State-Making and Labor Movements: France and the United States, 1876-1914* 1 ed (1999) 121.

[2040] Goldman *Labor and Employment Law in the United States* 225; Harper et al *Labor Law* 67.

[2041] V Feather *The Essence of Trade Unionism: A Background Book* (1963) 20-21 states:

> "Up to this date, the trade unions had existed mainly for the skilled mechanics, craftsmen and men with a trade. The skilled men who emigrated from Britain in the late 1870s and '80s because of unemployment took the idea of trade unionism with them and the unions they formed overseas were also organisations for skilled workers, ie, craft unions."

Furthermore, concerning the similarity of British and American trade union history, see F Schmidt "Industrial Action: The Role of Trade Unions and Employers Associations*"* in B Aaron & KW Wedderburn (eds) *Industrial Conflict: A Comparative Legal Study* (1972) 2 16-17, who begins his introductory examination of American labour relations by stating that "[t]he history of American trade unionism basically resembles that of British unionism."

[2042] RF Hoxie "Trade Unionism in the United States" (1914) 22 *J Pol Econ* 201 207 – "an organization of wage-workers engaged in a single occupation".

[2043] 207.

[2044] Hoxie at 208 – "organized on the basis of the industry rather than the craft".

[2045] Hoxie at 209 – the type that "proposes the organization of all workers regardless of craft or industrial divisions into homogenous groups by localities, by districts and throughout the nation" – with the Knights of Labor offered as example.

[2046] Hoxie at 212 – an organization that "expresses the viewpoint and interests of the workers in a craft or industry rather than those of the working class as whole", "is likely to be exclusive", and in "harmony with its business character it tends to emphasize discipline within the organization and is prone to develop strong leadership and to become somewhat autocratic in government". Kaufman (2001) *J Lab Res* 434, in citing Selig Perlman, ascribes the AFL as the "pioneer" in the business unionism approach.

[2047] J Seidman "Efforts toward Merger: 1935-1955" (1955) 9 *ILRR* 353 354 states as follows in this regard:

> "The craft form of organization, highly effective in organizing and bargaining in industries built primarily around the skilled tradesman, proved incapable of organizing the new industrial giants in the automobile, steel, rubber, and electrical industries, in whose plants machinery and division of labor had largely broken down craft skill."

its inclusive-membership oriented approach.[2048]

The (initial) statutorily unchallenged phase of restricted craft-based union membership and protection mentioned above, began to change in the period leading up to and including the 1930s.[2049] In order to understand why, events in America and the world at this time require further examination.

7 3 7 The Great Depression

"The 1930s saw a startling shift in the attitudes toward unions." So begins Hartley's discussion under his heading of the "[s]ocietal recognition of unions",[2050] which describes, in part, just how dramatic the turnaround in organised labour's fortunes was in comparison to the previous decade.

The transformation was largely influenced by the dramatic effects that the Great Depression had on labour in the United States and the world,[2051] as well as a shift in

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[2048] In this regard, M Crain & K Matheny "Labor's Identity Crisis" (2001) 89 *Calif L Rev* 1767 1774-1775 speak to the AFL's approach of "job-conscious unionism", which entails:

> "[A] protectionist ideology that lends itself to exclusionary practices and does not seek to challenge the basic structure of production. Thus, while the Knights' [of Labor] and the Wobblies' [IWW] philosophies [of socialist consciousness] necessarily committed them to building interracial and gender-blended movements of workers, the AFL's did not. The AFL popularized craft unionism, in which the workplace was the site for union organizing, craft unions were the organizational vehicles, and white male shopfloor culture was the foundation of solidarity" [footnotes omitted].

[2049] Discussed in more detail at § 7 3 6 below. But suffice it to state at this point, as per Seidman (1955) *ILRR* 355-356, one of the key role-players in this transition was the Committee (later to become the Congress) of Industrial Organizations. As explained further by H Seligson "The Paradox and Challenge of Unionism Today" (1959) 10 *Lab LJ* 180 181-182, who states:

> "Most significant, too, was the rise of the Congress of Industrial Organizations. With some exceptions, the AFL had, traditionally, been interested mainly in the crafts and had made little effort to organize the unskilled and semiskilled in the mass-production industries. Under the circumstances of the time, these groups were ripe for organization. It was the peculiar genius of the leadership of the CIO that it adopted tactics of organization more suited to organizing masses of unskilled and semiskilled workers than craftsmen".

[2050] Hartley (1982) *Cath U L Rev* 39.

[2051] Says Kaynard (1988) *Hof Lab LJ* 5 of this period:

> "The Great Depression of the late 1920's and the stock crash of 1929 took their toll. By 1933, 12,830,000 persons were out of work, about one-fourth of the urban labor force of over 51 million. The American economy was in chaos and American employees, employers and unions suffered. It was during this period that the US government started on the road of regulating the labor relations of the country, establishing a federal labor relations policy and fostering collective bargaining."

Similarly, Witte (1950) *ILRR* 4 states the following:

> "At the beginning of the New Deal period, the total union membership was only 3,000,000. Even then, the building trades, the printing and garment industries, and a few small industries were reasonably well organised; but in the great mass-production industries, the unions were almost

the way unions viewed their role in the ever-changing labour market.[2052] The economic turmoil that followed in the wake of the global collapse of financial markets, coupled with unions adapting to these dramatic changes, were conducive to the acceptance of unions by an ever-increasing number of American workers.[2053] Importantly, however, the American public proved equally receptive. As stated by Seligson: "[r]arely had the objectives and tactics of the unions evoked as much sympathy and support from the public as they did during the critical depression years of the 1930's".[2054] Also important was the "unexpected strategy adopted by the newly elected Roosevelt administration to end the Great Depression"[2055] (which is discussed in more detail below). Suffice it to say at this stage that the efforts to quell the disastrous effects of the Depression through federal statutory intervention[2056] played a fundamental role in making unions more accessible, legitimate, and necessary than had ever been the case before.

7 3 8 The turning of the tide

The other pivotal factor that was to bring about change was, for lack of a more

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nonexistent. Much of American industry was militantly anti-union and was practically unrestrained in the methods it could use to keep out the unions. The depression made the American workers more receptive to unionism, and the New Deal brought a political climate favorable to its growth."

[2052] For a succinct overview of the role played by organised labour in the initiatives aimed at economic revival, see I Bernstein "Labor and the Recovery Program, 1933" (1946) 60 *Q J Econ* 270 270-288.

[2053] Millis & Brown *National Labor Policy* 19-20 state the following:

"Unemployment, insecurity, and declining standards of living faced not only manual wage-earners but white collar workers and all others in all walks of life. There was as a result a widespread loss of confidence in the ability of unregulated free enterprise to maintain full employment and the rising standards which had been foreseen during the twenties. It came to be rather commonly believed, also, that an increase in mass purchasing power was necessary to sustain full production and employment under conditions of modern mass production; and, if this was so, the support for unionism and collective bargaining was desirable, to balance the unrestrained power of the great corporations. Measures to promote greater equality of bargaining power, therefore, began to appear proper public policy, in order to increase wages. Among workers themselves, moreover, the experience of depression and mass insecurity turned them towards the unions."

See further what Hartley (1982) *Cath U L Rev* 39 says, regarding the "loss of workers' individual liberty in large business organizations", along with the effects of the Great Depression – and how these factors saw American workers accept the possible roles of organised labour more readily. This in effect, as per Hartley (1982) *Cath U L Rev* 40 saw unions being recognized as a "necessary countervailing force to perform both democratic and economic functions".

[2054] Seligson (1959) *Lab LJ* 181.

[2055] Kaufman (2001) *J Lab Res* 446.

[2056] R Fahlbeck "The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law" (1994) 15 *Berk J Emp Lab L* 307 321.

precise term, civil society in the US.[2057] Crain and Matheny provide examples of leading law academics from the 1920s and 1930s motivating for legislation to rid the American labour relations system of the "yellow-dog contract".[2058] Furthermore, the publication of Frankfurter and Greene's research[2059] was an "influential book detailing the courts' abuse of the labor injunction".[2060] These factors all contributed to a growing awareness of the problems facing organised labour.[2061] There were increasing calls from the legal profession that "the use of injunctions against workers was causing public disrespect for the courts and the law".[2062] Arguably, however, it was the visit of Republican Senator George Norris in the late 1920s to the "coal mining regions of America" and his dismay at what he saw[2063] that was to have the most direct impact

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[2057] Crain & Matheny (2014) *UC Irvine LR* 571 speak of the "[p]rivileged elites whose sense of justice was offended by the widespread suffering" present within American during the early part of the 1930s. Compare this with Forbath (1989) *Harv L Rev* 1230-1231, who states: "[B]y the mid-1920's a widening swath of the nation's political elites was growing disenchanted with the courts. The repressiveness of the old judge-made order disturbed liberal consciences, sapped the courts' legitimacy among the working classes, and seemed to increase, not diminish, industrial unrest" [footnotes omitted].

[2058] This being in reference to Roscoe Pound, Dean of Harvard Law School, making his proposal in 1923 – see Crain & Matheny (2014) *UC Irvine LR* 572.

[2059] See § 7 3 5 2 above.

[2060] Crain & Matheny (2014) *UC Irvine LR* 572.

[2061] See futher Forbath (1989) *Harv L Rev* 1227-1228.

[2062] Crain & Matheny (2014) *UC Irvine LR* 572. See in this regard Winter (1960) *Yale LJ* 74-75, who states:

> "Excessive intervention in labor strife had tarnished the prestige of the federal courts. Entanglement in a struggle between opposing economic classes had destroyed the aura of impartiality essential to a rule of law and had made judges and judicial decisions in this area the center of political debate. This loss of prestige, moreover, was the unavoidable result of judicial interference in labor disputes, for such intervention leads to the assumption of partisan positions. While courts making law in areas such as tort or contract may draw upon generally accepted values, there are few such shared principles in the field of labor relations. Every decision tended to be a political statement, favoring one camp or the other" [footnotes omitted].

See further Winter (1960) *Yale LJ* 75 n37 for an extract from the Senate Report, explaining the sentiments of the American Congress at the time of drafting the legislation in response to this situation.

[2063] Crain & Matheny (2014) *UC Irvine LR* 572 describe what Senator Norris' saw on his tour – "virtual dictatorships in company towns, destitute and disabled miners who had been physically broken by brutal working conditions in the mines, exploitation practiced by the 'company stores,' and implacable hostility to unions." See further RJ Goldstein "Labor History Symposium: Political Repression of the American Labor Movement During its Formative Years – A Comparative Perspective" (2010) 51 *Lab Hist* 271 277, who cites Fagge's comments on the coal industry in West Virginia:

> "He refers to truly 'feudal fiefdoms, isolated from constitutional, legal and political rights' ... where perhaps 80% of the state's 270,000 miners in 1920 lived in company towns where the coal operators literally owned the houses, churches, schools, and police and exercised their power to evict strikers from their homes and bar union organizers from the towns."

on the US Government's response:

> "Senator Norris assembled a committee of expert advisers, including Felix Frankfurter, to draft a bill to strip federal courts of the jurisdiction to enforce yellow-dog contracts and issue injunctions in most labor disputes ... President Hoover signed the Norris-LaGuardia Act into law on March 23, 1932."[2064]

The tide had turned – commencing cautiously in 1932 before the complete turnaround would come to pass from 1933 onwards.

7 3 9 The Norris-LaGuardia Act (LDA) of 1932

7 3 9 1 Background to the LDA

The first major legislative instrument implemented by the US Government during the Great Depression years in the field of labour was the Norris-LaGuardia Act, designated the Labour Disputes Act of 1932 ("LDA").[2065] The LDA was important for several reasons, in particular for what it meant for the use of injunctions.[2066] As stated by Ross:

> "The Norris-LaGuardia Act represents more than the precursor of subsequent legislation designed

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[2064] Crain & Matheny (2014) *UC Irvine LR* 572, [footnotes omitted]. See further Forbath (1989) *Harv L Rev* 1228-1230 regarding the developments leading up to the passing of the Act, who states by way of commencement:

> "Amid these events, in February 1928, Senator George Norris, chair of the Senate Judiciary Committee, opened hearings on a new anti- injunction bill, and labor's representatives brought to Congress their common law arguments, their exiled constitutional claims, and their stories of judicial repression of worker-citizens in the country's coal fields and manufacturing districts… The hearings, originally scheduled for three days, lasted from February 8 through March 10."

[2065] Ch. 90, 47 Stat. 70 (1932), (29 U.S.C. §§ 101 et seq.) (2017).

[2066] On one of the key aims of the LDA, Cole (1939) *Ford L Rev* 36 n38 makes an interesting observation which – it is submitted – is justifiably accurate:

> "There must be noted here a remarkable parallel to the English Trade Disputes Act [of 1906], previously discussed, in the Norris-La Guardia Act of 1932 … limiting the jurisdiction of federal courts in the matter of issuing injunctions in labor disputes".

As discussed in chapter 4, the Trade Disputes Act came about in the wake of the *Taff Vale* decision, which exposed unions to civil claims as entities separate from that of their members – and accordingly limited the use of injunctions, and created the so-called "Golden Formula". The LDA was promulgated in the wake of a string of adverse decisions that all but made collective bargaining by means of organised labour impossible. Whilst the Great Depression and the surrounding economic climate no doubt played a part as well in bringing about the change, it is not inconceivable to reason that the LDA (or some version thereof) was always an inevitability, as the manifestation of society re-balancing the power between the employer/Capital/Judiciary on the one side, and the common worker and their labour organisations, on the other.

> to throw the government's weight on the side of unions. From a historical point of view, it stands not so much as support for unions but as an end to government intervention against them. The federal statute, which was soon followed by a number of somewhat similar state laws, severely limited and, for all practical purposes, ended the exercise of the courts' injunctive power on the application of employers in labor cases."[2067]

The Act consists of a mere fifteen sections, the first of which reads that "no court of the United States … shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in strict conformity with the provisions of the Act; nor shall any such restraining order or … injunction be issued contrary to the public policy declared in this Act."[2068] Of further importance was that the LDA signified the first attempts by the American government to actively become involved in the sphere of labour relations.[2069]

7 3 9 2 Application of the LDA

Sloane and Witney mention that not only did the Act serve as the "first major interindustry federal legislation to be applied to collective bargaining",[2070] but "it marked a significant change in public policy from repression to strong encouragement of union activity."[2071] The authors state further:

> "Even more symbolic of the major shift in public policy was the act's assertion that it was now necessary for Congress to guarantee the individual employee 'full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and

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[2067] Ross (1963) *Ann Am Acad Pol Soc Sci* 79, [footnotes omitted]. Regarding the state laws, Sloane & Witney *Labor Relations* 100 aver:

> "Nor was the treatment of unionism destined to be confined only to the federal arena. Within a short period of time, twenty states (including almost all the major industrial ones) had independently created their own 'little Norris-LaGuardia Acts' to govern labor relations in intrastate commerce."

[2068] See s 1 LDA. The "public policy" spoken of, is defined in terms of s 2, with the appropriate part cited below.

[2069] Considering the discussion above regarding the intention of Congress in drafting the Sherman Act, this statement is not exempt from controversy. Be that as it may, for the purposes of this study – whereas the Sherman Act, purposefully or not, might have left the matters of interpretation open to the judiciary, the LDA remains the first enactment where the American legislature specifically focused on organised labour matters in and of itself, rather than seeking to redress the judicial interpretation of earlier legislation (as was the case, for instance, with the Clayton Act). Millis & Brown *National Labor Policy* 20 explain of the LDA that it "[f]or the first time … spelled out a federal labor policy favoring full freedom of association of workers and freedom from interference by employers with this right."

[2070] Sloane & Witney *Labor Relations* 100.

[2071] 100, [their emphasis].

conditions of his employment… free from interference, restraint, or coercion of employers.' All the federal labor laws passed since 1932 have embodied this same principle."[2072]

The LDA effectively brought to an end the enforceability of "yellow-dog" contracts[2073] and furthermore stipulated that the US courts were not permitted to award "any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute" that fell within the ambit of a series of protected actions, including the "refusal to continue [the] employment relation",[2074] "peaceful assembly",[2075] or "becoming or remaining a member of any labor organization".[2076]

Section 5 specifically confirmed that the common law application of unlawful combination was no longer applicable to "persons participating or interested in a labor dispute", while section 6 introduced a presumed non-liability clause on the part of union officers or members for the "unlawful acts of individual officers, members or agents".[2077] Sections 11 and 12 addressed the process to be followed with regard to

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[2072] Sloane & Witney *Labor Relations* 100, citing from s 2 LDA – which defines the "public policy of the United States", as referred to in s 1 of the LDA, as follows:

"Whereas under prevailing economic conditions, developed with the aid of governmental authority for owners of property to organize in the corporate and other forms of ownership association, the individual unorganized worker is commonly helpless to exercise actual liberty of contract and to protect his freedom of labor, and thereby to obtain acceptable terms and conditions of employment, wherefore, though he should be free to decline to associate with his fellows, it is necessary that he have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection; therefore, the following definitions of, and limitations upon, the jurisdiction and authority of the courts of the United States are hereby enacted."

See further MW Finkin "The Meaning and Contemporary Vitality of the Norris-LaGuardia Act" (2014) 93 *Nebr L Rev* 6 13-14 for the reasoning behind the inclusion of this "public policy" clause.

[2073] This being in terms of s 3 of the LDA.

[2074] Subsection 4(a).

[2075] Subsection 4(f).

[2076] Subsection 4(b). The LDA did not provide for a complete embargo on injunctions, with s 7 setting out (in more direct terms) the procedure that was to be followed (including "hearing the testimony of witnesses in open court (with opportunity for cross-examination)" – and the grounds for such – whilst s 8 states that no injunctive relief shall be provided to any complainant "who has failed to comply with any obligation imposed by law ... or who has failed to make every reasonable effort to settle such dispute either by negotiation of with the aid of any available governmental machinery of mediation or voluntary arbitration". See Harper et al *Labor Law* 69-70 for a succinct overview of the s 7 procedures.

[2077] The wording of s 6 LDA reads as follows:

"No officer or member of any association or organization, and no association or organization

any contempt of court proceedings, which included a trial by jury (as opposed to only the judge, as was the case before) and the judge who initially presided over the matter not permitted to preside in the contempt hearing. Finally, section 13 stipulated what was to be understood by the term "labor dispute" and who was deemed to be the persons in dispute.[2078]

The LDA effectively removed the stigma of conspiracy in law from trade unions and gave them the right to bargain collectively with employers in order to improve worker conditions. Unions had finally received formal recognition within the American labour relations system, but several further legislative measures were needed before their position was secure. Regardless, in the words of Hardin et al, the importance of the Act lay in that it "is not what it does for organized labor but what it permits organized labor to do for itself without judicial interference".[2079]

7 3 10 The National Industrial Recovery Act of 1933

While the LDA was the first major piece of labour legislation enacted during the Great Depression, the first statute that was enacted in direct response to the economic pressures generated by the depression[2080] was the National Industrial Recovery Act ("NIRA"), promulgated in 1933.[2081]

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participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof" [my emphasis].

See in this regard WC Campbell "Section 6 of the Norris-La Guardia Act: A Statute Whose Time Has Come and Gone" (1980) 3 *GMU L Rev* 207 209-214, for a more detailed discussion regarding the background to s 6 LDA. In particular, Campbell (1980) *GMU L Rev* 211 states:

"[T]he legislative intent of Congress in enacting the Norris-LaGuardia Act was to protect the unions. In particular, section 6 was specifically designed to shield them from being crushed financially in their embryonic period by substantial damage judgments against them for violent acts allegedly committed by their officers and rank and file members" [footnotes omitted].

[2078] As stated by Millis & Brown *National Labor Policy* 21, the term "labor dispute" "was broadly defined to give wide latitude to the right to strike, picket, or boycott".

[2079] Hardin et al *Developing Labor Law I* 22, quoting from Gregory & Katz Labor and the Law 3 ed (1979) 186.

[2080] See Bernstein (1946) *Q J Econ* 270-271 for a brief overview of initial policies that were implemented in response to the Depression prior to the legislation.

[2081] Ch. 90, 48 Stat. 195 (1933). Goldman *Labor and Employment Law in the United States* 36 states in this regard:

"Franklin D. Roosevelt was elected President of the United States in 1933, a few years after the United States became enmeshed with the Great Depression that had enveloped the economies of

This Act not only affirmed the right of unions to bargain collectively (as first established in the LDA)[2082] but also allowed unions to organise the workforce through "representatives of their own choosing and without hindrance, restraint or coercion on the part of the employers"[2083] and made yellow-dog contracts unlawful, as opposed to merely unenforceable.[2084]

For the purposes of this study, the effect of NIRA on organised labour in America is important. Prior to the enactment of NIRA "the trade union movement stood with its back to the wall" with union density in 1933 at between 10 or 15% "and those largely in the skilled trades".[2085] Saposs writes that "[u]nionism was in the doldrums; thoughtful labor leaders and students were seriously speculating whether the union movement would withstand the apparently unending depression".[2086]

The turnaround initiated by NIRA saw unions' rapid growth trumped only by its

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the industrialised world. The Roosevelt administration proposed a series of programs designed to promote national economic recovery. Included was the National Industrial Recovery Act which was designed to stabilize business activities."

The preamble of the NIRA made reference to the need to "[t]o encourage national industrial recovery" and "to foster fair competition", whilst s 1 read that "[a] national emergency productive of widespread unemployment and disorganization, which burdens interstate and foreign commerce, affects the public welfare, and undermines the standards of living of the American people, is hereby declared to exist".

[2082] This in terms of subs 7(a) of the NIRA.

[2083] Subsection 7(a)(1).

[2084] Subsection 7(a)(2). DA McCabe "The Effects of the Recovery Act upon Labor Organization" (1934) 49 *Q J Econ* 52 53 states in this regard:

"Of the new factors introduced by the Recovery Act the most important in its bearing on labor organization is the prohibition, in Section 7(a), of discrimination against a worker for union membership or union activity. This goes far beyond the Norris-La Guardia Anti-Injunction Act of 1932. That refused the aid of federal courts to the enforcement of 'yellow-dog' contract … The Recovery Act declares it a violation of the law to attempt to make such a renunciation a condition of employment … The Recovery Act now prohibits any form of 'interference, restraint or coercion' from employers or their agents."

[2085] Bernstein (1946) *Q J Econ* 270. The author [at 270] states further in this regard:

"Membership in trade unions had declined from a peak of well over four million in the period following World War I to fewer than three million. Most collective agreements were applied at a local level. Wages, hours, and working conditions were determined principally by employers without reference to the wishes of their employees. The company union movement, which had gained momentum in the previous decade, lost its impetus during the depression as the threat from the trade unions declined."

[2086] DJ Saposs "The American Labor Movement Since the War" (1935) 49 *Q J Econ* 236 236.

scope: in the space of mere months[2087] "unprecedented growth"[2088] in union membership saw, by conservative estimates, a doubling in size in less than a year.[2089] Furthermore, this growth was also seen in industries that prior to NIRA "had been practically without organization".[2090]

A further noteworthy effect of NIRA (primarily in response to the rapid rise in strike action given the gains made by organised labour) was the formation of the National Labor Board (NLB) on 5 August 1933.[2091] The NLB was the "first federal labor board to undertake the function of implementing the first statutory incarnation of labor's rights to organize, engage in collective bargaining with employers, and refrain from joining company unions, accorded by [section] 7(a) of" NIRA[2092] and was to form the blueprint for future statutory mechanisms to oversee labour rights in America.[2093]

About the underlying approach of NIRA, Goldman says:

> "A basic technique used by the Act was to encourage members of various industries to propose

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[2087] Saposs (1935) *Q J Econ* 236-237 states in this regard:

> "Militant union activity pervaded the entire country. New unions were popping up everywhere and strikes were exploding in all directions. What was a dying union movement in June [of 1933] was by October transformed into one very much alive."

See further R Mendel "National Industrial Recovery Act*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 963 964 who states:

> "The passage of the NIRA set off a furious organizing spree amongst the nation's workers … Section 7a of the NIRA seemed to give not only government sanction for unionism, but for many workers, implied Roosevelt administration approval of their unionization efforts as a tool for economic recovery."

[2088] McCabe (1934) *Q J Econ* 52.

[2089] 52 n1.

[2090] 52. See in this regard WD Wandersee "'I'd Rather Pass a Law than Organize a Union': Frances Perkins and the Reformist Approach to Organized Labor" (1993) 34 *Lab Hist* 5 18-19, for some insight into the union membership drives, particularly in the mining industries – spurred on in part by UMW's posters reading "The President wants you to join the union" [at 18].

[2091] VA Sanchez "A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum under the Wagner Act" (2005) 20 *Oh St J Disp Res* 621 640. The NLB saw the prominent involvement [see CL Tomlins "The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism" (1985) 39 *ILRR* 19 24; Millis & Brown *National Labor Policy* 22] by one Senator Wagner, an individual that was one of the driving forces behind NIRA [see M Barenberg "The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation" (1993) 106 *Harv L Rev* 1379 1410], and was soon to play an even more-pronounced role in the context of the American labour relations system, as apparent from the discussion at § 7 3 11 below.

[2092] Sanchez (2005) *Oh St J Disp Res* 635. The author states further [at 635] that "President Roosevelt created the National Labor Board in 1933 by executive order to 'handle labor disputes' arising from [s] 7(a) of the NIRA, and to foster 'voluntary' compliance with it" [footnotes omitted].

[2093] See Harper et al *Labor Law* 83. See further Barenberg (1993) *Harv L Rev* 1401-1403.

> codes to regulate the conduct of business in their industry. Upon approval of these codes by the President, they were to have the force of law and be exempt from antitrust law restrictions. In order to qualify for such approval, the codes were required to deal with specified problems and to adopt certain policies."[2094]

NIRA was a highly specific and unconventional legislative response by the federal government to a highly unusual socio-economic environment which had at its centre far-reaching presidential (executive) powers. Rabin notes that "NIRA was the subject of intense interest and debate from the outset: Critics, depending on their political perspective, regarded it as fascistic, communistic, or less sensationally, simply monopolistic".[2095] The Act did not survive for long. On "Black Monday"[2096] (27 May 1935) the Supreme Court, called on to consider the "scope of congressional, presidential, or federal administrative authority", found NIRA to be unconstitutional in *A.L.A. Schechter Poultry Corp. v US*.[2097]

While the Supreme Court again demonstrated its willingness to intervene in a matter that was to significantly affect organised labour and the broader labour relations system, the respondent in this case was the federal government. The outcome of this case (which, by implication, included the dissolution of the NLB)[2098] would also have been far-reaching were it not for what transpired a mere 40 days later. In explaining the events subsequent to *Schechter Poultry*, Harper et al state that "[t]he collapse of the NIRA edifice made more urgent the case for the labor relations legislation that

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[2094] Goldman *Labor and Employment Law in the United States* 36.

[2095] Rabin (1986) *Stan L Rev* 1243.

[2096] ME Parrish "The Great Depression, The New Deal, and the American Legal Order" (1984) 59 *Wash L Rev* 723–750 731.

[2097] 295 US 495 (1935). Craver "Historical Foundation" in *Can Unions Survive?* 26 states:

> "The Court majority found that Congress had impermissibly sought to use its authority to regulate interstate commerce as a vehicle for prescribing rules governing wholly intrastate business activities".

Thus, MJ Nelson "Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement" (2000) 8 *Geo Mason L Rev* 527 529 n21 (in citing Chief Justice Hughes in *Schecther Poultry*), despite the Great Depression, the primacy of the Constitution remained the Court's key focus: "Extraordinary conditions do not create or enlarge constitutional power" (The full text of the extract [at 528] reads as follows:

> "Extraordinary conditions may call for extraordinary remedies. But the argument necessarily stops short of an attempt to justify action which lies outside the sphere of constitutional authority. Extraordinary conditions do not create or enlarge constitutional power").

See further Rabin (1986) *Stan L Rev* 1255-1256 for a succinct overview of the facts of the case.

[2098] See Sanchez (2005) *Oh St J Disp Res* 640.

Senator Robert F. Wagner of New York, an ally of organized labor, had been shepherding through Congress."[2099]

NIRA is described by Adams and Brock as "the most comprehensive peacetime attempt to institutionalize a system of management-labor-government cooperation in the United States".[2100] Despite (arguably justified) criticism of its effectiveness,[2101] widespread strike action and violence continued following its demise.[2102] It was plainly apparent that legislative intervention was required. The response to this need became the foundation of the American labour relations system to the present day.

7 3 11 The Wagner Act (NLRA) of 1935

7 3 11 1 The origins and purpose of the NLRA

On 5 July 1935 President Roosevelt, in light of the demise of NIRA,[2103] signed into law the new National Labor Relations Act of 1935 ("NLRA"),[2104] known as the Wagner

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[2099] Harper et al *Labor Law* 84. Says Barenberg (1993) *Harv L Rev* 1412 in this regard:

> "[A]fter the Supreme Court's nullification of the Recovery Act in May, 1935, the New Deal was left without a program that either addressed economic recovery directly or eased the labor unrest that threatened recovery indirectly. Robert Wagner was ready in the wings with a portion of a recovery program, which bore the stamp of progressive debate and experience" [footnotes omitted].

[2100] W Adams & JW Brock "Industrial Policy and Trade Unions" (1985) 29 *J Econ Iss* 497 500-501

[2101] See for instance Hartley (1982) *Cath U L Rev* 42.

[2102] See JJ Brudney "Gathering Moss: The NLRA's Resistance to Legislative Change" (2011) 26 *ABA J L Emp L* 161 163-165, with the author reasoning [at 164] that "[s]trike activity and related violent clashes appeared to intensify in June 1935, following the Supreme Court decision". See further Anonymous (1937) *Colum L Rev* 832 n119 and JF Manley "Marx in America: The New Deal" (2003) 67 *Sci & Soc* 9 18-23 for insight into the labour violence during 1934 and 1935.

[2103] AH Raskin "Elysium Lost: The Wagner Act at Fifty" (1986) 38 *Stan L Rev* 945–955 946 states in this regard:

> "But by the time the Supreme Court struck down the NIRA as unconstitutional in 1935, the momentum of the union drive had run out. Employers were defying Section 7(a), and its administrators were having scant success in enforcing its protections for workers. Indeed, many of them were showing little appetite for enforcing the law at all. When the Supreme Court's decision in Schechter Poultry Corp. v. United States removed even the hope of reviving Section 7(a) as a mainstay of employee freedom, the American Federation of Labor threw all its energies into ensuring the speedy passage by Congress of the more comprehensive industrial relations bill that Senator Wagner had already drafted out of a belief that the NIRA machinery for safeguarding labor was inadequate."

Considering this, RA Bock "Secondary Boycotts: Understanding NLRB Interpretation of Section 8 (b)(4)(b) of the National Labor Relations Act" (2004) 7 *U Pa J Lab Emp L* 905 911 makes the important point that s 7(a) NIRA essentially lived on inside s 7 of the Wagner Act.

[2104] Ch. 372, 49 Stat. 449 (1935), (29 U.S.C. §§ 151 et seq.) (2017).

Act.[2105] To this day it remains the core statutory instrument of American labour legislation.[2106] Its stated purpose was union regulation and labour relations management, an area increasingly demanding organisation at the time of enactment.[2107] According to Sloane and Witney, the Act essentially provided the means through which the government could finally seek to properly protect collective bargaining rights, as initially sought in 1932.[2108] In this regard, section 1 of the NLRA recognises that "[t]he denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife and unrest".[2109]

[2105] The Act is named after its primary author Senator Robert Wagner, who, as evidenced from the discussion above, played a key role in not only drafting the NLRA, but also that of its predecessor, NIRA – see Bernstein (1946) *Q J Econ* 278; Barenberg (1993) *Harv L Rev* 1399, 1410-1411. Thus, Hardin et al *Developing Labor Law I* 26 describe Wagner as being responsible for the origin of modern American labour law, whilst Barenberg (1993) *Harv L Rev* 1411 states [citing Schlesinger] that Wagner "almost singlehandedly forced a reluctant administration into a national labor policy".

[2106] Sloane & Witney *Labor Relations* 110; Goldman *Labor and Employment Law in the United States* 37. With this being said, at the time of its promulgation, the Act was certainly not without its critics. As stated by DL Gregory "The Right to Unionize as a Fundamental Human and Civil Right" (1988) 9 *Miss Coll L Rev* 135–154 140:

> "Most business interests were infuriated by the Act. Ownership interests largely regarded both the Act and the National Labor Relations Board [as discussed in detail at § 9 3 4 1 below] as the instruments, agents, and dupes of ominous socialism".

See further J Bellace "Labor Law for the Post-Industrial Workplace: Breaking the New Deal Model in the USA" in JR Bellace & MG Rood (eds) *Labour Law at the Crossroads: Changing Employment Relationships – Studies in Honour of Benjamin Aaron* (1997) 11 12, who states:

> "Those now criticizing the NLRA seem to look back to the statute's early years through a nostalgic haze. They fail to recognize that the NLRA was flawed from the very beginning with essential features of the basic statutory design at odds with its goals."

[2107] Nelson (2000) *Geo Mason L Rev* 529-530, who in paraphrasing the Act describes its underlying purpose as follows:

> "The Wagner Act laid the foundation for American labor law. Its stated purpose was 'to eliminate…obstructions to the free flow of commerce … by encouraging … collective organizing and by protecting… workers['] full freedom of association, self-organization and designation of representatives … [to] negotiate[e] the terms and conditions of their employment.' It barred employers from using 'unfair labor practices' to avoid unionization and mandated that employers bargain with employees in 'good faith'."

[2108] Sloane & Witney *Labor Relations* 100-101 reason that whilst the Norris-LaGuardia Act formally initiated a system centred around collective bargaining, the "ambitious language" of the Act was nonetheless inadequate in effectively preventing employers from fighting the unions with whichever means they could implement.

[2109] The entire wording of s 1 is too lengthy to be reproduced in full here, but of interest are the following (remaining) excerpts:

> "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other

7 3 11 2 Key components of the NLRA

The NLRA attempted this by means of firstly forbidding five types of employer conduct (in sections 7 and 8),[2110] designating them as unfair labour practices.[2111]

Secondly, the Act provided for the (re)formation[2112] of the National Labor Relations

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forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions… Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce… by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes … and by restoring equality of bargaining power between employers and employees. It is hereby declared to be the policy of the United States to … encourag[e] the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

[2110] For a detailed discussion of these provisions as set out in s 8 of the Act, see Sloane & Witney *Labor Relations* 101-106. Millis & Brown *National Labor Policy* 31 state the following:

"Five unfair labor practices were defined and forbidden to employers: (1) any interference, restraint or coercion of employees in the exercise of the rights guaranteed [subs 8(1)]; domination or interference with the formation or administration of a labor organization or contributing financial or other support to it [subs 8(2)]; discrimination to encourage or discourage union membership; except that closed-shop contracts were not illegal if made with a union representing the majority of the employees in an appropriate bargaining unit and without illegal assistance by the employer [subs 8(3)]; discrimination against an employee for filing charges or testifying under this Act [subs 8(4)]; and (5) refusal to bargain collectively with the legal representative of employees in an appropriate bargaining unit [subs 8(5)]."

[2111] These stem from the rights encapsulated in s 7, described by Hardin et al *Developing Labor Law I* 27, as the "cornerstone of the Act". Section 7 reads:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, *to bargain collectively through representatives of their own choosing*, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3)" [my emphasis].

It was the interpretation of the phrase "concerted activities for the purposes of collective bargaining" by the American Federal Courts and the National Labor Relations Board (§ 9 3 4 1 below), which was to formalise the protection of strikes and picketing within the context of American labour relations. See in this regard A Cox "The Right to Engage in Concerted Activities" (1951) 26 *Ind LJ* 319–347 319, 322-325, for a discussion of the judicial approach to interpreting "concerted activities" in the early days of the NLRA. Regarding the right to collective bargaining, B Aaron "Arbitration in a Non-Union Environment in the United States*"* in C Engels & M Weiss (eds) *Labour Law and Industrial Relations At the Turn of the Century - Liber Amicorum in Honour of Prof. Fr. Roger Blanpain* (1998) 595 595 states that the "[a]doption of the [NLRA] established collective bargaining as the national labor policy of the United States for regulating labor relations between private employers and their employees."

[2112] The NLRB in terms of the NLRA was a continuation of the NLB, introduced in terms of NIRA.

Board ("NLRB"),[2113] tasked with enforcing these unfair labour practice provisions.[2114]

Furthermore, section 9 regulates who the representatives of workers are to be and the election of these representatives. Specifically, subsection 9(a) states that representatives are to be designated or selected for the purposes of collective bargaining *by the majority of the employees* in a unit appropriate for such purposes[2115] and will be the "*exclusive* representatives of *all* the employees in such unit".[2116] Subsection 9(b)-(d) regulates the power of the NLRB to certify who the representatives of a bargaining unit are (in the event of a dispute).[2117] In addition, the NLRA also serves

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[2113] This in terms of ss 3-6 NLRA. The NLRB is a federal, administrative agency (Sloane & Witney *Labor Relations* 101 describe it as a "quasi-judicial agency") that was re-established in terms of the Act to implement and administer the substantive and procedural regulations of the NLRA. It consists of a board of five members, (appointed by the President, with Senate consent), with more than 30 regional offices in major cities across America. It is charged with, *inter alia*, determining proper bargaining units, conducting elections for labour union representation, the arbitration of deadlocked labour-management disputes, and investigating and remedying the unfair labour practices specified in terms of the Act. The NLRB is discussed in more detail at § 9 3 4 1 below.

[2114] Millis & Brown *National Labor Policy* 27, following on their discussion of the NLRB's predecessors, explain how the initial Bill introduced by Senator Wagner in February 1935 was focused primarily on the implementation of a NLRB, which would allow for the establishment of a "permanent national policy" of "effective protection of the right of workers to organize which would not be destroyed by court decisions." The NLRB was to be the interpreter (and enforcer) of the broad rights guaranteed in s 7 of the NLRA, read with unfair labour practices' protection of s 8 – this being in terms of s 10. Subsection 10(a) of the NLRA accordingly reads:

> "The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise."

In the words of Millis & Brown *National Labor Policy* 30-31, whereas "[t]he Act itself was essentially simple, with limited purpose", and "was not intended to deal with all types of labor relations questions, or the prevention of strikes in general…", "the Wagner Act gave to the [NLR] Board which was to administer it only limited powers, to prevent practices of employers which interfered with the right of workers to freely organize and bargain collectively". With this being said, it was the manner – or rather, the perception of the manner, in which the NLRB went about interpreting and enforcing the NLRA, that was to shape and influence the future of the Act.

[2115] Subsection 9(a) of the NLRA [my emphasis].

[2116] In the words of RA Epstein "Labor Unions: Saviors or Scourges" (2013) 41 *Cap U LR* 1 26, the wording of subs 9(a) – in particular that such representatives shall be the *exclusive* representatives of all employees in such unit – "creates the legal monopoly for the union that gains recognition" – and how this, when read with subsequent interpretation of the clause by the NLRB [as per *J.I Case Co. v NLRB* 321 US 332 (1944)], resulted in the principle of majoritarianism: "[E]xplaining how even individual employees must adhere to exclusive bargaining rights of the certified union representative" – see Epstein (2013) *Cap U LR* 26 n173.

[2117] Section 11 of the NLRA regulates the investigatory powers of the NLRB – to be considered in more detail at § 7 3 11 2 and § 8 3 1 6 below.

as the first example of legislation including a statutory definition of a "labor organization" (in subsection 2(5)).[2118] Section 13 states that "[n]othing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike."

7 3 11 3 A Bill of Rights for unions?

Regarding the importance of the NLRA and what it potentially signalled for the fortunes of organised labour, Millis and Brown state the following:

> "The wheel of governmental policy toward a combination of workers to promote their interests by collective action had turned far, from disapproval and repression … to toleration … and finally to positive protection of the right to organize, and therefore to encouragement of organization, by prohibiting interference by employers with that right."[2119]

The NLRA was of key importance in guaranteeing both fundamental rights to unions as well as the role of organised labour within the broader industrial relations system. As pointed out by Mikva, the "two primary effects" of the NLRA were that it firstly "forbade management from engaging in unfair labor practices that interfered with employees' right to form or join a union or to bargain collectively"[2120] and, secondly, "made it an unfair labor practice to refuse to bargain in good faith over 'wages, hours of employment or other conditions of employment'."[2121] The Act, therefore, served as a shield against the collective aggression of employers, rather than the proverbial sword offering direct rights to unions – but the effect was arguably the same.

While the Clayton Act amounted to labour's "Magna Carta",[2122] the inescapable fact remains that the NLRA introduced a series of rights and protections for organised

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[2118] Subsection 2(5) of the NLRA states:
"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[2119] Millis & Brown *National Labor Policy* 29. Says Kaynard (1988) *Hof Lab LJ* 7, regarding the impact of the NLRA: "Thus, what had, in the past, been variously rejected, tolerated, and fought over, namely the right of employees to join unions and bargain collectively, was accepted in 1935, and declared by Congress to be the law of the land."

[2120] AJ Mikva "The Changing Role of the Wagner Act in the American Labor Movement" (1986) 38 *Stan L Rev* 1123 1125, in referencing subs 8(1) of the NLRA.

[2121] Mikva (1986) *Stan L Rev* 1125.

[2122] See § 7 2 5 above.

labour in its sections 7 and 8. This was done in response to organised labour bearing the collective brunt of well-organised opposition to their continued existence. Put differently, the NLRA introduced an admittedly rudimentary, but nonetheless important, declaration of rights for American trade unions.

7 3 11 4 Reception and opposition to the NLRA

Hardin et al discuss the "conspicuous… one-sided nature"[2123] of the Act by making the point that not only were employers provided with no protection from labour organisations, but the interests of employees against possible abuse at the hands of their own unions was also not considered.[2124]

Not surprisingly, the Supreme Court was once again asked to rule on the constitutionality of an Act regulating labour relations.[2125] In this regard, several commentators make the point that part of the reason why the NLRA was promulgated so quickly, and with so little congressional opposition, was precisely *because* of the expected judicial outcome once its constitutionality was to be tested.[2126] Says Brudney in this regard: "In sum, the Republican Party, along with top business leaders, evidently concluded that a bruising [congressional] floor fight was unnecessary because the Wagner Act would fail under the Court's constitutional test" – and accordingly meet the same demise as NIRA.[2127]

[2123] Hardin et al *Developing Labor Law I* 28.

[2124] 28.

[2125] 29-30.

[2126] See C Fisk & DC Malamud "The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform" (2009) 58 *Duke LJ* 2013–2085 2045. See furthermore Harper et al *Labor Law* 85, in referencing the 100-odd injunctions issued by the "lower federal courts" against the NLRB in response to *Schechter Poultry*, between 1935 and 1937. Lastly, see Fisk & Malamud (2009) *Duke LJ* 2046 n127 and Millis & Brown *National Labor Policy* 35-40 for an account of how ineffectual and powerless the NLRB was in the initial years following the passing of the NLRA, owing to employer opposition and public apathy.

[2127] Brudney (2011) *ABA J L Emp L* 166-167. See further B Aaron "A Half-Century of Labor Relations Law and Collective Bargaining" (1998) 13 *Lab Law* 551 553, who states as follows regarding events within the American labour relations system between the passing of the NLRA, and its constitutional review in 1937:

> "The law's backers underestimated the strength and resolve of organized business and industry, which almost unanimously opposed the principles enunciated in the Act. Immediately following its passage, the lawyers' committee of the American Liberty League issued an opinion pronouncing it flagrantly unconstitutional, thereby encouraging many of the country's major corporations to ignore and violate its terms. For the next two years, enforcement of the Act was virtually paralyzed by a flood of federal court injunctions against government officials seeking to carry out its terms".

However, a "closely divided Supreme Court"[2128] – in the decision of *NLRB v Jones & Laughlin Steel Corp.*[2129] – ruled in favour of the constitutionality of the Act and the right of the federal government to (effectively) intercede in the "private economic activity" of employers *vis-à-vis* employees.[2130] This decision came as a surprise to employers and industry in general.[2131]

See further Turner (2006) *U Pa J Lab Emp L* 712 n33, in reference to J Cohen & L Cohen "The National Labor Relations Board in Retrospect" (1948) 1 *ILRR* 648 648-649, for further details surrounding the structured opposition to the NLRA and NLRB.

[2128] Goldman *Labor and Employment Law in the United States* 37.

[2129] National Labor Relations Board v Jones & Laughlin Steel Corporation 301 US 1 (1937).

[2130] Hardin et al *Developing Labor Law I* 30 state as follows, in this regard:

> "[T]he Court rejected the argument of the critics of the Wagner Act and held the Act constitutional. Concluding that the Commerce Clause issue was pivotal, the Court adopted a more liberal definition of the commerce power than it had accepted in its earlier opinions … The constitutional criterion, the Court said, was not the locus of the actions and conditions that Congress sought to regulate; rather, it was whether or not those actions and conditions were the *source* of burdens and obstructions to the free flow of commerce. In the light of the Wagner Act's purpose and effect, which relied on the statutory phrase "affecting commerce," the Act clearly fell within the scope of congressional powers" [their emphasis].

In demonstration of how far judicial acceptance of the role of organised labour had progressed, see AW Blumrosen "Group Interests in Labor Law" (1958) 13 *Rut L Rev* 432–484 440, citing Chief Justice Hughes [301 US 1 (1937) 42], who states:

> "Experience has abundantly demonstrated that the recognition of the right of employees to self-organization and to have representatives of their own choosing for the purpose of collective bargaining is often an essential condition of industrial peace. Refusal to confer and negotiate has been one of the most prolific causes of strife. This is such an out- standing fact in the history of labor disturbances that it is a proper subject of judicial notice and requires no citation of instances."

For background into earlier attempts to have the NLRA declared unconstitutional, including the so-called "Liberty League Brief" of 1935, see Hardin et al *Developing Labor Law I* 29.

[2131] Regarding the background to *Jones & Laughlin*, PJ Cihon & JO Castagnera *Employment & Labor Law* 7 ed (2011) 349 state as follows:

> "For more than a year after the passage of the NLRA, there was only limited activity by the NLRB. The Board set out to develop economic data supporting the findings of fact in Section 1 of the NLRA. It also sought the best possible case to take to the Supreme Court to settle the constitutionality issue. Finally, the NLRB brought five cases to the federal courts of appeals. The cases involved an interstate bus company, the Associated Press news service, and three manufacturing firms. The Board lost all three of the manufacturing company cases in the courts of appeals on the interstate commerce issue. All five of the cases were taken to the Supreme Court and were heard by the Court in February 1937. The NLRB developed its arguments in the *Jones & Laughlin Steel* case, one of the manufacturing cases, almost entirely on the inter-state commerce issue. That case became the crucial litigation in the test of the NLRA's constitutionality" [their emphasis].

Twomey *Labor & Employment* 68 states as follows in regard to the five "test" cases brought before the Supreme Court by the NLRB:

> "On the same day that the Supreme Court rendered the *Jones & Laughlin* decision … four companion cases were simultaneously handed down, all of which upheld the constitutionality and coverage of the [NLRA] Act. Thus, in one fell swoop, manufacturing, textiles, transport, and

Part of the reason for the judgment, arguably influenced by broader societal influences[2132] and the focus of the NLRA (on the protection of workers/organised labour at the apparent expense of employers), arose from the pervasive belief that the underlying cause for labour strife was the inability of workers to collectivise and thereby compel employers to negotiate.[2133] The passing of the NLRA was the manifestation of the view that organised labour had a central role to play in labour market stability through the collective representation of America's workers.[2134] However, this is not to suggest *Jones & Laughlin* signalled the end of the "bitter struggle over the passage of the Wagner Act".[2135] On the contrary, "it simply took a different form".[2136] The nature of this opposition[2137] will become apparent from the discussion to follow in chapter 8.

The initial effect of the NLRA – seen against its legal and broader societal background – is well encapsulated by Gross:

> "The Wagner Act established the most democratic procedure in United States labor history for the participation of workers in the determination of their wages, hours, and working conditions. The Wagner Act was not neutral; the law declared it to be the policy of the United States to encourage the practice and procedure of collective bargaining and to protect workers… This was a fundamental

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newspapers were included in the employer coverage" [footnotes omitted].

[2132] That being said, see Parrish (1984) *Wash L Rev* 728-735 for a discussion around the "battle" between the Presidency and the Supreme Court, in light of the New Deal and the view that the Executive was increasingly overstepping its powers – and in particular, Parrish (1984) *Wash L Rev* 731, where is said: "In the face of FDR's landslide reelection victory and the introduction of his plan to reorganize the federal judiciary, the Court reversed its doctrinal gears once again". However, see Parrish (1984) *Wash L Rev* 737-738 for the great political cost that Roosevelt was to pay for his ill-fated attempt at passing the Judicial Reform Act (in 1937).

[2133] Hardin et al *Developing Labor Law I* 28 state:

> "But Congress' narrow vision could not have been fairly criticized at the time, for in 1935 it was generally believed that the shortcomings of federal labor law arose primarily from the inability of employees to join together into units having sufficient economic leverage to bargain with employers."

[2134] Cox (1951) *Ind LJ* 319, 323 states:

> "The philosophy behind the labor legislation of the nineteen thirties was deeply rooted in the disappointing experience of half a century of legal intervention into industrial conflicts ... Hence Congress turned the policy of relying for the adjustment of industrial conflicts upon negotiation between employers and labor organizations strong enough to bargain effectively on behalf of employees. Judicial intervention into strikes, boycotts or picketing was prohibited partly because it did nothing to resolve the underlying problems."

See further Hartley (1982) *Cath U L Rev* 44.

[2135] Cohen & Cohen (1948) *ILRR* 648.

[2136] 648. See further Raskin (1986) *Stan L Rev* 948-949.

[2137] See for instance Hartley (1982) *Cath U L Rev* 46, for a brief overview.

change in public policy, particularly in regard to the role of government regulation of labor relations. The Act promised a protected opportunity for workers through power-sharing to participate in making the decisions that affect their workplace lives. What was then called industrial democracy was to replace employers' unilateral determination of matters affecting wages, hours, and working conditions. The Wagner Act had the potential to bring about a major redistribution of power from the powerful to the powerless at United States workplaces covered by the statute."[2138]

7 4 Conclusion

The discussion in this chapter, focused as it was on the historical development of the regulation of trade unions in America from inception to assimilation, brings a number of points to light that inform the remainder of this study.

The initial prohibition and proscription of unions in America through the use of criminal law already shows a similarity with Britain. In fact, the discussion showed that US courts were influenced by certain of the key decisions taken in Britain (and discussed in chapter 4 above). Furthermore, the fact that the complete failure of the NTUA 1886 stemmed primarily from organised labour's increasing distrust of state judicial intervention – only to have those fears confirmed by the outcome of the British *Taff Vale* judgment – again demonstrates the initial similarity between the experience of the USA and Britain in the area of trade union regulation.

Consideration of the Sherman Act (1890) provides insight into the developing strategies of employers in America in their opposition to organised labour. Despite the fact that this Act was promulgated to curb anti-competitive conduct of mega-corporations, its use (to great effect – in conjunction with a willing federal judiciary) against unions as combinations/conspiracies in restraint of trade illustrates the challenges faced by the fledgeling trade union movement. The "strikebreaking art" of American employers and their willingness to make use of external agencies specifically focused on this, underlines the extent of the adversarial nature of labour relations at the time. This was a battle that American unions continued to lose well into the first decades of the twentieth century.

However, the discussion also showed the turning point – as borne out by the events in the immediate aftermath of the Sherman Act (the Pullman strikes) as the first indication of the increasing awareness amongst American workers of the value to be

[2138] JA Gross "Worker Rights as Human Rights: Wagner Act Values and Moral Choices" (2001) 4 *U Pa J Lab Emp L* 479 4801-4481.

had in broad-based trade unions (as opposed to the former, more strictly delineated, craft-based unions).

Against the backdrop of these developments and use of injunctions by employers, the Supreme Court decision in *Danbury Hatters* decision serves as an example of a federal judicial system still unwilling to see beyond the unincorporated status of labour unions (this only changed in 1922). In comparison, Britain saw the (first) Trade Union Act afford recognition to trade unions as legal entities in 1871 and the "golden-formula" of union liability protection introduced by the Trade Union Act of 1906 (driven through Parliament largely as a result of a new Labour Party formed in reaction to the earlier *Taff Vale* decision of 1901). Already by 1913, as discussed in chapter 4 above, unions in Britain were described as "an estate of the nation".[2139]

The Clayton (1914) Act is, in the first instance, evidence of trade unions turning to political lobbying to effect legislative change. However, instead of freeing unions from the effect of the Sherman Act's injunctions instituted readily by employers and granted with equal willingness by the courts, the levels of injunctions actually increased. Thus, again in comparison to Britain, when American unions turned to legislation for protection, the desired statutory immunities were not forthcoming. This was not necessarily through purposeful intent of the legislation, but rather due to the fact that the courts continued to interpret the poorly worded legislation in such a manner that saw the protections afforded employers continue.

The *Coronado* decision in 1922 finally saw the Supreme Court consider trade unions as entities separate from the members, premised as it was on the size of the union in question operating as a corporation. However, this decision must be viewed against the backdrop of the First World War. Similar to Britain, the war resulted in significant recognition afforded to unions to ensure assistance in the war effort. *Unlike* Britain, and upon the conclusion of the war, organised labour was "out-organised" by the concerted efforts of employers and employer associations to systematically undo the gains acquired by the union movement during the war. Furthermore, unions remained under attack from the effective use of injunctions, which played a significant role in their inability to muster collective bargaining momentum (which in turn impacted negatively on their growth). The ebb and flow during this period were not so much the swing between judicial interference and legislative amelioration, but rather the

[2139] See § 4 3 8 above.

continued struggle between the adversarial forces of employers and organised labour.

But the above also raises a significant point regarding the relationship between workers, as members, their unions – and to an increasing extent – (civil) society at large: The combined effect of the approach of the courts (in continuing to allow the large-scale use of injunctions) with that of the Great Depression, meant that when the legislative opportunity presented itself trade unions were suitably placed to utilise the changes in the American socio-economic environment to their benefit. In this sense, American trade union history serves as the inverse of the example offered by Britain (where powerful labour drove governmental and judicial anti-union responses at different times). In the USA powerful employers (supported by the courts) and a largely uninvolved government, juxtaposed against a floundering organised labour sector and clear inequality in labour bargaining power, saw the crystallisation of pro-union legislation. This furthermore speaks to the point made in the conclusion to chapter 6 of a labour relations system seeking equilibrium, but this time (other than in Britain) to offset the immense, unbalanced power of employers in relation to trade union members and their unions. The direct result of this process was the enactment of the LDA followed by the NLRA.

The LDA serves as evidence of the first direct sign of involvement by the federal government in the sphere of labour relations in the USA (in 1932). The LDA laid the initial foundation for all future labour law in America, premised on the notion of a worker's freedom of association and providing for the designation of their representatives of their own choosing', free from interference by employers and, as importantly, free from judicial interference by means of injunctions. Mention must be made of the short-lived NIRA and the virtually instantaneous effect it had on trade union membership and trade union density. Membership and density exploded, which gave the necessary momentum to the American organised labour movement to secure their future over the following decades.

The NLRA, despite being promulgated in 1935, still serves as the core statutory instrument of the collective labour system in America. It introduced the three pillars based on which industrial relations largely is still practiced to this day in the USA. Firstly, it introduced the concept of unfair labour practice. Provision for employer unfair labour practices, illustrated a firm shift in favour of labour, trade unions and workers. Secondly, the Act also established the NLRB, which plays a significant role in the collective bargaining processes of the American industrial relations system to this day.

Thirdly, and of critical importance (also for the remaining chapters discussing the USA) is that the NLRA instilled one of the foundational principles of collective bargaining and organised labour in US workplaces, namely that of exclusive representation by trade unions in bargaining units, a principle providing for the majority of workers in those units designating their representative (that is, trade union) as the *sole* representative for *all* those workers.

Perhaps the most significant point to be made about the NLRA is that it was the Supreme Court, against all expectations of employers, that confirmed its constitutional validity and prevented is NIRA-like demise. Thus, employers were dealt a judicial blow that would see them spend the following decades in a concerted and coordinated fashion lobbying for its amendment. The process was to play a fundamental role in shaping the future of the American industrial relations system. The “bitter struggle was simply to take on a different form”.

The discussion in this chapter serves as an alternative example (to Britain) of the progression from the initial prohibition/prescription of trade unions to their eventual acknowledgement/assimilation. While the American experience also demonstrates the ebb and flow of this process, the role players involved in this process in the USA were markedly different than in Britain. At the same time, this process was focused on the establishment and recognition of trade unions, not so much on their internal functioning and accountability to their members. As chapters 8 and 9 will show, once recognised, attention did turn to these matters.

CHAPTER 8: THE HISTORICAL DEVELOPMENT OF TRADE UNION REGULATION IN THE USA – THE PERIOD OF READJUSTMENT

> "In an industrial economy with large scale production and a chronic scarcity of jobs, the individual's power to bargain for himself became an empty fiction ... The worker retained full freedom – to submit or starve. The advent of unions has not changed the inescapable character of modern industry that an individual's economic life is governed by forces beyond himself. Collective bargaining does not alter the amount of power which is exercised over the individual. It only shifts its source."[2140]

8 1 Introduction

This chapter, in line with the hypothesis informing this research and the approach in chapter 5 above (relating to Britain), will examine the historical development of trade union regulation in the USA during the phase of readjustment towards unions. As is evident from chapter 5 above, the readjustment phase follows chronologically on the earlier periods of prohibition and assimilation. As far as the USA is concerned, the initial phase, ranging from prohibition to assimilation was described in chapter 7. This chapter will address both legislative developments during the readjustment phase in the USA as well as the (parallel) establishment and development of common law principles regulating trade unions and their accountability. While it is difficult to assign development of common law principles to any specific phase of the development of trade union regulation (in general, and specifically in the USA), the discussion of the common law is included in this chapter (dealing with readjustment) to align this chapter with the chapter (5) that discussed the same phase of development in Britain. Admittedly, however, development of the common law in the USA did not, as was the case in Britain, form such a clearly identifiable part of the readjustment phase nor served as such a clearly identifiable trigger for legislative intervention.

As far as legislative readjustment is concerned, the chapter will commence with an examination of the immediate effects of the promulgation of the NLRA on trade unions and their members. This will include a discussion of the underlying changes to America's largest union federation and how this was to affect unions' structural ideologies (along with its broader impact on the organised labour movement).

The impact of the Second World War serves as backdrop to an examination of events leading to promulgation of the Labour Management Relations Act in 1947. The

[2140] CW Summers "Union Powers and Workers' Rights" (1951) 49 *Mich L Rev* 805 816.

effect of this statute, which fundamentally amended the NLRA, will be considered. The chapter will show that the LMRA served as the first indication of the readjustment of the approach to trade unions (after their assimilation). The discussion will also examine prominent Supreme Court decisions that interpreted the LMRA.

In turn, these events provide the background for an introductory discussion of the increased awareness and importance of union democracy in the USA, borne from a growing awareness of trade union corruption and malfeasance. This, in turn, requires consideration of the final major labour relations enactment of the readjustment phase, namely the Labor-Management Reporting and Disclosure Act of 1959. The key provisions of the Act, impacting as they do on the internal administration of unions will be examined, as will its reception and effect. The chapter will then provide a brief examination of the further development of American collective labour relations' concepts, primarily through the courts, before concluding with a discussion of the development of the common law principles applicable to trade unions and their accountability.

It is important to note that the core legislation applicable to trade unions and their accountability in the USA has not changed for 60 years. In one sense, this means that the readjustment phase also, at least to some extent, encompasses the current regulation of trade unions and militates against a separate chapter considering such current regulation (as was done, in relation to Britain, in chapter 6). Even so, the current regulation of trade unions and their accountability in the USA is discussed separately in chapter 9 below. While this chapter introduces the provisions of the most important pieces of legislation and their immediate interpretation, chapter 9 will discuss their application and subsequent interpretation in the context of the development of the broader industrial relations system between 1960 and 2019. It will also provide the opportunity for a discussion of the institutions responsible for enforcing the legislation (as was done in case of Britain in chapter 6) and to focus on one unique aspect of the American legal system – the so-called "duty of fair representation".

Broadly, the chapter will show that, following the initial resistance to, and subsequent acceptance of, trade unions (as discussed in chapter 7 above), the American organised labour movement was to enjoy a relatively short reprieve from the pressures they were previously subjected to. Key to this was the movement itself seeing factional in-fighting between its most prominent federations, as well as an

inability to constitute a coherent and concerted political counterpoint to that of employers and their lobbyists (which led to significant legislative amendments).

This ultimately led to statutory involvement in the internal administration of unions in an apparent attempt to rid organised labour of corruption and to shield members against their own unions' officialdom. As such, the chapter will show how legislation was adopted, legislation which was to serve as a template for that which was attempted in Britain through the IRA 1971 (discussed above in chapter 5). Underlying all of these events (and markedly different to the catalysts which drove developments in Britain), was the continuing adversarial relationship between organised labour and employers – with employers largely directly responsible for this readjustment in the approach to trade unions.

8 2 The position post-*Wagner*

The discussion in chapter 7 concluded with the promulgation of the NLRA and confirmation of its constitutional validity by the Supreme Court. Given the focus of this chapter on the readjustment to trade unions, it is necessary to first consider the impact of the NLRA on organised labour and its membership numbers as background and introduction to what was to transpire over the course of the next few decades.

The foundation provided by the NLRA in 1935 coupled with further labour-related statutes[2141] adopted during the last years of the 1930s,[2142] caused trade unions to

[2141] Mention can for instance be made of the passing of the Fair Labor Standards Act ("FLSA"), in 1938 [52 Stat. 1060 (1938), 29 U.S.C. § 203 (2018)]. Whilst not speaking directly to organised labour, it nonetheless served as further evidence of the increasingly important role of workers within the American labour relations system, and was central to the introduction of fundamental basic worker rights, including *inter alia* minimum wages, payment of overtime and the proscription of child labour. See in this regard, T Perez "The Fair Labor Standards Act at Seventy-Seven: Still 'Far-Reaching, Far-Sighted'" (2015) 30 *ABA J L Emp L* 299 299-304, for a succinct overview of the Act.

[2142] Regarding additional factors that contributed to this growth, AA Sloane & F Witney *Labor Relations* 5 ed (1985) 109 state:

> "The modern labor movement in this country can, in fact, justifiably be said to have begun in 1935. Union membership totals boomed after that year, due in no small measure to the Wagner Act and its state counterparts. Other influences, of course, also played a role: the improving economic climate, the generally liberal sentiments of the times, the keen competition between the American Federation of Labor and the newly born Committee for the Industrial Organization, and dynamic union leadership. And it is equally true that prior legislation – not only Norris La Guardia but also the ill-fated National Industrial Recovery Act of 1933 – had paved the way for the new era and had independently led to much spontaneous union organization before 1935."

grow through the 1940s and into the 1950s.[2143] However, this period also showed a transformation in the approach of trade unions themselves.

The change from craft to industrial unionism,[2144] along with the associated shift from exclusive to inclusive union membership (which meant trade unions disregarded the particular trade skill of a worker to determine eligibility), was instigated by several member-unions of the AFL[2145] in the formation of the Committee for Industrial Organization in 1935.[2146] The focus on industrial unionism was not welcomed by the existing leadership of the AFL and proved to be the genesis of several controversies in the federation (and the broader American organised union movement). This resulted in the formation of the Congress of Industrial Organizations ("CIO") in November of 1938.[2147] As stated by Fischer:

> "With the advent of the CIO came the invasion of unionism into what had previously been virtually forbidden territory: the major mass production industries".[2148]

[2143] See CL Tomlins "The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism" (1985) 39 *ILRR* 19 252, who states:

> "Having doubled their membership in the four years after 1933, the unions more than doubled it again, expanding from 5,780,100 in 1937 to 14,594,700 in 1947. This raised the fraction of the non-farm labor force organized into trade unions from 11.8 percent in 1933 to 17.9 percent in 1937 and 31.8 percent in 1947, a level which was sustained into the second half of the 1950s".

[2144] Says CB Craver "The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization" (2005) 23 Hof Lab & Emp LJ 69 76 in this regard, in light of the promulgation of the NLRA:

> "The passage of this critical statute coincided with an important structural change taking place within the American labor movement. This change was designed to enhance the capacity of unions to organize workers in the emerging mass production industries. Traditional craft unions were still limiting membership to highly skilled artisans, which made it difficult to organize the skilled, semiskilled, and unskilled individuals employed by manufacturing firms".

[2145] The movement was primarily led by John Lewis, President of the UMW – see Craver (2005) *Hof Lab & Emp LJ* 77 for the list of the other unions involved.

[2146] AL Goldman *Labor and Employment Law in the United States* (1996) 31 explains that the member-unions were responsible for the establishment of a task force (the Committee for Industrial Organization) within the structure of the AFL Federation. Its purpose was to investigate the potential benefits of such a change in policy, which would entail focusing instead on membership for all workers employed by either the same employer, or even all who work in the same industry. With this being said, Craver (2005) *Hof Lab & Emp LJ* 77 explains how the Committee moved very swiftly form investigating the feasibility of industrial unionism within the AFL, to actively organising along those lines – and this despite the outright objections of the AFL's leadership.

[2147] See Craver (2005) *Hof Lab & Emp LJ* 77-78 and J Seidman "Efforts toward Merger: 1935-1955" (1955) 9 *ILRR* 353 356 who provide details of the internal strife associated with the formation of the CIO.

[2148] As stated by B Fischer "Collective Bargaining and Fifty Years of the CIO" (1985) 36 *Lab LJ* 659 659.

America's largest trade union federation had effectively split – with the ten unions responsible for the original Committee/CIO expelled from the ranks of the AFL.[2149] Even so, the corner had been turned with regard to industrial (as opposed to craft) unionism. Increasingly, several of the major unions within the AFL started to lobby for members in the different industrial sectors, given the clear initial successes of the CIO.[2150]

However, a further factor influencing the growth of trade unionism was the Second World War (1939-1945). While the USA only entered the war in December of 1941, the increase in industrial production as a result of the (preceding) wartime trade, together with supply needs following the USA's military involvement, drove significant expansion in the (increasingly) union-organised industries. World War 2 was not without its labour innovations, adjustments to labour policy[2151] and controversies,[2152]

[2149] See AH Raskin "AFL-CIO: A Confederation or Federation? Which Road for the Future?" (1963) 350 *Ann Am Acad Pol Soc Sci* 36 38.

[2150] See I Bernstein "The Historical Significance of the CIO" (1985) 36 *Lab LJ* 654 655. Seidman (1955) *ILRR* 356-357 states in this regard:

> "As steel, automobile, rubber, electrical, textile, transport, and other workers poured into industrial unions, CIO strength shot upward at a rate unprecedented in American labor history. From a start of about one million in the fall of 1935, the CIO rose to a claimed membership of almost three and three-quarter millions in October 1937… Stung by the CIO's spectacular success and fearful of remaining the smaller of the federations, the AFL launched vigorous organizing efforts of its own, striving to match the momentum that the CIO had achieved and to counter its appeal to unorganized factory workers with the federation's version of industrial unionism".

[2151] These included *inter alia* the introduction of the War Labor Board, the efforts surrounding "wage freezing" to combat inflation (see J Gay "Freezing of Labor in Wartime" (1943) 18 *Wash L Rev & St BJ* 137–161, 143-153), and the seizure of "businesses or activities stalled by labor controversies [that is, disputes] and to operate them for the protection of the community's health and safety" by the Federal Government – see L Teller "Government Seizure in Labor Disputes" (1947) 60 *Harv L Rev* 1017 1017.

[2152] See in particular Teller (1947) *Harv L Rev* 1024-1026, on the promulgation of the War Labor Disputes Act [57 Stat. 163 (1943), 50 U.S.C. § 1501 (Supp. 1946)], which was enacted largely in response to the UMW's refusal to accede to the widely accepted "wartime no-strike pledge" [at 1024], and rejection of any War Labor Board orders. See further Gay (1943) *Wash L Rev & St BJ* 154-161 for an overview of the bituminous coal miners' strike – "the country's greatest wartime strike crisis" [at 154]. P Taft "Rank-and-File Unrest in Historical Perspective" in J Seidman (ed) *Trade Union Government and Collective Bargaining: Some Critical Issues* (1970) 80 95 makes the point that the coal strikes were however "not a reflection of widespread discontent, but tactical maneuvers by the leadership of the miners to gain permanent concessions". See JR Steelman "The Work of the United States Conciliation Service in Wartime Labor Disputes" (1942) 9 *L & Cont Prob* 462 468 and HA Millis & EC Brown *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* 1 ed (1950) 298 regarding the "pledge" by American labour during the War.

but, overall, organised labour emerged in 1945 in a significantly stronger position.[2153]

Trade union growth resulted in a rapid escalation of union power, which, ironically, led to unfavourable consequences for American trade unions. While the mid-1930s saw the beginning of organised labour becoming an established fixture, the growing strength and influence of unions in the decade thereafter,[2154] together with a dramatic increase in strikes,[2155] led to growing demands from industry leaders and government for the legislative restriction of union powers.[2156] In this regard, Nelson states:

> "This employee-employer tension resulted in a 'series of devastating strikes in ... 1945 and 1946 with almost 5 million workers involved in 4,630 work stoppages.' This strife was accompanied by consolidation within union organizations: '[p]ower shifted from the shop floor, where it had [been for a] half-century, to the union bureaucracy, and ... authority was concentrated in the hands of the top-executives.' These trends spawned the public impression that union officials 'had become irresponsible and union power should be curbed.' The national media portrayed the strikes 'as the

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[2153] SM Kaynard "Deregulation and Labor Law in the United States" (1988) 6 *Hof Lab LJ* 1 7 states as follows:

> "By 1939, the AFL membership exceeded 8 million; by the end of World War II, labor membership increased to more than 14 million, 35.8 % of the nonagricultural employment, and there were collective bargaining agreements in most of the important industries and companies in the United States".

P Hardin et al (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 1* 4 ed (2001) 35 state in turn:

> "Between 1935 and 1947 unions had flourished in the climate provided by the [Norris-LaGuardia Act] and the Wagner Act. Union membership had expanded from 3 million to 15 million people. In some industries … four-fifths of the employees were working under collective bargaining agreements" [footnotes omitted].

[2154] See Hardin et al *Developing Labor Law I* 35 who state:

> "This growing image of union power led one commentator to conclude in 1947 that the labor movement in the United States was the 'largest, the most powerful, and the most aggressive that the world has ever seen; and the strongest unions… are the most powerful private economic organizations in the country'. Moreover, organised labor was not at all hesitant to exercise this burgeoning power to obtain the benefits it wanted" [footnotes omitted].

[2155] One of the reasons offered for the increase in strikes was the determination of the unions to sustain wages at 1940s wartime levels, despite the economic slump that followed shortly after the conclusion of the war. Employers simply could not afford to pay such high prices and accordingly resisted. Organised labour's reply was to resort to large-scale industrial action.

[2156] PW Cane Jr "Parent Union Liability for Strikes in Breach of Contract" (1979) 67 *Calif L Rev* 1028 1029 states:

> "In 1946, a wave of strikes had shut down steel mills, coal mines, auto assembly plants, electrical products plants, seaports, and utilities. Congress and the public believed that unions were too powerful, that strikes had become too frequent, and that employers therefore did not receive the industrial peace for which they had bargained". See RA Gorman & MW Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 2 ed (2004) 495, who speak of "the loss of over 100 million man-days of work" in "the first year of peacetime".

> natural result of unions gaining too much power under the Wagner Act' ... The public 'believed [they] were being denied [important goods] by the greed of union workers [and] the unfettered power of union leaders.'"[2157]

This confirmed that "the Wagner Act had swung the pendulum in industrial relations too far to the union side."[2158] While union membership was to triple between 1933 and 1941,[2159] with both the AFL and CIO making significant gains in membership in the newly industrialised sectors of the American economy, the resistance to organised labour remained ever-present.[2160] The War merely provided a temporary respite from efforts to undo the effect of the NLRA.[2161]

Once again, significant changes to the relationship between organised labour, employers and the state, were on the horizon. During this period, the Supreme Court further developed what had been notionally laid down in *Coronado*, by finding that a trade "union's property was distinct from that of its members".[2162] This significant ruling

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[2157] See MJ Nelson "Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement" (2000) 8 *Geo Mason L Rev* 527 530, [footnotes omitted]. However, compare the strike-related figures from Nelson, with that of Taft "Rank-and-File" in *Union Government* 96, who cites the "4,985 strikes in 1946, involving 1,460,000 workers, establish[ing] a record" in terms of industrial action, up and to that point.

[2158] As per AH Raskin "Elysium Lost: The Wagner Act at Fifty" (1986) 38 *Stan L Rev* 945–955 949.

[2159] RC Hartley "The Framework of Democracy in Union Government" (1982) 32 *Cath U L Rev* 13 45.

[2160] As stated by Hartley (1982) *Cath U L Rev* 46: "[T]he NLRB was denounced as 'public enemy number one'; pressure was mounted to restrict the Board's jurisdiction; and a litigation strategy to contain both unions and the scope of protections afforded by the Wagner Act was initiated." See further B Aaron "A Half-Century of Labor Relations Law and Collective Bargaining" (1998) 13 *Lab Law* 551 553 who explains:

> "[T]here was no abatement in the opposition to [the Wagner Act] by most of the country's employers; they simply changed their tactics, testing the limits of the unfair labor practice provisions in the law, slowing the union certification process by attacking the Labor Board determinations of appropriate bargaining units, and challenging the Board's decisions and orders in the courts. Over the intervening years employers' countervailing tactics have become more sophisticated, but their adamantine opposition to unions and to collective bargaining has remained".

[2161] Says Raskin (1986) *Stan L Rev* 949:

> "The nearest thing to a honeymoon for the NLRB came in World War II, when this country's position as the 'Arsenal of Democracy' brought voluntary acquiescence by both the AFL and the CIO to a nostrike pledge, and employers joined in acceptance of the notion that uninterrupted war production must take priority over their firm conviction that the Labor Board was a covert arm of trade unionism, conspiring to fatten the roster of union dues-payers at home while American troops fought to defend democracy overseas".

[2162] This is in terms of *United States v White* 322 US 694 (1944). See Anonymous "Unions as Juridical Persons" (1957) 66 *Yale LJ* 712 724-725 for a brief discussion of the case, against the background of the transition between the Wagner Act/NLRA of the mid-1930s, and what was to follow shortly after the War (as discussed at § 8 2 below).

echoed the House of Lords in *Taff Vale* (albeit some 43 years later) and was part of the gradual broadening of the legal theory surrounding organised labour and the forms it takes.[2163] There also was a series of decisions about one important aspect of the union-member relationship (the duty of fair representation), discussed in more detail below.[2164] But it was to be a new statute – promulgated despite a veto by President Truman[2165] – that provided the clearest indicator of the opposition to organised labour and the search for a readjustment in the balance of power in the American industrial relations system.[2166]

8 3 The readjustment towards trade unions in the USA

8 3 1 The Taft-Hartley Act (LMRA) of 1947

8 3 1 1 The background to the LMRA

The enactment of the Labor Management Relations Act of 1947 ("LMRA"),[2167] known as the Taft-Hartley Act,[2168] was to result in a "[swing in] the balance of power from labor towards business".[2169] Hartley states as follows:

[2163] See the discussion surrounding *Coronado* at § 7 3 2 above.

[2164] See the discussion surrounding a union's duty of fair representation, to follow the analysis of the LMRDA at § 8 4 2 – and then again at § 9 4, below).

[2165] See Millis & Brown *National Labor Policy* 388-392.

[2166] Regarding the contributing factors behind the impending change, B Aaron "Amending the Taft-Hartley Act: A Decade of Frustration" (1958) 11 *ILRR* 327 327 speaks of the aforementioned "strike wave of 1946", "profound postwar disillusionment", along with the "the resurgence of the Republican party after fifteen years of New Deal domination, the relatively acute inflation, and the growing concern over the enhanced power and prestige of organized labour, which was heightened by the asserted penetration of the Communist party into key sections of the labor movement".

[2167] Ch. 120, 61 Stat. 136 (1947), (29 U.S.C. §§ 141 et seq.) (2017).

[2168] Partly named after its key promoter, the ever-present Senator Robert Taft. In the words of Aaron (1958) *ILRR* 327, Taft was responsible for "piloting the new legislation through the Senate and the Conference Committee, culminating in the overriding in both houses of a presidential veto, [which was] a remarkable example of his political skill".

[2169] L Lenz Jr "Carbon Fuel Company v United Mine Workers of America – An Unfortunate Departure from Vigorous Enforcement of the Proarbitration Policy of the Labor Management Relations Act" (1980) 6 *J Corp L* 195 198. See further W Green "The Taft-Hartley Act: A Critical View" (1951) 274 *Ann Am Acad Pol Soc Sci* 200 201, who describes the actions of the American Congress in promulgating the LMRA as amounting to "a complete reversal of national labor policy". It must be mentioned that the critical nature of this article is hardly surprising given that the author, William Green, was president of the AFL at the time. Compare this article with the more measured evaluation of the LMRA by J Cohen & L Cohen "The National Labor Relations Board in Retrospect" (1948) 1 *ILRR* 648 648-649, and Sloane & Witney *Labor Relations* 109 – who describe the new period in public policy heralded by the Act as being one of "*modified encouragement coupled with regulation*" [their emphasis].

> "Taft-Hartley is significant both for what it did and did not do. On the one hand, it can be seen as a reaffirmation of the national commitment to the practice and procedure of collective bargaining. There was no turning back from the view that the individual had a right to a voice at the work-place, and the best hope to secure that voice remained with the organized group. Yet the emphasis changed from protecting the group, to placing controls on it in the interest of dissenting individuals, other groups, and society-at-large.[2170] Accordingly, the federal government, for the first time through legislation, assumed responsibility for protecting individuals and small groups of workers from the larger group by regulating union government at the workplace and within unions."[2171]

Adoption of the Act has been described as "a watershed event in the relationship between government and labor".[2172] However, it is also true that the LMRA did not alter key components of the existing labour relations legislation: the "basic protections – the rights to organize, to bargain collectively, and to strike – were largely untouched".[2173]

8 3 1 2 The purpose of the LMRA

The LMRA amended the NLRA of 1935[2174] and sought to implement its two primary underlying purposes, namely to limit the number of industrial disputes and to place "employers on an equal footing with unions in bargaining and labor relations procedure[s]".[2175] A further important consequence of the Act was the extension of the

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[2170] See for instance Cohen & Cohen (1948) *ILRR* 648, who raise a similar point in quoting the chairman of the NLRB, as stating "the spotlight was *now* on the *employers* of the nation as it had been on union labor in the last decade" [their emphasis].

[2171] Hartley (1982) *Cath U L Rev* 46-47.

[2172] AJ Mikva "The Changing Role of the Wagner Act in the American Labor Movement" (1986) 38 *Stan L Rev* 1123 1127.

[2173] Mikva (1986) *Stan L Rev* 1127.

[2174] It must be noted that the LMRA incorporated the original provisions of the 1935 NLRA, virtually verbatim, whilst adding significant portions thereto in specific sections. In highlighting the degree of change from the NLRA (Wagner) to the LMRA (Taft-Hartley), A Cox "Some Aspects of the Labor Management Relations Act, 1947: II. The Negotiation and Administration of Collective Agreements" (1947b) 61 *Harv L Rev* 274 312-313 states as follows:

> "Despite its great importance, the Wagner Act dealt with only a narrow segment of industrial relations. The Act prevented employers from interfering in the organizational activities of employees and labor unions ... Beyond this the Wagner Act left collective bargaining to develop freely without government intervention. The Taft-Hartley Act restricts the conduct of employers, employees, and labor unions, both before and after the establishment of collective bargaining relationships."

[2175] M Weinstein *Summary of American Law* (1988) 329. Regarding the scope of the act, Anonymous "Labor Relations – Decisions of Courts – Administrative Agencies" (1949) 1 *Lab LJ* 133 133 states:

> "The Taft-Hartley Act is unquestionably the most intricate and the most comprehensive piece of

duty to bargain to trade unions[2176] (as initiated by the Wagner Act).[2177] Structural changes were also made to the NLRB[2178] in terms of size and internal functioning,[2179] but in particular, that of the role of the General Counsel.[2180] In addition, in terms of section 202, an "independent agency" in the form of the Federal Mediation and Conciliation Service ("FMCS") was brought into existence to replace the former Conciliation Service of the Department of Labor (as discussed above).[2181]

Of concern to both houses of the US Congress at the time were several problem

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labor legislation ever enacted by the Congress of the United States. Its provisions encompass the whole process of collective bargaining and the circumstances under which bargaining takes place; its range extends from the first hint of organizational activity to the actual selection of a bargaining representative, then onward through every phase of the bargaining process, up to the complexities of picketing-as-free-speech and the intricacies of secondary strikes and boycotts. So broad is the scope of the act that the number of issues which may arise under it is almost unlimited; indeed, in the majority of cases more than a single question is decided, while in some cases twenty, thirty or more questions are settled."

With this being said, the Act only spans 27 pages, contains 48 sections (albeit with detailed subsections), and is composed of five "titles", addressing respectively the amendment to the NLRA (Title I), conciliation of labour disputes (Title II), "suits by and against labor organizations" (Title III), the creation of a joint committee to report on labor issues (Title IV) and an additional definitions' section (Title V).

[2176] As per s 201 of the LMRA.

[2177] R Abelow "Management experience under the Taft-Hartley Act" (1958) 11 *ILRR* 360 367 states that the collective bargaining rights and duties were also expanded to include unions. For example, in terms of the LMRA, subs 8(b)(3) declares that it is an unfair labour practice for a union to refuse to bargain with an employer if the labour association is the duly authorised bargaining agent of the employees – formerly, under the NLRA, this duty only applied to employers.

[2178] This in terms of ss 3-6 of the LMRA.

[2179] Millis & Brown *National Labor Policy* 402-403. See further A Cox "Some Aspects of the Labor Management Relations Act, 1947" (1947b) 61 *Harv L Rev* 1 4-8.

[2180] This in terms of subs 3(d) LMRA. The function of the General Counsel, *vis-à-vis* the NLRB, is discussed in more detail in the appropriate section to follow at § 9 3 4 1 below. But suffice it to say at this point, the General Counsel was to "exercise general supervision over all attorneys employed by the Board", and "shall have final authority" in regards to s 10 investigations and complaints, "and in respect of the prosecutions of such complaints before the Board" [subs 3(d)]. Section 10 LMRA pertains to the "[p]revention of unfair labor practices" (discussed at § 8 3 1 6 below). See in this regard I Klaus "The Taft-Hartley Experiment in Separation of NLRB Functions" 11 *ILRR* 371 378-381, regarding the final implementation within the LMRA, and Klaus *ILRR* 375-378, regarding the original form that the procedural revision was to take during the earlier stages of the Bill and congressional debates.

[2181] This in terms of subs 202(d) LMRA. The FMCS is discussed in more detail at § 9 3 4 3 below, but suffice it at this point to state that the functions of the Service are regulated in terms of s 203 LMRA, and has at its core the task of "assist[ing] parties to labor disputes in industries affecting commerce to settle such disputes through conciliation and mediation" [as per subs 203(a)].

areas of the industrial relations system, including[2182] secondary boycotts,[2183] closed-shop[2184] and union-shop agreements[2185] and, finally, union democracy.

Considering the latter, the Act introduced several measures that sought to regulate the *internal* affairs of trade unions. In the words of Taft:

> "[T]he Taft-Hartley Act, as it was finally written, represented a new departure in federal labor legislation. It not only sought to protect labor's right to organize and to bargain collectively, as had the Wagner Act, but for the first time an attempt was made to impose standards of operation upon certain aspects of internal union management."[2186]

Given the goal of this study, the extent to which the LMRA attempted to regulate

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[2182] See Hardin et al *Developing Labor Law I* 36-37, for a succinct discussion of these key areas dealt with in terms of the Act.

[2183] Abelow (1958) *ILRR* 364 who states: "One of the most serious labor problems facing management prior to the Taft-Hartley Act was the secondary boycott situation. In Taft-Hartley, Congress set out to protect the public and neutral and primary employers from the effect of secondary boycotts." As explained by Abelow (1958) *ILRR* 364, subs 8(b)(4)(A)-(D) accordingly made it an unfair labour practice for unions to participate or implement a secondary boycott, in other words – requesting members of other employers to strike in support of the initial strike action, thereby bringing additional external pressure to bear on the employer involved in the initial strike action, was deemed punishable.

[2184] This in terms of s 7 read with subs 8(3) LMRA. Says WH Parr Jr "The Taft-Hartley Law" (1947) 23 *Ind LJ* 12–33 16 in this regard, that s 7 added the right for employees to refrain from all the rights associated with collective bargaining, unions representation and the like (as outlined in s 7), except to the extent that such might be "affected by later union-shop or maintenance of membership clauses" as per subs 8(3)(a). The latter, in turn, makes it an unfair *employer* labour practice "to discriminate in regard to hire or terms of employment so as to encourage membership in any labor organization" [at 16]. This new requirement, "entirely change[d] the complexion of the old [Wagner] Act" [at 16], in that – as explained by Parr Jr (1947) *Ind LJ* 16-17 – several new conditions were now included within subs 8(a)(3) that effectively outlawed closed-shop agreements in America. See further Hartley (1982) *Cath U L Rev* 47.

[2185] Says RA Taft "The Taft-Hartley Act: A Favorable View" (1951) 274 *Ann Am Acad Pol Soc Sci* 195 196 [the Senator himself penned this article], in describing a "union-shop agreement":

> "The Taft-Hartley Act prohibits the closed shop contract and permits only a limited type of union contract. If the majority of employees to be affected voice their desire for a union shop contract in an election conducted by the [NLRB] and the employer agrees, such a contract may be entered into. It may require all existing employees to join the union within thirty days, and all new employees to join within a like period following the date of their employment. The union remains free to deny membership to new employees or expel its members for any reason it pleases, but if membership is denied or terminated for any reason other than non-payment of dues or initiation fees, the employer may not be required to discharge [the employee]. If the union wishes to have the compulsory membership feature of the contract enforced as to any given employee, it must offer him membership on the same terms and conditions generally applicable to other members. This limited type of compulsory membership contract is a complete answer to the "free rider" argument so often advanced to support the need for a closed shop."

[2186] P Taft "Internal Affairs of Unions and the Taft-Hartley Act" (1958) 11 *ILRR* 352 352.

internal union affairs is of obvious importance and will be explored in greater detail below. But this alone is not the only noteworthy aspect of the Act relating to trade union accountability. The extension of unfair labour practices to include acts by unions (as a second area of consideration),[2187] the attempted harmonisation of the procedural formalities surrounding legal action against unions (as the third), and the NLRB's powers to prevent such unfair labour practices (as the fourth) are equally significant and will also be explored in greater detail below.

8 3 1 3 Internal union democracy provisions

The key provision that sought to introduce internal democratic regulation of unions was section 9 of the LMRA, entitled "Representatives and Elections". This section signified "the first recognition of public policy that some internal regulation of the union as an institution was in the public interest – and as a harbinger of more such regulation to come."[2188] The section is divided into 27 subsections with its core found in subsection 9(f), which commences with the following words:

> "No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization ... no petition ... shall be entertained, and no complaint shall be issued ... unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its *constitution and bylaws and a report*, in such form as the Secretary may prescribe".[2189]

What this report required is set out in detail in subsections 9(f)(A)(1) to (6) and 9(f)(B)(1) to (2) and includes the following: (i) The union name and address;[2190] (ii) The names, compensation and allowances of the union's "three principal officers" and any

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[2187] In this sense, Hartley (1982) *Cath U L Rev* 48 draws the connection between the LMRA, and those in opposition to the findings of the 1915/1916 Commission of Industrial Relations (at § 7 3 3 above), by stating as follows:

> "Few in 1947 saw Taft-Hartley as the first installment of the prediction advanced thirty years earlier by the dissenters on the Commission of Industrial Relations of 1916 that 'if the State recognized any particular union by requiring the employer to recognize it, the State must necessarily guarantee the union to the extent that it must strip it of any abuses that it may practice'."

[2188] Sloane & Witney *Labor Relations* 124. The LMRA was thereby the first American statute that attempted such internal oversight.

[2189] Subsections 9(f)-9(f)(A) of the LMRA [my emphasis].

[2190] As per subs 9(f)(A)(1).

other “officers or agents whose aggregate compensation and allowances” exceeded the prescribed amount;[2191] (iii) The manner in which these officers were elected or appointed;[2192] (iv) What the membership costs/fees are to join the union;[2193] and, (v) What the regular (monthly) dues or fees for continued membership are.[2194] In terms of subsection 9(f)(A)(6)(a) to (l) a “detailed statement of, or reference to provisions of its constitution and bylaws” that demonstrated the union procedures to be followed in a series of specific instances, had to be contained in the report.[2195] These procedures, in turn, included the “qualification for or restrictions on membership”,[2196] the elections of union “officers or stewards”,[2197] the calling of regular or special meetings,[2198] the “imposition of fines”,[2199] the “ratification of contract terms”,[2200] the “authorization for strikes”,[2201] the auditing of “union financial transactions”,[2202] what was done when members were expelled from the union, and the “grounds therefor”.[2203]

Subsection 9(f)(B), in turn, requires filing an additional financial report with the Secretary of Labor, containing, *inter alia*, all of “its receipts of any kind and the sources of such receipts”,[2204] the union’s “total assets and liabilities as of the end of its last fiscal year”[2205] and confirmation that copies of this financial report was “furnished to all members of such” union.[2206] Subsection 9(g) introduced the obligation that unions update all of the aforementioned on an annual basis and provide copies to its members. Failure to do this meant the following: “no labor organization shall be eligible for certification under this section as the representatives of any employees”, while no petitions shall be entertained or complaints investigated unless the union or its

[2191] Subsection 9(f)(A)(2).
[2192] Subsection 9(f)(A)(3).
[2193] Subsection 9(f)(A)(4).
[2194] Subsection 9(f)(A)(5).
[2195] Subsection 9(f)(A)(6).
[2196] Subsection 9(f)(A)(6)(a).
[2197] Subsection 9(f)(A)(6)(b).
[2198] Subsection 9(f)(A)(6)(c).
[2199] Subsection 9(f)(A)(6)(e).
[2200] Subsection 9(f)(A)(6)(g).
[2201] Subsection 9(f)(A)(6)(h).
[2202] Subsection 9(f)(A)(6)(j).
[2203] Subsection 9(f)(A)(6)(l).
[2204] Subsection 9(f)(B)(1)(a).
[2205] Subsection 9(f)(B)(1)(b).
[2206] Subsection 9(f)(B)(2).

affiliates have complied with these requirements.[2207] The LMRA also showed concern with broader issues: subsection 9(h) of the LMRA requires that officers of a trade union seeking assistance from and use of the NLRB and related industrial relations' dispute-resolution mechanisms, file an affidavit confirming that they are "not a member of the Communist Party" and do not believe in or teach of the overthrow of the US Government by force or any illegal or unconstitutional methods.[2208]

Sloane and Witney state that "aside from what unionists vocally termed a nuisance value",[2209] the value of these provisions lay more in their acknowledgement that the internal affairs of unions were worthy of consideration given the increasing power of organised labour. However, to reason that the provisions brought about wholesale changes within American unions would be an overstatement. As explained by Taft:

> "Much of this kind of information has always been available in the international and local constitutions of unions. Filing requirements do not of themselves change the policies of unions in these matters. The mere depositing of such information without any checks as to whether it is accurate or, even more significantly, whether it meets any standards can have no effect upon the conduct of the organizations of labor … The requirements governing expenditures were evidently designed to check abuses in the use of funds by compelling the local and national unions to give a record of their expenditure. [The fact that no] standards were set up, however … demonstrate[s] that the mere requirement for financial reporting is not sufficient in itself to protect members and their unions from dishonest officers…[2210] It can be said in summary that as far as the financial practices of unions are concerned, the Taft-Hartley law has had virtually no effect".[2211]

Therefore, while the LMRA was the first attempt at the regulation of internal union affairs, it did no more than introduce a procedural element of transparency.[2212] This

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[2207] It must be mentioned at this point, that the foregoing sections were to see significant amendments/alterations in 1959 – as discussed at § 8 3 3 below.

[2208] Sloane & Witney *Labor Relations* 124 confirm that the requirement for the affidavit was repealed in 1959, given it being "judged to be ineffective".

[2209] 124.

[2210] Taft (1958) *ILRR* 356 however does make the point, given the context of the article being written at the time of senator committee hearings during 1957-1958 in consideration of union corruption (§ 8 3 3 2 below), that "[i]t should also be noted that the evidence so far adduced does not indicate that many unions are afflicted with embezzling officers".

[2211] 355-356.

[2212] B Aaron & MI Komaroff "Statutory Regulation of Internal Union Affairs – I" (1949a) 44 *Ill L Rev* 425 446 state as follows in this regard:

> "The enactment of the Taft-Hartley amendments to the National Labor Relations Act marked the first Congressional attempt to regulate the internal affairs of labor unions. *Actually, the legislative controls embodied in the amendments which relate to union administration are, without exception, indirect;*

transparency was still devoid of actual enforcement or obligations on the part of organised labour to meet specific requirements or "standards".[2213] Secondly, while the LMRA speaks to greater regulation of unions, it has to be viewed against the overall purpose of the LMRA. The additional obligations on unions amounted to recognition of their increased importance, as well as recognition of the importance of collective bargaining as the mainstay of the American labour relations system, primarily engaged in through suitably appointed trade unions as representatives of workers in appropriate bargaining units. Furthermore, the increased regulation was frequently offset by gains for organised labour in other areas of the Act.[2214]

In short, the LMRA was the first step in the readjustment process and serves as an important marker on the road to the significant developments regarding internal procedures of unions and the complete readjustment that were still twelve years into the future. However, as indicated above, these procedural requirements were but one of the four key aspects of the LMRA. The second important aspect of the Act was its unfair labour practices provisions.

8 3 1 4 Unfair (union) labour practices

The LMRA essentially shifted the emphasis of federal labour law in the US[2215] by introducing a more balanced approach to federal protection of employees and their

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it is theoretically possible for a union to function effectively without complying with a single one of them" [my emphasis, footnotes omitted].

[2213] Says Taft (1958) *ILRR* 358-359 in this regard:

"It would appear, in view of their history of ignoring public criticisms made against such practices, that these unions would be deterred only by regulations or administrative orders and not by mere public disclosure".

[2214] See for instance WB Gould "Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971" (1972) 81 *Yale LJ* 1421 1422-1423, who argues convincingly that the LMRA formalised the supremacy of federal law (in terms of the Act) over that of individual State laws – which "removed the potential for large awards of compensatory and punitive damages against unions". Furthermore, as will be apparent from the discussion to follow surrounding section 301 of the LMRA at § 8 3 1 5 below, despite unions being the apparent target, in the words of Gould (1972) *Yale LJ* 1423: "When it comes to the enforcement of collective agreements, it is the unions, supposedly the objects of discipline for their irresponsible failure to abide by contractual obligations, which have been plaintiffs in the overwhelming majority of court proceedings and grievants in most of the arbitrations".

[2215] Millis & Brown *National Labor Policy* 395 state in this regard:

"The 1947 law extended federal control, to some extent over management, and much more over union rights and activities, as well as to some degree over internal affairs and political activities of labor organizations".

right to unionise. This was done by introducing restrictions on some types of trade union activity (essentially *union* unfair labour practices)[2216] while simultaneously guaranteeing individual worker rights.[2217] At the outset, it is important to note the unfair labour practices of the LMRA focused on *unions* and were inserted after the unfair labour practices that targeted *employers* (originally introduced by the NLRA in 1935).[2218] The latter was largely left unchanged (there were only minor adjustments). This focus of the LMRA is described by Sloane and Witney, who write:

> "Taft-Hartley, unlike the Wagner Act, *recognized a need to protect the rights of individual employees against labor organizations*. It explicitly amended the 1935 legislation to give a majority of the employees the right to refrain from, as well as engage in, collective bargaining activities. It also dealt more directly with the question of individual freedoms … [by means of the] outlawing of the closed shop, union coercion, union-caused employer discrimination against employees, and excessive union fees".[2219]

The introduction of *union* unfair labour practices ("ULPs") was to play an important role in restoring equilibrium in the American labour relations system.[2220] The first noteworthy section, subsection 8(b)(1)(A), deems it a ULP for a union, or its agents,[2221] to "restrain or coerce" employees in the exercise of their rights as provided for in terms of section 7 of the Act, but with the proviso that the union still maintained its right to "prescribe its own rules with respect to the acquisition or retention of membership".[2222] Subsection 8(b)(2), in turn, declares it a ULP for a union to attempt to cause an

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[2216] These unfair labour practices (to be of application to unions), were included in subs 8(b) of the LMRA. See Sloane & Witney *Labor Relations* 110-115 for a more detailed discussion of these provisions.

[2217] Hardin et al *Developing Labor Law I* 39-40.

[2218] These remained in subs 8(a) LMRA, and were discussed in more detail in the NLRA section above, at § 7 3 11 2.

[2219] Sloane & Witney *Labor Relations* 114, [my emphasis].

[2220] Cox (1947b) *Harv L Rev* 44 states as follows in this regard:

> "The Government, instead of aiding one side, now stands in the center. The change of policy appears to be based on the belief that labor unions have become so strong that legislative action was required to redress the balance of power in the collective bargaining process."

[2221] What is to be understood by the word "agents", is discussed below is this section.

[2222] Subsection 8(b)(1)(A) LMRA. Regarding the focus of this subsection, in seeing the NLRB initially interpret its application to be limited to "'union tactics involving violence, intimidation and repression or threats thereof', and only where such misconduct occurred in the context of union organizing drives" – before including the "statutory duty of fair representation in 1962" – see WW Osborne et al (eds) *Labor Union Law and Regulation* (2003) 68-69.

employer to discriminate against an employee on the grounds covered in subsection 8(a)(3),[2223] while subsection 8(b)(3) echoes that of the employers' ULP (at subsection 8(a)(5)) by making it a ULP if a trade union "refuse[s] to bargain collectively" with the employer in question. Lastly, and before considering subsection 8(b)(4) in more detail, subsections 8(b)(5) to (6) make it a union ULP to respectively charge "excessive or discriminatory" membership-joining fees and to cause an employer to "pay or deliver … any money or other thing of value" for union services which were not performed.

Subsection 8(b)(4) contains four subsections[2224] and introduces a union ULP for engaging in, or inducing or encouraging the employees of any employer to engage in a strike or similar industrial action[2225] where the objective of the industrial action is to, *inter alia*: (i) Force or require "any employer or self-employed person" to join a union (or employer organisation) or force or require an employer to cease using, handling, selling and the like, any products of – or cease doing business with – any other person;[2226] (ii) Force or compel recognition of or bargaining with a union by "any other" employer;[2227] (iii) Force or compel recognition of or bargaining with a particular union despite *another* union having been certified as the representative;[2228] or finally, (iv) Force or require any employer "to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization or in another trade, craft, or class".[2229] The effect of the abovementioned was to effectively classify "secondary boycotts and jurisdictional strikes as unfair labor practices".[2230]

In considering these trade union ULPs, Millis and Brown make the point that "by no means were all the restraints and bans against unions new, for many of them had

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[2223] This pertains to discrimination by the employer in regards to the hiring of workers, or a term/condition of employment seeking to encourage/discourage union membership. Writing in 2013, DP Twomey *Labor & Employment Law: Text and Cases* 15 ed (2013) 202 states that these "first two union unfair labour practices" – as contained in subss 8(b)(1)-(2) – "currently generate more than 80 percent of union unfair labor practices charges filed with the NLRB".

[2224] Subsection 8(b)(4)(A)-(D) LMRA.

[2225] Duly described in terms of subs 8(b)(4).

[2226] Subsection 8(b)(4)(A).

[2227] Subsection 8(b)(4)(B).

[2228] Subsection 8(b)(4)(C).

[2229] Subsection 8(b)(4)(D).

[2230] Anonymous "Diversity Jurisdiction Under Section 303 (b) of the Taft-Hartley Act" (1950) 59 *Yale LJ* 575 576.

been found in court-made and state laws".[2231] This, however, was not to suggest that the union ULPs were inconsequential. In this regard, a key question was the meaning of the term "agents"[2232] and how this would impact on the liability of unions in terms of subsection 8(b). Put differently, while the "question of whether the specific acts performed were actually authorized or subsequently ratified" would not be "controlling" in making a determination of whether or not the act of the agent can be imputed to the union,[2233] "agency" still had to be proved.[2234] In the words of Millis and Brown, "[a] clear intent was to replace the rule of the Norris-La Guardia Act under which unions and their officers and members were not held responsible or liable for unlawful acts of officers, members, or agents, except upon clear proof of actual participation in or authorization of such acts".[2235] Parr makes the point that this introduced an equal liability for agents on both labour and employers.[2236] The LDA (Norris-LaGuardia) had been frequently used by organised labour "as a shield for its agents".[2237] The LMRA ushered in a far-broader scope for potential liability.[2238]

The ULPs were (at least ostensibly) aimed at the viable operation of the collective

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[2231] Millis & Brown *National Labor Policy* 441.

[2232] As per subs 8(b)(1)(A) LMRA.

[2233] Millis & Brown *National Labor Policy* 443-444, citing subs 2(13) LMRA – with the full text reading as follows:

> "In determining whether any person is acting as an 'agent' of another person so as to make other such person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling."

The same wording is to be found in subs 301(e) – discussed at § 8 3 1 5 below.

[2234] 444.

[2235] 444.

[2236] This being in the sense that "in determining responsibility for the acts of agents under [the LMRA], both labor and management will be governed by the same rules" – Parr Jr (1947) *Ind LJ* 19.

[2237] 19.

[2238] In effect, the term "agent" was to be construed within the "ordinary rules of agency" – which as reasoned by Parr Jr (1947) *Ind LJ* 18 – essentially turned on the question of the "general scope of employment" of the agent involved. Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 286 state further:

> "In short, the usual principles of agency law apply in determining union liability for unfair labor practices – as well as employer liability under section 8(a) – which liability can be based not only upon proof of actual authority but also of implied authority or apparent authority. Thus a union will be liable for the actions of others when the union is shown to have 'instigated, supported, ratified or encouraged' the activity".

Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 286 n1 are quoting from the judgment of *Feather v Mine Workers* 711 F.2d 530 (3d Cir. 1983), which in turn relied on one of the key cases in this area of American law – that of the Supreme Court decision in *Carbon Fuel Co. v United Mine Workers of America* 444 US 212 (1979) – as discussed at § 8 4 3 below in more detai.

bargaining system in the USA. One key aspect of this approach is demonstrated by subsection 8(b)(3) and its requirement – mirroring that of the employer's obligations – regarding the duty to bargain.[2239]

The enforcement of these ULPs was to (mostly) fall within the domain of the NLRB[2240] and is discussed in further detail in the appropriate sections that follow below. For now, attention must be paid to the third aspect of the LMRA that requires consideration, namely clarification of the circumstances under which unions could see legal action taken against them.

8 3 1 5 Sections 301 and 303 of the LMRA (legal action against unions)

In a 1955 Note on the application of section 301 of the LMRA the following is stated:

> "The purpose of Title III of the Labor-Management Relations Act is to equalize the legal responsibilities of labor organizations and employers, and liability for breach of collective bargaining agreements was one of the more important areas in which the Eightieth Congress considered legislation necessary to accomplish this purpose. The inequality which the legislation sought to remedy *stemmed from the difficulty of subjecting unions to suit. Unions, as unincorporated associations, cannot be sued at common law as an entity, and their assets were difficult to reach*. Consequently, the legislators felt that union breaches were 'acts for which, under existing laws, unions… often escape liability but for which all other citizens must answer in court.'[2241] Although in most states the inequality does not exist because the common-law rules are not applied, the desired mutuality of responsibility could not be fully attained 'until all jurisdictions, and particularly the Federal Government, authorized actions against labor unions as legal entities.'[2242] The statutory plan to achieve the ultimate objective of mutual enforcement of the collective bargaining agreements is embodied in Section 301."[2243]

[2239] With this being said, Millis & Brown *National Labor Policy* 448 point out, writing as they were shortly after the promulgation of the LMRA, that "it has been management far more than unions which has balked at and attempted to thwart collective bargaining" – with this in obvious contrast to unions, which "are organized primarily *for the purpose of* collective bargaining" [my emphasis]. Subsection 8(d) in turn outlines what is to be understood by the term "[t]o bargain collectively". In terms of the wording of the subsection, this involves, *inter alia*, "the performance of the mutual obligation of the employer and the representative of the employee to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder".

[2240] This being s 10 LMRA, entitled "Prevention of Unfair Labor Practices".

[2241] As per 902 n2, citing from the House of Representatives' Report record.

[2242] As per 902 n4, citing from the House of Representatives' Report record.

[2243] Anonymous "Interpretation and Application of Section 301(a) of the Labor-Management Relations Act" (1955) 103 *U Pa L Rev* 902 902, [footnotes omitted; my emphasis].

Section 301 therefore serves as the centrepiece of the "harmonisation puzzle"[2244] – it functions as the *statutory* means through which the initial steps taken in *Coronado*[2245] were brought to fruition in the USA.

Section 301 is found under the heading "Title III – Suits by and against labor organizations". Subsection 301(a) states that "[s]uits for violations of contracts between an employer and a labor organization … may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties".[2246] Subsection 301(b) provides that "[a]ny labor organizations whose activities affect commerce as defined in [the LMRA]… shall be bound by the acts of its agents" and that "[a]ny such labor organization may sue or be sued as an entity and in behalf of the employees it represents in the courts of the United States".[2247] Furthermore, any monetary judgments taken against such union in a Federal District Court "shall be enforceable only against such organization as an entity and against its assets, and shall not be

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[2244] See further § 8 3 1 2 above. See further Cox (1947) *Harv L Rev* 304.

[2245] See § 7 3 2 above.

[2246] Subsection 301(a) LMRA. These latter concepts – surrounding the amount in "controversy", and without regard to the American state "citizenship" of the parties, speaks directly to the establishment of federal district court jurisdiction over the parties in the suit – and is discussed in greater detail at § 9 3 1 below. But suffice it at this point to quote EB Miller & WS Ryza "Suits By and Against Labor Organizations Under the NLRA" (1955) *U Ill L F* 101–126 102, who state:

> "Until the advent of Section 301, attempts to sue in the federal courts proved equally unsuccessful. The required diversity of citizenship was almost impossible to establish, and, under Rule 17(b) of the Rules of Civil Procedure for the District Courts of the United States, in the absence of a federal question, lack of capacity to sue or be sued in a state court also applied in the federal courts … To overcome all of these barriers, Section 301 permits suits to be brought in any district court of the United States, abolishing for this purpose the customary requirements of jurisdictional amount and diversity of citizenship" [footnotes omitted].

[2247] Subsection 301(b) LMRA. Regarding strike action, according to Lenz Jr (1980) *J Corp L* 201-202, not only did s 301 increase union responsibility (by virtue of the possibility of union liability for damages) in the event of industrial action being undertaken by its members after the commencement of a collectively bargained agreement, but the onus on the employer, required to prove union involvement in the unlawful strike, was significantly reduced from what it had been in terms of the LDA (Norris-LaGuardia Act). Millis & Brown *National Labor Policy* 444 explain the development of this approach, which was to see the requirement of "clear proof of actual participation in or authorization of such acts" before liability being found on the part of the union, being replaced with "the ordinary rules of agency" [at 444] in the LMRA. Not unexpectedly, Millis & Brown *National Labor Policy* 444 opine further that (written as it was, shortly after the promulgation of the Act) that "[m]any [NLRB] decisions would be required to make clear the extent to which unions might be held responsible for the unlawful actions of members, as well as of officers, official organizers, stewards, or others, who were unquestionably acting as authorized agents of the union".

enforceable against any individual member or his assets".[2248] Subsection 301(c) outlines the relevant jurisdictional requirements of the courts,[2249] while subsection 301(d) provides that the service of any "summons, subpoena or other legal process … upon an officer or agent of a labor organization, in his capacity as such, shall constitute service" upon the union in question. Lastly, subsection 301(e) echoes the wording of the ULPs in section 8 (as discussed above),[2250] in outlining what is to be understood by the term "agent" and that "specific acts performed were actually authorized or subsequently ratifying shall not be controlling".[2251]

Of particular importance is the wording of subsection 301(a), the section to apply in "suits for violation of contracts between an employer and a labor organization".[2252] The effect hereof, despite questions surrounding the original intent of Congress,[2253] was to move collective bargaining agreements ("CBAs") between employers and unions as representatives of their members and the broader workforce into the realm of enforceable contracts in federal law.[2254] The LMRA placed the CBA, concluded between an employer and the designated union through its officials serving as representatives of all the employees in a designated bargaining unit, at the centre of

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[2248] Subsection 301(b) LMRA.

[2249] The subsection focuses on the location of the union's "principal office" (in terms of subs 301(c)(1) LMRA) or where the "duly authorized officers or agents are engaged in representing or acting for employee members" (this in terms of subs 301(c)(2) LMRA).

[2250] As per subs 8(b)(1)(A).

[2251] Says Lenz Jr (1980) *J Corp L* 201-202 in this regard:

> "[S]ection 301(e) removes the rigid burden of proof required under the Norris-LaGuardia Act. Under the [LDA], to establish an agency relationship between the union and its local members it was necessary to show that the union had actually authorized, participated in, or ratified the actions of the workers after the union had actual knowledge thereof. Section 301(e) provides that an employer need not show that the union actually authorized or ratified the workers' actions in order to show agency. Under the LMRA, therefore, to establish agency between the national and local unions an employer is required to show only that the national union in some way encouraged or condoned the actions of its local members" [footnotes omitted].

[2252] Subsection 301(a) LMRA.

[2253] See CO Gregory "The Law of the Collective Agreement" (1959) 57 *Mich L Rev* 635 637-638.

[2254] Gregory (1959) *Mich L Rev* 635, in speaking to the position prior to the enactment of the LMRA, states:

> "The Wagner Act contained no law governing collective agreements. Congress left their enforcement to the state and federal courts under the miserable body of common-law rules".

BS Feldacker *Labor Guide to Labor Law* 4 ed (1999) 381 accordingly speaks of the "uniformity" that was introduced by subs 301(a) of the LMRA, as the means to "[allow] for either the employer or trade union to enforce these contracts, thereby resulting in collective bargaining agreements being recognised as a federally enforceable agreement".

America's collective labour system. In this regard, writing shortly after the LMRA's introduction, Cox makes the prescient statement:

> "Section 301 provides that suits for breach of a collective bargaining agreement, negotiated by a union representing employees in an industry affecting commerce, may be maintained against the union as an entity in the federal courts. Although it is probable that the sole effect of these provisions is to recognize labor unions as juristic personalities, and to confer jurisdiction on the federal courts in contract actions to which a union is a party, *nevertheless there is room for the argument that Section 301 makes collective bargaining agreements negotiated under the NLRA enforceable as a matter of substantive law*."[2255]

Cox was proved correct in 1957.[2256] From the outset, it was clear that the introduction of the section was problematic.[2257] It was up to the courts to interpret the extent to which section 301 was to provide jurisdiction over labour cases.[2258] This was done by creating substantive federal law, inasmuch as the subject matter at hand was to be viewed as falling within the "'arising under … the Laws of the United States' clause of Article III of the [American] Constitution".[2259] The approach of the courts in

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[2255] Cox (1947b) *Harv L Rev* 283, [my emphasis]. See further Millis & Brown *National Labor Policy* 502, who state succinctly in reference hereto as follows:

> "Taft-Hartley thus for the first time brought suability for violation of agreements under federal law and the jurisdiction of the [federal] district courts. The result of this and also many of the state laws is in striking contrast to what obtained a little less than a generation ago."

[2256] See further his article a decade after his original comments, exploring the underlying contractual theories of CBA's in light of the (as it was then) recent developments in the American courts – A Cox "The Legal Nature of Collective Bargaining Agreements" (1958) 57 *Mich L Rev* 1-36.

[2257] As stated by Anonymous (1955) *U Pa L Rev* 903: "The enactment of this section presents difficulties which Congress did not foresee and which almost five years of judicial construction have failed to settle. Conflicting theories and different results are found in almost every situation in which the section is relied upon."

[2258] As explained by Miller & Ryza (1955) *U Ill L F* 103:

> "Section 301 was intended to and did broaden the jurisdiction of the district courts of the United States, and thus in a sense of the entire federal judicial system. The right of Congress to regulate collective bargaining matters in industries affecting commerce has long been established. And substantive rights which are created in the course of such regulation may, no doubt, be enforced through the federal judiciary. But where Congress creates no substantive rights, and merely opens the doors of the federal courts for the enforcement of common-law rights, a serious constitutional question arises" [footnotes omitted].

[2259] Anonymous (1955) *U Pa L Rev* 903. In this regard, as per Anonymous (1955) *U Pa L Rev* 903 n9, the applicable text of Constitution (§2) reads as follows: "The judicial power shall extend to all cases … arising under … the laws of the United States…". § 2 is the primary section of the American Constitution upon which the federal jurisdiction is founded, as discussed in more detail in the appropriate section in § 9 3 1 below. The crux of section 301's constitutionality therefore turned, in the words of Miller & Ryza (1955) U Ill L F 103, on whether or not the section "violate[s] these constitutional limitations by extending

the years following the enactment of the LMRA is discussed in greater detail at § 8 3 1 7 below. At the same time, while section 301 was clearly significant, it is also clear that its effect has to be seen in conjunction with section 303 of the Act.

Section 303, found under the heading "Boycotts and other unlawful combinations" in Title III, consists of subsections (a) and (b). Curiously, prior to being amended in 1959 (as discussed below),[2260] subsection 303(a) replicated the wording of the earlier ULP subsection 8(b)(4) (as discussed above),[2261] which outlines the extent to which it shall be unlawful for unions to induce a strike or secondary boycott on the grounds outlined in subsection 303(a)(1) to (4) or subsection 8(b)(4)(A)-(D). However, the interrelatedness of section 303 to that of 301 becomes apparent when the wording of subsection 303(b) is considered:

> "Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States subject to the limitations and provisions of section 301 hereof without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit."[2262]

Gorman and Finkin describe the effect of section 303 to be that "Congress declared that the conduct outlawed in section 8(b)(4) shall be subject to redress not only by the [NLR]Board but also as a federal tort in the federal and state courts", therefore a "dual remedial scheme [being] clearly designed as a deterrent to the kinds of union conduct – secondary boycotts, recognition and work-assignment strikes – which Congress found most objectionable".[2263] Thus, the breach of collective agreements, certain

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the jurisdiction of the federal courts to cases other than those 'arising under… the laws of the United States'?"

[2260] The 1959 amendment (discussed in more detail at 8 3 3 below) saw s 704 introduce changes both to subs 8(b)(4) and subs 303(a), by having the latter simply refer back to the former, whilst confirming that is shall be unlawful for "any labor organization to engage in any activity or conduct defined as an unfair labor practice" in subs 8(b)(4) LMRA.

[2261] Miller & Ryza (1955) *U Ill L F* 117.

[2262] Subsection 303(b) LMRA.

[2263] Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 388-389. See further Anonymous "Notes: Sections 8(b)(4) and 303: Independent Remedies Against Union Practices under the Taft-Hartley Act" (1952) 61 *Yale LJ* 746 745-746 where is stated:

> "Section 303 gives a private party injured by such conduct the right to sue the union for damages in federal or state courts, and to obtain a jury trial on the issue. Section 8(b)(4), by classifying these activities as unfair labor practices, empowers the NLRB to issue cease and desist orders against violators, to assign work in jurisdictional disputes, and to seek temporary injunctions against the

types of strike action,[2264] and secondary boycotts were brought into sharp focus through sections 301 and 303 of the LMRA.[2265] Parr states that "[u]nder Title III of the Act appear those provisions long prayed for by employers and their counsel on the theory that they would guarantee union responsibility".[2266] But perhaps the words of Millis and Brown best summarise the true intention of sections 301 and 303:

> "The damage-suit provisions in Taft-Hartley were presumably designed largely to equalize the law of labor as it applies to employer and union, to promote the sense of responsibility in management and unions, and to provide a method of obtaining compensation for economic losses resulting from unlawful behavior or breach of contract."[2267]

This in mind, the section to follow focuses on how the LMRA provided for the NLRB's enforcement of the key obligations contained in its various provisions.

8 3 1 6 Sections 10, 11 and 12 – prevention and investigatory powers of the NLRB

The three final provisions in the LMRA that deserve specific mention are sections 10 to 12, contained under the headings "Prevention of Unfair Labor Practices"[2268] and "Investigatory Powers".[2269]

In terms of subsection 10(a), the NLRB "is empowered … to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. The procedure is initiated by means of subsection 10(b),[2270] while subsection 10(c)

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proscribed practices in the federal courts" [footnotes omitted].

[2264] In addition to what is discussed below in regards to strike action, brief mention can be made of the "National Emergencies" provision that was introduced by ss 206-210 LMRA, which provides special powers to the US President (and related procedures) to act [as per s 208] against threatened or actual strike action which might "imperil the national health or safety" [as per s 206].

[2265] In the words of Miller & Ryza (1955) *U Ill L F* 101:

> "Utilizing the restraining effect which potential liability in private party litigation might exert in the field of labor relations, Congress enacted Sections 301 and 303 of the Taft-Hartley Act in an attempt to bring about greater stability in labor contracts and to deter labor unions from engaging in certain unfair labor practices involving secondary boycotts and jurisdictional disputes. Both sections permit private parties to resort to the courts in specified cases without regard to the administrative processes of the National Labor Relations Board."

[2266] Parr Jr (1947) *Ind LJ* 31.

[2267] Millis & Brown *National Labor Policy* 496.

[2268] Section 10 LMRA.

[2269] Sections 11-12 LMRA.

[2270] In terms of subs 10(b) LMRA, which is discussed in more detail at § 9 3 4 1 below, once it is "charged

states that if – "upon the preponderance of the testimony" – the NLRB is of the opinion that the ULPs were committed, then it shall "state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay,[2271] as will effectuate the policies of this Act".[2272] Subsection 10(e) in turn regulates the enforcement of NLRB orders, makes provision for "appropriate temporary relief or restraining order" under the auspices of the relevant District Courts,[2273] defines the NLRB's jurisdiction and provides that the "findings of the Board with respect to questions of fact by substantial evidence on the record considered as a whole shall be conclusive".[2274] Subsection 10(f) provides for review of the final orders of the NLRB in "any circuit court of appeals of the United States in the circuit where the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business".

Section 11 outlines the extent of the powers afforded the NLRB to fulfil its mandate in terms of sections 9 and 10 of the LMRA. In this regard, subsection 11(1) states that the NLRB "shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or

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that any person" has either engaged/is engaging in an UFL, the NLRB is then to issue a complaint with details of the hearing upon the person being complained of – with such being limited to ULP incidences occurring within a six month time frame prior to when the filing took place. The respondent is in turn afforded "the right to file an answer to the original or amended complaint and to appear in person or otherwise and give testimony at the place and time fixed in the complaint".

[2271] It must be noted that in terms of subs 10(c) LMRA, the back pay "may be required of the employer *or labor organization*, as the case may be, responsible for the discrimination suffered by [the complainant]" [my emphasis]. Furthermore, in terms of subs 10, "[n]o order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any back pay, if such individual *was suspended or discharged for cause*" [my emphasis]. Being discharged for (good) "cause" in the context of the American labour relations system, amounts to a summary dismissal as a result of the most serious and "clear-cut" offences – and the employee's actions in this regard usually sees them forego any entitlements pertaining their dismissal, aside from any outstanding wages. See in this regard HD Laube "The Right of an Employee Discharged for Cause" (1935) 20 *Minn L Rev* 597 597-616 for a discussion of the origins of the approach in American labor law, as well as examples from various State jurisdictions pertaining to, *inter alia*, incompetence, disobedience, insolence, theft and drunkenness.

[2272] Subsection 10(c) of the LMRA.

[2273] Read with subss 10(h) and 10(j).

[2274] Subsection 10(e).

proceeded against that relates to any matter under investigation or in question".[2275] Furthermore, the Board has the right to "forthwith issue to such party subp[o]enas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application".[2276] Subsection 11(2) makes provision for contempt of court proceedings, in the event of non-compliance with the instructions of the NLRB. Subsections 11(3) to (6) outline further procedural aspects. Section 12 reads as follows:

> "Any person who shall wilfully resist, prevent, impede, or interfere with any member of the Board or any of its agents or agencies in the performance of duties pursuant to this Act shall be punished by a fine of not more than $5,000 or by imprisonment for not more than one year, or both."[2277]

Sections 10 to 12 of the LMRA empowers the NLRB to actively counter ULPs by means of investigation and the enforcement of its orders. While the role and functioning of the NLRB will be discussed in more detail at a later stage (given the fact that this was again shaped by legislative intervention a mere twelve years later), 1947 served as a pivotal year in the context of American unionism. The LMRA of that year, through its internal union democracy provisions, provision for union ULPs and sections 301 and 303 of the Act, was an important step in the legislative readjustment to trade unions. The impact of these provisions on the broader labour relations system – as well as their reception by workers, organised labour, employers and the broader American society – are understandably of interest to the overriding question of this study. It is to this aspect that the focus will now turn.

[2275] Subsection 11(1) of the LMRA.
[2276] Subsection 11(1). In addition, the subsection provides further that "[a]ny member of the Board … may administer oaths and affirmations, examine witnesses, and receive evidence".
[2277] Section 12.

8 3 1 7 The reception and effect of the LMRA

The immediate reception and impact[2278] of the LMRA, not surprisingly,[2279] led to efforts by organised labour to force the repeal[2280] of the LMRA.[2281] From the perspective of American unions[2282] the epithet "slave labor law" most accurately described the LMRA.[2283] However, many sources contain convincing arguments that the LMRA was not nearly as controversial or cataclysmic as suggested by its opponents.[2284] Nonetheless, the labour relations atmosphere in America immediately

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[2278] It must also be pointed out that any discussion surrounding the effect of the LMRA, is not necessarily to be limited to that which was to play out within the context of the American labour relations system. By this is meant simply that the impact of the LMRA was also felt further afield, specifically in the UK – as is apparent from the discussion of IRA 1971 in chapter 5 at § 5 2 4 above. Reference can accordingly again be made to the article of Gould (1972) *Yale LJ* 1421.

[2279] Hardin et al *Developing Labor Law I* 46.

[2280] Regarding organised labour's attempts at repeal, see for example Aaron (1958) *ILRR* 328-330.

[2281] The Bill became law on 22 August 1947 – Millis & Brown *National Labor Policy* 610.

[2282] See N Lichtenstein "Taft-Hartley: A Slave-Labor Law" (1998) 47 *Cath U L Rev* 763 766-767 for a succinct overview of the perception of the LMRA held by some of the key unionists.

[2283] Aaron (1998) *Lab Law* 554. It was not only organised labour that was opposed to the LMRA's promulgation. As per Hardin et al *Developing Labor Law I* 38-39, President Truman vetoed the Bill (subsequently overridden by Congress) and stated: "[The LMRA's] provisions would cause more strikes, not fewer… It contains seeds of discord which would plague this Nation for years to come". See further Millis & Brown *National Labor Policy* 390-392 for a succinct overview of the political processes surrounding Truman's veto, and its subsequent defeat. Millis & Brown *National Labor Policy* 659-664, writing as they did shortly after the introduction of the LMRA, for instance discuss the "unjustified interferences with collective bargaining and administration" and "unfair, discriminatory, and antiunion provisions" respectively, as introduced – in their view – by the LMRA. RL Hogler "The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions" (2005) 23 *Hof Lab & Emp LJ* 101 133 in turn describes the stinging criticism of the Taft-Hartley Act by none other than Senator Wagner himself:

> "Wagner presciently noted that the Taft-Hartley Act constituted a 'grand assault' on labor. In his words, '[t]his bill would turn the clock back in labor relations, not to conditions that existed before the National Labor Relations Act was adopted, but in many instances to those that had obtained more than a hundred years ago when labor had to fight for its right to organize'. Wagner went on to point out some of the most extreme defects of the law, characterizing it as 'a confused hodgepodge of wholesale rewriting of our labor law' that would invite 'another decade of extensive, costly, and exasperating court litigation to determine the full meaning and impact of the legislation'" [this being cited from Wagner's April 1947 written statement for the purposes of the Congressional Record, on the Taft-Hartley bill proposal].

[2284] See for instance CL Estlund "The Ossification of American Labor Law" (2002) 102 *Colum L Rev* 1527 1533 n24, and K Andrias "The New Labor Law" (2016) 126 *Yale LJ* 2 18 n71, with the former stating:

> "Contemporary labor historians disagree over the extent to which Taft-Hartley was a turning point or more of a codification and consolidation of preexisting legal restrictions" [with both authors referring back to Lichtenstein (1998) *Cath U L Rev* 763-765]. Aaron (1998) *Lab Law* 554 in turn, regarding the more contemporary position, states: "Over the last 50 years, the sense of urgency among labor

post-LMRA was anything but harmonious. Hardin et al explain that unions adopted the attitude that nothing short of the annulment of the LMRA, coupled with reinstatement of the Wagner Act, would suffice.[2285]

The unyielding view of the unions was widely criticised and deemed unrealistic given the context of post-war America[2286] and contributed in no small part to the continued and unaltered existence of the LMRA. A further contributing factor to the unchanged status of the Act was the commencement of the inter-union/union federation rivalry between the AFL and the CIO and their affiliates (with 1949 to 1952 marking the climax of this conflict). This in-fighting detracted from their focus on the statutory framework imposed on trade unions and their members.[2287] The conflict continued until 1955, when common ground was found and the two union federations merged to form the AFL-CIO.[2288] The unification of the AFL and CIO featured as a major turning point in the development of trade unionism in the USA,[2289] with the energy of the new federation instead directed at its core function of labour-relations

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partisans about repealing the Taft-Hartley Act has almost completely dissipated. The term 'Slave Labor Law' has long since fallen into disuse and is recalled only with embarrassment. Although organized labor still vigorously opposes [aspects of] the Act's restraints … it perceives the employment policies of employers, rather than existing labor legislation, as the greatest threat to its continued existence."

[2285] Hardin et al *Developing Labor Law I* 46.

[2286] 46-47. See further Aaron (1958) *ILRR* 330, who states of the approach by organised labour to repeal the LMRA:

"Their 'all or nothing' demands seemed arrogant and unreasonable, especially when contrasted with the deceptively conciliatory proposals of Taft to discuss and, if need be, amend or eliminate any provisions of the existing law that were demonstrably unworkable or prejudicial to labor's legitimate interests. Whatever slight hope there might have been for popular support of substantial revision of Taft-Hartley was shattered by the unions' intransigent position."

[2287] As explained by Goldman *Labor and Employment Law in the United States* 31, this struggle can be traced back to the mid-1930s, and the initial formation of the CIO (as discussed at § 8 2 above). Over the following years, the CIO proceeded to engender immense support from major industries that were formerly the domain of the AFL, an action that served to inflame a bitter rivalry between the industrially oriented CIO unions and the trade skills'-oriented AFL unions.

[2288] The eventual merger of both bodies brought about a new set of guidelines and rules of conduct with which to regulate inter-union disputes, with particular emphasis on preventing "competitive practices [such] as enticing members from each other to gain status as the recognized bargaining agent in units represented by another union" – Goldman *Labor and Employment Law in the United States* 31, 226-227. See in general MF Neufeld "Structure and Government of the AFL-CIO" (1956) *ILRR* 371, who provides an overview of the structure and history of both organisations, and the merged entity.

[2289] See Raskin (1963) *Ann Am Acad Pol Soc Sci* 36-45 for a contemporary (as it was then) account of the expected implications of the merger.

management.[2290]

8 3 2 The interplay between State and Federal labour law

As mentioned in the earlier discussion of sections 301 and 303 of the LMRA,[2291] it was to fall to the American courts to clarify the validity of these provisions, at least inasmuch as questions surrounding their constitutionality remained.[2292]

The first decision in this regard was the 1955 decision of the Supreme Court in the *Association of Westinghouse Salaried Employees v Westinghouse Electric Corp.*[2293] This decision resulted in "a divided majority of Supreme Court justices [who] seemed to agree that section 301 of the [LMRA] did not establish federal substantive law to govern the enforcement of a collective bargaining agreement"[2294] and "[t]herefore, there was no basis for federal jurisdiction over a union's suit to enforce the agreement in this respect, in the absence of diversity of citizenship".[2295]

[2290] Writing in 1956, Seidman (1955) *ILRR* 353 states: "The new federation promised organized labor increased political and legislative power, vigorous organizing drives in remaining nonunion areas, and greater influence in the international labor movement and in community and public life generally."

[2291] See § 8 3 1 5 above.

[2292] As stated in Anonymous "The Westinghouse Case: Union's Right to Sue under Section 301 of Taft-Hartley" (1955) 50 *NW U L Rev* 289 290:

> "However, the section has not proved a panacea for the correction of the defects which motivated its enactment, but, instead, has raised vexing problems when courts have sought to apply its provisions to concrete cases. Underlying problems of application is the crucial question of whether Congress created a federal substantive right when it enacted Section 301, or whether it merely provided a vehicle for the application of state substantive law. If a federal substantive right is found to have been created, the difficult problem remains of determining how these collective bargaining agreements are to be enforced." Put differently, the author states further [at 292] as follows: "Where state substantive law is applied by federal courts which have not acquired jurisdiction by reason of diversity of citizenship, there must be a federal right involved in order to sustain the constitutionality of the jurisdictional grant".

[2293] 348 US 437 (1955).

[2294] Gregory (1959) *Mich L Rev* 636 [footnotes omitted]. Says K Van Wezel Stone "The Post-War Paradigm in American Labor Law" (1981) 90 *Yale LJ* 1511 1527 of Frankfurter J's reasoning in his majority decision in this regard:

> "Frankfurter concluded that it was undesirable to give section 301 a substantive interpretation because it would make the federal courts 'inextricably involved in questions of interpretation of the language of contracts'".

[2295] Gregory (1959) *Mich L Rev* 636. See further DH Wollett "Addendum: Taft-Hartley and State Power to Regulate Labor Relations" (1956) 31 *Wash L Rev & St BJ* 39 48-50 for a succinct overview of the case, and Anonymous (1955) *NW U L Rev* 289-304, for a detailed analysis of the *Westinghouse* decision. "Diversity of citizenship" is one of the grounds clothing federal courts with jurisdiction and refers to the situation where a case involves two litigants from different states – see the discussion in chapter 9.

However, a mere two years later saw the position of the court reversed in *Textile Workers Union of America v Lincoln Mills*.[2296] In this regard, Gregory states as follows:

> "[I]n the *Lincoln Mills* case a different majority of the Court held that section 301 *did*[2297] give the federal courts jurisdiction to enforce an agreement to arbitrate, upon a union's suit for specific performance. The basis for federal jurisdiction was in the federal law which was to govern the case, arising under section 301 itself. When section 301 of Taft-Hartley was passed in 1947, nobody took it very seriously. The *Westinghouse* decision in 1955 certainly gave it little scope. But in the *Lincoln Mills* case it became of crucial importance."[2298]

Lincoln Mills, as suggested by Cohn, assisted in clarifying a decade of split Circuit Court decisions.[2299] *Lincoln Mills* confirmed that "section 301(a) creates substantive federal rights and is not merely procedural",[2300] thus (arguably) following the intention of Congress in the promulgation of the LMRA.[2301] Therefore, *Lincoln Mills* resulted in

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[2296] 353 US 448 (1957). The crux of the matter surrounded the TWUA seeking to enforce an arbitration clause within the collective agreement, compelling the employer to have the dispute arbitrated. See further in this regard Van Wezel Stone (1981) *Yale LJ* 1528, who cites the reasoning of Douglas J in his majority decision regarding the underlying intention of s 301, as follows:

> "[P]lainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way" [their emphasis].

As an aside, Justice Douglas was again to issue the majority decisions in a series of cases – the so-called *Steelworkers Trilogy* – handed down during the 1960s, which features prominently on the American labour relations' landscape (discussed at § 8 4 1 below).

[2297] My emphasis.

[2298] Gregory (1959) *Mich L Rev* 636-637 [footnotes omitted, their emphasis].

[2299] SL Cohn "Problems in Establishing Federal Jurisdiction Over an Unincorporated Labor Union" (1958) 47 *Geo LJ* 491–530 496.

[2300] Cohn (1958) *Geo LJ* 496. See further *Lincoln Mills* 456, where is stated:

> "The question then is, what is the substantive law to be applied in suits under s 301(a)? We conclude that the substantive law to apply in suits under s 301(a) is federal law, which the courts must fashion from the policy of our national labor laws."

Therefore, in the words of Cohn (1958) *Geo LJ* 496:

> "But by reading into section 301(a) substantive rights, the Court avoided the constitutional question of whether Congress could provide for federal court jurisdiction for what would normally be simple breach of contract actions within the exclusive realm of state courts except where diversity exists" [footnotes omitted].

[2301] Cohn (1958) *Geo LJ* 496. In this regard, Bagley states:

> "One of the primary purposes of the [LMRA]… was to make unions, as well as employers, responsible for their acts and the acts of their agents. Prior to the passage of this Act, and under the provision of the [NLRA], neither the unions nor employees could be guilty of unfair labor practices because that Act did not define any unfair labor practices on the part of unions or employees, nor

– by implication – the application of Federal Rule 17(b), which gave "unions the capacity to sue and be sued as entities in federal court for breach of a collectively bargained employment contract".[2302] However, the counterpoint was also important:

> "Moreover, the Taft-Hartley Act provided organized labor with some positive benefits. Unions did not at first fully appreciate that Section 301 gave them the right for the first time to sue employers in their own names for breach of collective agreements in federal district courts without regard to the amount in controversy or diversity of citizenship".[2303]

The *Westinghouse* and *Lincoln Mills* cases were therefore important markers along the road of union empowerment and development. The process, however, was by no means complete. Questions remained regarding the interplay between the NLRB, the NLRA and the federal/state divide in the application of the various laws to organised labour and its members.

The third important judgment – *San Diego Building Trades Council v Garmon*[2304] –

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were there any provisions in that Act for the enforcement of collective bargaining agreements against a union or for recovery of damages for its breach against the union. Also, that Act did not attempt to make unions responsible for the tortious acts of its members or agents. In other words, it was an entirely one-sided proposition – benefiting the unions at the expense of the employers" – CF Bagley Jr "Suits Against Labor Organizations Under Section 301 of the Labor Management Relations Act" (1952) 9 *Wash & Lee L Rev* 29 29, [footnotes omitted].

[2302] Cohn (1958) *Geo LJ* 497. Regarding Rule 17(b), Cohn (1958) *Geo LJ* 497 n33 cites Federal District Court decisions confirming that the rule "gives federal courts jurisdiction to give declaratory judgments concerning such contracts".

[2303] Aaron (1998) *Lab Law* 554, [footnotes omitted]. Aaron (1998) *Lab Law* 554 states further:

> "And although they had to wait 10 years to achieve it, unions won a significant victory when the Supreme Court ruled in the *Lincoln Mills* case that Section 301 provides the basis upon which the federal district courts may take jurisdiction over suits to enforce arbitration provisions in collective agreements, and that the substantive law to apply in such suits is federal law to be fashioned from the policy of our national labor law" [footnotes omitted, their emphasis].

Writing as he was shortly after the handing down of *Lincoln Mills*, Gregory (1959) *Mich L Rev* 653 encapsulates the developments surrounding the status of collective agreements as follows:

> "This whole thing is a unique legal situation. We are dealing with a novel subject-matter – the collective agreement – which is supposed to be what the parties themselves make it. At the same time we are trying to foster a new kind of social structure – self-government in an industrial society. On top of this we recognize the need of some neutral procedure to enforce collective agreements and settle differences arising under them. But we do not want to restrict the parties at all in their experimentation. What better or more unique answer to this need could be imagined than the roving commission the Supreme Court has assumed for itself and the lower federal courts? In a fluid quasi-legislative fashion they may conduct experiments in this field and can produce something eventually that is bound to be revolutionary – and no doubt a triumph – in law-making" [footnotes omitted].

[2304] 353 US 26 (1957); 359 US 236 (1959). *Garmon* is discussed again in chapter 9 below, in the Federalism and pre-emption section at § 9 3 2.

was handed down by the Supreme Court in 1959 (but had its genesis two years earlier).[2305] This case gave rise to the so-called "*Garmon* rule"[2306] or doctrine,[2307] namely that "in the absence of an overriding state interest … state courts must defer to the exclusive competence of the NLRB in cases in which the activity that is the basis of the litigation is 'arguably subject' to the protections of Section 7 or the prohibitions of Section 8 of the NLRA."[2308]

While these decisions clarified the centrality of collective agreements and the suability of unions, much still remained ripe for Supreme Court direction (to be discussed in chapter 9). The period following the promulgation of Taft-Hartley saw significant changes to American labour unions and the management of labour relations (through the NLRB and the courts).[2309] Nevertheless, the changes within organised labour itself – despite all indicators pointing to continued prosperity[2310] –

[2305] As explained by HH Drummonds "Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy" (2009) 70 *La L Rev* 97 165 n307, the first matter (1957) saw the Supreme Court reverse the ruling of the California Supreme Court (in issuing a "$1000 damages award on the ground that the NLRB had declined jurisdiction"), and remanded the matter back to the California Supreme Court, which then proceeded to "[sustain] the $1,000 fine against the union, reasoning that while the NLRB could issue a cease and desist order to stop the picketing, the agency lacked any statutory authority under the NLRA to award damages". On appeal again in 1959, this effectively being *Garmon II*, the US Supreme Court again "found the California judgment preempted" [Drummonds (2009) *La L Rev* 165 n307]. *Garmon II* saw judgment being handed down some five months prior to the next major labour-related legislative enactment (in September 1959) – as discussed in the section to follow.

[2306] A Cox "Labor Law Preemption Revisited" (1972) 85 *Harv L Rev* 1337-1377, 1340.

[2307] MC Harper et al *Labor Law: Cases, Materials, and Problems* 5 ed (2003) 922.

[2308] Twomey *Labor & Employment* 86. Thus, Twomey *Labor & Employment* 86 states further, the "basic premise of this rule is that there is a clear need for uniformity of regulation in the field of labor relations" Put conversely, in the words of D Charish "Union Neutrality Law or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law Section 211-A" (2006) 14 *J L & Pol* 779 792 – "[t]he *Garmon* preemption doctrine exists to prevent states from regulating activities that may conflict with national labor policy" [their emphasis].

[2309] See Millis & Brown *National Labor Policy* 610-618 for a detailed overview of the labour matters heard before the NLRB in the period following the enactment of the LMRA.

[2310] Andrias (2016) *Yale LJ* 19-20, in considering organised labour in the major American industries, states as follows:

> "The passage of Taft-Hartley was widely viewed by the labor movement as a resounding defeat. Yet the extent to which the law would ultimately fail to protect workers' rights to engage in concerted action and collective bargaining, even at a narrow firm-based level, would not become clear for some time. Rather, the postwar years were marked by relative prosperity among organized workers. Because unions in industries like auto and steel had already achieved significant density, they were able to force employers to engage in pattern or industry-wide bargaining, despite the absence of any legal obligation to do so. In exchange for assurances of industrial discipline and stability, unions won substantial wage increases with cost of living adjustments, pensions, and generous health

were not to last[2311] and did not translate into improved conditions for unions as a whole. As explained by Houseman:

> "The post-Taft-Hartley years, particularly since 1954, when a long-term decline set in, have been a period climaxed by the current era of weak bargaining contracts, very rare organizing victories, and a new low of union membership (well under 20 percent of the nation's work force). They have also been years of more restrictive and hostile (as far as unions are concerned) labor legislation, as well as more restrictive and hostile enforcement."[2312]

It is to this period that the discussion will now turn.

8 3 3 The Landrum-Griffin Act (Labor-Management Reporting and Disclosure Act) of 1959 ("LMRDA")

8 3 3 1 Union democracy and union corruption

Any discussion of the sweeping legislative changes that were implemented in the final stages of 1950s America would be incomplete without reference to union democracy. The reason for these changes can be traced back to the turn of the previous century.[2313]

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benefits. The result was that workers in these highly organized, oligopolistic industries – albeit largely white men – made significant gains, helping produce one of the most economically egalitarian periods in American history. During these decades, increases in productivity consistently led to wage and benefit increases for middle-income Americans" [footnotes omitted].

[2311] Andrias (2016) *Yale LJ* 20 speaks to the 1950s and 1960s as being characterised increasingly by union leaders and members becoming complacent:

> "Willing to settle for a private, depoliticized system of bargaining, many unions failed to organize new members ... Meanwhile, employers, even in highly organized industries, began to develop a range of new management strategies that would ultimately lead to the near collapse of labor unions in the private sector" [footnotes omitted].

Rapid changes in the fortunes of unions were accordingly on the horizon.

[2312] GL Houseman "American Labor Unions: Dependent Upon but Not Fairly Protected by the Law" (1985) 36 *Lab LJ* 716 719.

[2313] CW Summers "From Industrial Democracy to Union Democracy" in S Estreicher et al (eds) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 45 45-49 refers to, *inter alia*, the various governmental Industrial Commissions established in America, who made widely-received recommendations pertaining to the need for industrial democracy at various times. See in this regard the 1902 Report (at § 7 2 3 above) [Summers "Industrial Democracy" in *Internal Governance* 46 n1] and the 1916 Report (at § 7 3 3 above) [Summers "Industrial Democracy" in *Internal Governance* 47 n9], which contributed in no small part to industrial democracy having become a "national by-word" within 1920's America – Summers "Industrial Democracy" in *Internal Governance* 47. As a result of the aforementioned, Summers "Industrial Democracy" in *Internal Governance* 48 reasons that the "goal of industrial democracy through collective

Given the multitude of factors associated with the American political system, its history as a nation and the interplay between organised labour, its members[2314] and capital, American society expected "democracy" as a point of departure implicit in all its institutions. So too in a labour relations system shaped by the NLRA, which saw trade unions and their agents officially elevated to representatives of all deemed to fall within a particular bargaining unit.[2315] In unpacking the four sources of public demand for union democracy, Summers states:[2316]

> "*First*, in a society in which the articulate ethic of organization is democratic, we tend to expect all organizations to be democratic. We expect the government of private groups to mirror the government of public groups. We accept as faith that democracy is not merely a device for governing the state but is an ethic which should permeate all of life … The public expects unions to be democratic because they are organizations living within a democratic society. *Second*, the public expects unions to be democratic because unions expect themselves to be democratic. Unions have historically justified their existence on the grounds that through them workers achieve a greater degree of human dignity, and have traditionally insisted that they are and should be democratic … *Third*, the public fears the size and nature of union power … Out of our history we distrust power which is concentrated in the hands of a few and we consciously seek to keep that power widely distributed. There is, therefore, an undercurrent of demand that this power not be held by a few union officers but that it be shared by the membership of the union. Only such shared power is considered safe. The *fourth* reason… is that the union acts as representative of its members. We have a basic ethical notion that those who claim to represent others should be controlled by those whom they represent. As an agent is subject to his principal, the officers of the union should be

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bargaining" was to become "one of the core purposes of the Wagner Act in 1935".

[2314] The words of A Cox "The Role of Law in Preserving Union Democracy" (1959) 72 *Harv L Rev* 609 610 are particularly apposite in this regard:

> "An individual worker gains no human rights by substituting an autocratic union officialdom for the tyranny of the boss. Only a democratic union, sensitive to the rights of minorities, can help [workers] to achieve the ideals of individual responsibility, equality of opportunity, and self-determination."

[2315] See in this regard SM Lipset "The Law and Trade Union Democracy" (1961) 47 *Virg L Rev* 1 7, in quoting Cox (1959) *Harv L Rev* 610-611, who says as follows regarding why union democracy sat at the centre of policy considerations at this point:

> "[L]abor unions occupy their present position largely by force of law. Under the [NLRA] a union which acts as the bargaining representative has power, in conjunction with the employer, to fix a man's wages, hours, and other conditions of employment without his assent. The individual employee may not lawfully negotiate with his employer. He is bound by the union contract. As a matter of practice, if not in legal theory, the union also controls the grievance procedure through which a man's contract rights are enforced. The government which gives unions this power has the concomitant obligation to provide safeguards against abuse. The most effective safeguard is legal assurance that unions will be responsive to the desires of the men and women whom they represent."

[2316] As mentioned in chapter 3 at § 3 2 above, any reference to union democracy would be incomplete without reference to Prof Clyde Summers – as such, his research is extensively referred to in the context of this section.

> subject to their members. Cast in broader terms, this is but an application of the fundamental democratic concept that the power to govern derives its just power from the consent of the governed. Thus, the union's power to govern must rest on the consent of the governed as expressed through the democratic process."[2317]

This provides the context for the increased awareness of the American public of union malfeasance and corruption during the late 1950s.[2318] At the same time, this begs the question as to the reasons for the internal problems experienced in trade unions in the USA. The answer lies in a combination of different factors (evidenced by several sources), which include increased membership numbers,[2319] increasingly

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[2317] CW Summers "Public Interest in Union Democracy" (1958) 53 *Nw U L Rev* 610 611-612, [my emphasis]. With this being said, compare the above with Summers' views some 40 years later, where he questions why society appears to turn the proverbial blind-eye to other public bodies who lack democratic decision-making – Summers "Industrial Democracy" in *Internal Governance* 45.

[2318] It must however be noted, as evidenced by Summers "Industrial Democracy" in *Internal Governance* 50 – that heightened focus on the internal operations of organised labour had already started in the prior decade. In this regard, Summers "Industrial Democracy" in *Internal Governance* 50 n27 cites the "Democracy in Trade Unions" study, as conducted by the ACLU (as above) and released in 1942/1943 – along with ACLU "Statement of policy" of 28 April 1952, entitled "Democracy in Labor Unions", based essentially on the report authored by none other than Summers himself – American Civil Liberties Union ("ACLU") "A Labor Union 'Bill of Rights' – Democracy in Labor Unions – The Kennedy-Ives Bill: Statements by the America Civil Liberties Union" (1958) <http://debs.indstate.edu/a505l33_1958.pdf> (accessed 18-11-2018) 8-27. Similarly, Aaron & Komaroff (1949) *Ill L Rev* 426 state, writing as they were on the cusp of the 1950s:

> "In the last two decades, however, we have witnessed the phenomenal growth in size and in power of organized labor in this country. The role of the labor union as a quasi-public institution, exercising considerable control over the lives of millions of people, is now generally understood to be quite different from that of the church or of the lodge. Actual or potential abuses of power by unions have aroused an increasing amount of public concern."

Similarly, MJ Goldberg "Union Democracy, American Democracy, & Global Democracy: An Overview & Assessment" in S Estreicher et al (eds) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) 75 78 confirms that the American Government had certainly taken note of these developments as well – and states accordingly:

> "In her annual report for the fiscal year ending June 30, 1941, Secretary of Labor Frances Perkins proclaimed that internal union affairs had become matters of public concern, with the public demanding careful accounting of union funds and democratic procedures in union governance".

[2319] On the one hand, more members simply meant both a statistically greater likelihood of cases involving union impropriety, along with any such impropriety being more noticed, given the greater awareness of organised labour due to the associated increase in union power and influence. As succinctly stated by WP Murphy "The Background of the Bill of Rights and its Provisions" in R Slovenko (ed) *Symposium on LMRDA: The Labor-Management Reporting and Disclosure Act of 1959* (1961) 277 279:

> "It was not until the unions swelled their membership rolls in the late 1930's and early 1940's and became powerful forces in our society that the dimensions of the problems of union democracy became large enough to attract public attention".

powerful union officials[2320] and internal union factionalism.[2321] This state of affairs also

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See further J Bellace et al *The Landrum-Griffin Act: Twenty Years of Federal Protection of Union Members' Rights 19* (1979) 2; Lipset (1961) *Virg L Rev* 2, 4 and B Aaron & MI Komaroff "Statutory Regulation of Internal Union Affairs – II" (1949) 44 *Ill L Rev* 631 672. On the other hand, the membership increases meant more membership dues and contributions to union financial schemes and related investments, which meant greater union funds, and the associated risks of more union officials being corrupted by relatively easy access thereto (given their positions of authority and office). In this regard, JA Loftus "LMRDA in Retrospect" in R Slovenko (ed) *Symposium on LMRDA: The Labor-Management Reporting and Disclosure Act of 1959* (1961) 8 9 encapsulates the risks, and background hereto, as follows:

> "Where employers dropped their resistance to the principle of unionism, the union-shop brought new thousands to the unions in the post-war period. These new members were, in a sense, draftees. The Great Depression, one of the stimuli to unionism in the thirties, was not even a memory to many of the new union members, much less an experience. There was a remoteness between them and the union leaders in many cases. Their dues were checked off. Welfare and pension funds as well as union treasuries fattened. Some union leaders were unprepared to cope with large sums or with the temptations they brought. There was an infestation of racketeers. Police powers of the states and their subdivision had become inadequate, incompetent, or corrupted."

See further Lipset (1961) *Virg L Rev* 6; Murphy "Background" in *Symposium on LMRDA* 277 and P Dray *There is Power in a Union: The Epic Story of Labor in America* (2010) 432-433.

[2320] Lipset (1961) *Virg L Rev* 11-12 states as follows regarding union officialdom:

> "The full time officials are the authorized interpreters of the union constitution and of union regulations; they have the power to discipline locals and individual members, and the right to hear appeals. Most of the time, the paid officials work together in a strictly hierarchic and smoothly functioning political machine, and are likely to regard any opposition to their policies as a form of treason to the union itself … Control by the [union] officers is, in turn, made easier by rank and file apathy … Since most union officials have risen from the ranks of industrial workers to prestigious positions allowing them to enjoy middle class comforts, the full time union functionary is powerfully motivated to maintain himself in office. Defeat in a union election means having to return to a relatively low-status, low-paying occupation. Many union officials are thus led by self-interest to circumvent efforts at greater membership control and democratic rights".

Six years later, sees E Stein "Ethical Aspects of Union Policy and Conduct" (1966) 363 *Ann Am Acad Pol Soc Sci* 117 118-119 state of the same period – albeit whilst also cautioning that it was difficult to state with any authority how widespread the problems were amongst American unions:

> "From time to time, before the present era, there have been some labor leaders who have robbed and plundered and who have regarded the union as their private domain, which they used as a base for self-aggrandizement at the expense of worker and employer alike. Such persons looted union treasuries, gave preferred treatment to favored employers, extorted from susceptible employers and employees by a rich variety of devices, and ruthlessly suppressed any protests from their members."

[2321] This being brought about in no-small part by the increasing influence of communism within organised labour within America. See in this regard Aaron & Komaroff (1949) *Ill L Rev* 631-635 and P Taft "Internal Characteristics of American Unionism" (1951) 274 *Ann Am Acad Pol Soc Sci* 94 94-96 for a succinct discussion of the internal strife present within the CIO – evidenced at its 1949 national convention – as the Federation sought to rid itself of "those who have insistently directed their policies and activities towards the achievement of the program or the purposes of the Communist party, and Fascist organization, or other totalitarian movement" [Aaron & Komaroff (1949) *Ill L Rev* 633]. Regarding the impact of the aforementioned, Lipset (1961) *Virg L Rev* 8-9 states that "at the height of their powers in the forties, the American Communists controlled unions with between one-quarter and one-third of

drew the attention of academic researchers to the internal affairs of unions,[2322] as well as the attention of civil-liberty groups, most notably the American Civil Liberties Union ("ACLU").[2323]

8 3 3 2 The McClellan Committee Hearings

It was against this backdrop that 1957 saw the establishment of the "Senate Select Committee on Improper Activities in the Labor or Management Field", commonly

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the membership of the CIO". Given that the latter (along with the AFL) served as one of the two largest union federations within the US, with a total membership running into the millions, the impact of the "totalitarian opposition" espoused by the communist factions within the CIO's unions, which served to undermine the "democratic 'rules of the game'" [Lipset (1961) *Virg L Rev* 44 n127], was anything but inconsequential – cutting across all manner of internal union procedures applicable to the union-member relationship.

[2322] These include the following in the context of the USA (some of which have also been referred to in chapter 2 above – under the discussion of "Trade union democracy" at § 3 2, and elsewhere in this section): CS Golden "New Patterns of Democracy" (1943) 3 *Ant Rev* 391 391-404; W Herberg "Bureaucracy and Democracy in Labor Unions" (1943) 3 *Ant Rev* 405 405-417; P Taft "Opposition to union officers in elections" (1944) 58 246 246-264; P Taft "Democracy in Trade Unions" (1946) 36 *Amer Econ Rev* 359 359-369; CW Summers "Admission Policies of Labor Unions" (1946) 61 *Q J Econ* 66 66-107; J Kovner "The Legal Protection of Civil Liberties within Unions" (1948) 1 *Wisc L Rev* 18 18-27; FC Pierson "The Government of Trade Unions" (1948) 1 *ILRR* 593 593-608; Aaron & Komaroff (1949a) *Ill L Rev* 425-466; Aaron & Komaroff (1949) *Ill L Rev* 631-674; C Summers "Disciplinary Powers of Unions" (1950) 3 *ILRR* 483 483-513; AM Oppenheim "Trade-Union Democracy" (1951) 1 *Duke B J* 243 243-248; CW Summers "Legal Limitations on Union Discipline" (1951) 64 *Harv L Rev* 1049 1049-1102; Summers (1951) *Mich L Rev* 805-838; Taft (1951) *Ann Am Acad Pol Soc Sci* 94-100; J Seidman "Democracy in Labor Unions" (1953) 61 *J Pol Econ* 221 221-231; J Kovner & HJ Lahne "Shop society and the Union" (1953) 7 *ILRR* 3-14; JL Johnson "Government Regulations of Internal Union Affairs" (1954) 5 *Lab LJ* 807 807-818, 858; RW Smedley "A Plan for Union Democracy" (1954) 5 *Lab LJ* 337–344 337-344; HA Ratner "Analyses of Smedley's Plan for Union Democracy" (1954) 5 *Lab LJ* 779 779-785, 794; JR Coleman "The Compulsive Pressures of Democracy in Unionism" (1956) 61 *Amer J Soc* 519 519-526; AS Tannenbaum "Control Structure and Union Functions" (1956) 61 *Amer J Soc* 536 536-545; CW Summers "Judicial Settlement of Internal Union Disputes" (1957) 7 *Buff L Rev* 405 405-425; Summers (1958) *Nw U L Rev* 610-625; CW Summers "The Usefulness of Law in Achieving Union Democracy" (1958) 48 *Amer Econ Rev* 44 44-52; HH Wellington "Union Democracy and Fair Representation: Federal Responsibility in a Federal System" (1958) 67 *Yale LJ* 1327 1327-1362; Cox (1959) *Harv L Rev* 609-644; JBS Hardman "Interrelationships in the Regulation of Internal Union Affairs" (1959) 10 *Lab LJ* 496–500 496-500; and CP Magrath "Democracy in Overalls: The Futile Quest for Union Democracy" (1959) 12 *ILRR* 503 503-525. See further DL Tagliacozzo "Trade-Union Government, Its Nature and Its Problems – A Bibliographical Review, 1945-55" (1956) 61 *Amer J Soc* 554 554-581 for a detailed overview of the countless articles (not considered above) that focus on this topic, with the bibliography of articles listed at 565-581.

[2323] Murphy "Background" in *Symposium on LMRDA* 280. The impact of the ACLU on the eventual content of the legislative enactments to follow, is discussed at § 8 3 3 3 below.

known as the McClellan Committee.[2324] Perceived corruption within the ranks of the leadership of certain prominent trade unions prompted the calls for[2325] and subsequent implementation of a congressional investigation.[2326] As a result,[2327] the national labour

[2324] Nelson (2000) *Geo Mason L Rev* 532 – named after Senator John McClellan.

[2325] Regarding the specific motivation for the establishment of the Committee, Nelson (2000) *Geo Mason L Rev* 534 states: "McClellan's and Robert Kennedy's outrage over pre-Committee findings of [Dave] Beck's corruption [(as former president of the International Brotherhood of Teamsters)] led in part to the Committee's formation." The "pre-Committee findings" being spoken of, refer to initial enquiries (in 1956) into corruption involving the supplying of government uniforms. On the basis of seemingly false reports filed at the Department of Labor by unions involved in the supply, the impetus that was to see the formation of the McClellan Commission, had taken shape. See in this regard MH Malin & LA Schmall *Individual Rights Within the Union* (1988) 35.

[2326] Hardin et al *Developing Labor Law I* 49-50 aver that the hearings were convened to "investigate alleged wrongdoings in the labor-management field", but understandably – given the size of organized labour in America – there was always going to be certain practices, or rather – unions – that saw more focus than others. As stated by Bellace et al *Landrum-Griffin Act* 3:

> "The McClellan Committee focused its attention on the improper activities of the Teamsters, the Bakery and Confectionery Workers, the Operating Engineers, the United Textile Workers, and the Allied Industrial Workers. As the hearings progressed, one union emerged to dominate the proceedings – the International Brotherhood of Teamsters. The articulate, colorful, and combative president of the Teamsters, James R. Hoffa, was a frequent witness. Often engaging in sharp encounters with Senator McClellan, Hoffa was the recipient of widespread, highly unfavorable press coverage. Likewise prominently reported in the media were sensational disclosures of union corruption and lack of democratic procedures which were being revealed at the McClellan Committee's hearings" [footnotes omitted].

The authors make the further point that "[t]hirty-four of the fifty-eight volumes of the McClellan Committee's hearings are devoted to testimony relating to the Teamsters" – see Bellace et al *Landrum-Griffin Act* 3 n10. For a succinct overview of some of the corruption unearthed during the course of the Committee hearings, see in general Anonymous "Summaries of Studies and Reports: Findings From the Second Report of the McClellan Committee" (1959) 82 *Mon L Rev* 981 981-991. But perhaps it is the words of CW Summers "American Legislation for Union Democracy" (1962) 25 *MLR* 273 273-274, that best captures the essence of the Hearings:

> "The dominant theme of the investigation was the misuse of union office for financial gain either by diverting union funds for personal use, profiting on transactions with the union, or receiving benefits from employers with whom they bargained collectively. Among the endless variations on this dominant theme was the attraction into the labour movement of criminal elements whose ultimate purpose was exploitation of union office for self-enrichment. A wholly subordinate theme was the destruction of the democratic process within the unions – and this was almost always presented as but one piece of the pattern of exploitation. The committee hearings disclosed numerous instances of corrupt or dictatorial international officers crushing opposition at the local level by appointing trustees to take over rebellious local unions. Apart from this, evidence pointed to but a handful of irregular or fraudulent union elections, and only scattered instances of arbitrary expulsions, unfair trial procedures, or encroachments on the democratic rights of union members" [footnotes omitted].

[2327] Nelson (2000) *Geo Mason L Rev* 529-533 reasons that the underlying reason for the dramatic and influential impact of the hearings with regards to public sentiment rested in the fact that "the hearings gained the national spotlight because they made great television; millions of Americans watched real-life dramas unfold before their eyes, leading them to the conclusion that union corruption was

policy of the United States was to undergo another important legislative change, albeit one that was arguably unexpected on the part of organised labour.[2328]

As Hardin et al explain – and with acknowledgement of the impact of these[2329] also on organised labour[2330] – forceful negotiations[2331] were to result in the promulgation

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pervasive."

[2328] Hardin et al *Developing Labor Law I* 51 explain the consequences of the new proposed labour bill as being unexpected, due to it not being viewed as labour friendly as was anticipated. The Republican Party was defeated in the 1958 national elections, and it was widely held that "'union bosses' were generally credited with the Democratic sweep" [Hardin et al *Developing Labor Law I* 51]. Many analysts, therefore, readily assumed that any impending labour legislation would be more accommodating to labour demands than was, in the end, the actual case.

[2329] Nelson (2000) *Geo Mason L Rev* 535-537 states that the highly-televised nature of the investigation into the financial affairs of Jimmy Hoffa, and the voluminous, associated evidence describing in detail the extent of his corruption – resulted in a "'clamor for government action to regulate the internal affairs of labor unions [that] became incessant' [quoting DB McLaughlin & ALW Schoomaker *The Landrum-Griffin Act and Union Democracy* (1979) 1]." See further Malin & Schmall *Individual Rights* 35-36, who provide the following details of the hearings:

> "The McClellan Committee held 270 days of public hearings, recording 20,432 pages of testimony from 1,526 witnesses. It investigated several unions … It also investigated several management consultants … The McClellan Committee issued two interim reports and a final report" [footnotes omitted].

[2330] See for instance JB Carey "The Betrayal of Trade Unionism – Racketeering and Corruption Must Be Eliminated" (1957) 23 *Vital Speeches Day* 395 395-398, in demonstration of the concerns held by a senior union official, as but one example regarding the extent of the negative impact that the McClellan hearings was expected to have on organised labour's reputation. Furthermore, Bellace et al *Landrum-Griffin Act* 3 make the point that one of the immediate outcomes of the McClellan hearings, were the adoption by the AFL-CIO "of six codes of ethical practices", which focused on, *inter alia*, "subversives and racketeers, business interests of union officials, union financial and property interests, and union democratic processes". For the wording of the pertinent codes, see Anonymous "Codes of Ethical Practices of the Labor Movement" (1957) 80 *Mon L Rev* 350 350-353 and Anonymous "AFL-CIO Ethical Practices Codes 5 and 6" (1957) 80 *Mon L Rev* 838 838-840. Furthermore, six unions were subsequently suspended from the Federation for "noncompliance with the codes" [at 3] – with three of these, *excluding* the Teamsters, being reinstated once compliance took place [Bellace et al *Landrum-Griffin Act* 4]. Regarding this latter point, however, Goldberg "Global Democracy" in *Internal Governance* 81-82 n35 confirms that "the AFL-CIO's efforts along these lines did not last long", with the "still mob-dominated Teamsters" being allowed back into the Federation in 1988, whilst the "Ethical Practices Committee" (tasked with the enforcement of the abovementioned ethical codes) is no longer in operation.

[2331] Hardin et al *Developing Labor Law I* 60 reason that as long as the relative political lobbying strength of the two antipodal groups (management/owner versus labour) remains equal, any amendment of legislation relevant to either party is simply not possible, and in effect, a stalemate ensues – as was the case in the lead-up to the legislative changes afoot in 1959. However, the authors identify [at 60] the two key factors which upset this balance of power: Firstly, the huge publicity, and effects thereof, associated with the McClellan hearings, and, secondly, organised labour's resolute unwillingness to support any statute unless its demands for the annulment of the Taft-Hartley Act were met. Regarding the second factor, that of organised labour's aversion to changing their stance, Nelson (2000) *Geo Mason L Rev* 539-540 states that union leaders were in effect over-confident and completely "misread

of the LMRDA, commonly known as the Landrum-Griffin Act.[2332] This Act was signed into law on September 14, 1959.[2333]

8 3 3 3 The background and purpose of the LMRDA

In the words of Slovenko, the LMRDA (and its focus on the internal procedures of unions)[2334] "is aimed at two general evils":

> "One is corruption on the part of union officers and employees, as illustrated by the misuse of union funds and by the use of economic power for personal enrichment. Broadly speaking, the remedy chosen by Congress to alleviate this evil was the requirement of reporting and disclosure, supplemented by certain criminal sanctions. The other evil at which Congress was aiming is the lack of democratic processes in the operation of some labor unions. Broadly speaking, Congress dealt with this matter of union democracy in three ways: by providing a bill of rights of

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the congressional climate" – thus their assumption of receiving governmental support with regards to labour legislation, in recompense for the assistance offered during the 1958 election proved unfounded. Furthermore, organised labour was simply not organised enough. Nelson (2000) *Geo Mason L Rev* 540 continues to reason that they were not presenting a unified front or, for that matter, a unified and coordinated demand with regards to the Act – and as such, "[t]hese mixed signals confused many on Capitol Hill and hurt the AFL-CIO's lobbying efforts". Lastly, organised labour's opposition in congress was highly organised and motivated to see their needs translated into legislation. As Hardin et al *Developing Labor Law I* 60 state, in what proved to be a "bitter lesson in power politics in the federal legislature", organised labour in America learnt that its purposes might have been better served had they been less confident in their own strength and support and more willing to cooperate and compromise with the authors of federal legislation.

[2332] Pub L 86-257, 73 Stat. 519 (1959), (29 U.S.C. §§ 401 et seq.) (2017).

[2333] Hardin et al *Developing Labor Law I* 60. Says Goldberg "Global Democracy" in *Internal Governance* 82-83 in this regard: "[I]n the wake of the McClellan Committee hearings, a fundamental belief by the American people that unions should be democratic, promoted in Washington by the ACLU and few others, joined together with the strange bedfellows of politics to produce, in the words of Clyde Summers [as per Goldberg "Global Democracy" in *Internal Governance* 83 n41], 'the political miracle' of the LMRDA's enactment in September of 1959".

[2334] In this regard, subsection 2(a) LMRDA – under the heading "[d]eclaration of findings, purposes, and policy" – states as follows:

> "The Congress finds that, in the public interest, it … is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations".

Subsection 2(b) LMRDA, in turn, is even more explicit:

> "The Congress further finds, from recent investigations in the labor and management fields, that there have been a number of instances of breach of trust, corruption, disregard of the rights of individual employees, and other failures to observe high standards of responsibility and ethical conduct which require further and supplementary legislation that will afford necessary protection of the rights and interests of employees and the public generally as they relate to the activities of labor organizations, employers, labor relations consultants, and their officers and representatives."

> members of labor unions, by regulating the elections in labor unions, and by regulating trusteeships[2335] imposed on local unions by their parent international [union]."[2336]

St. Antoine reasons that the focus of the LMRDA on reporting and disclosure was based on "the 'goldfish bowl' concept, [namely] the notion that if union members were kept adequately informed about their organizations, they themselves could remedy abuses that might occur".[2337] Put differently, Goldberg remarks: "[I]f provided with the tools and the legal protection necessary, the members of unions victimized by corruption would be able to clean up their unions for themselves, by voting the rascals out".[2338] However, it has to be emphasised that the view of organised labour as being significantly corrupt was not a universally-accepted notion in the late 1950s-early 1960s America. Key members of the McClellan Committee (and later, senators), along with several prominent academics and commentators were at pains to point out that, while there were examples of malfeasance and racketeering, this was not the norm.[2339] If one combines this with St. Antoine's further point that a "conservative

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[2335] Trusteeships are discussed in more detail in the sections to follow below, but suffice to state at this point that it refers to national unions that suspend the autonomy of their constituent local union-affiliates, and take over their supervision – see TJ St. Antoine "The Regulation of Labor Unions" (1982) 30 *Am J Comp L* 299 300.

[2336] Murphy "Background" in *Symposium on LMRDA* 277-278.

[2337] St. Antoine (1982) *Am J Comp L* 300.

[2338] Goldberg "Global Democracy" in *Internal Governance* 81. Goldberg's reasoning, writing with the benefit of hindsight, is that the "one of the strongest arguments in favor of union democracy legislation was its utility in eliminating corruption and racketeering" – Goldberg "Global Democracy" in *Internal Governance* 80. It must be noted however, that both St. Antoine and Goldberg's views precisely echo those of Senator McClellan, who – as will be seen below – played a crucial role in the introduction of the union members' "Bill of Rights" within the LMRDA. Malin & Schmall *Individual Rights* 37-38 quote extracts of the debate before the American Senate, at the time of deliberations around the Act's promulgation, where McClellan argued as follows:

> "I believe that if you would give to the individual members of the unions the tools with which to do it, they would pretty well clean house themselves … We must pass a law, such as the measure now proposed, which will enable [them] to prevent ursurpation by would be exploiters. Let us start to help the workers."

[2339] P Taft "The Impact of Landrum-Griffin on Union Government" (1961) 333 *Ann Am Acad Pol Soc Sci* 130 139 speaks to "at most, about two per cent of the total number" of the approximately "71,000… local, regional, and national unions" being affected by alleged violations of the LMRDA, thereby requiring investigation. A Cox "The Landrum-Griffin Amendments to the National Labor Relations Act" (1959) 44 *Minn L Rev* 257 speaks of the findings of the McClellan hearings as having "tainted only a small minority". Whilst B Aaron "The Union Member's 'Bill of Rights': First Two Years" (1962) 1 *Ind Rel J Econ Soc* 47 274 duly acknowledges the "numerous instances" of issues pertaining to trusteeships revealed by the hearings, he states further:

coalition of Republicans and Southern Democrats seized the occasion to press for wide-ranging provisions that would enhance union 'democracy' *and at the same time might impair the operational effectiveness of labor organizations*",[2340] certain similarities between the USA at the turn of the 1960s and Britain at the turn of the 1980s become noticeable.

As discussed in chapter 5, the aim in Britain at that time was claimed to be to "give union's back to their members",[2341] but in reality, this goal always was secondary to that of the government wanting to, effectively, quash the power of organised labour in Britain.[2342] The impact of a worker losing union membership in the UK was far-reaching (due to the high prevalence of closed-shop agreements and unions' focus on industry-protection)[2343] and a similar effect certainly was possible in the USA,[2344] albeit

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> "Apart from this, evidence pointed to but a handful of irregular or fraudulent union elections, and only scattered instances of arbitrary expulsions, unfair [disciplinary] trial procedures, or encroachments on the democratic rights of union members."

But that is not to suggest that Aaron is indifferent to the issues that were highlighted – arguing that the hearings "revealed intolerable conditions in a number of unions", and that these "developments demonstrated that unions were incapable of cleaning their own house" – Aaron (1962) *Ind Rel J Econ Soc* 278. See further Malin & Schmall *Individual Rights* 38, and A Cox "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959" (1960) 58 *Mich L Rev* 819 832, who quotes Senator John Kennedy, in arguing that unions have "made a commendable effort to correct internal abuses", and as a result – legislative control should speak to only those "essential standards", so as to not "undermine union self-government or weaken unions in their role as collective-bargaining agents".

[2340] St. Antoine (1982) *Am J Comp L* 300, [my emphasis]. See further B Aaron "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 73 *Harv L Rev* 851 852, who states:

> "The [McClellan] committee's revelations furnished ammunition both to thos primarily concerned with protecting the rights of union members *and to others whose principal aim was to reduce the economic and political power of unions"* [my emphasis].

[2341] See in particular the discussion surrounding the passing of the Trade Union Act 1984 (c 49), as at § 5 2 7 4 above.

[2342] In effect therefore, the objective of union democracy was premised on the belief that militant officials, as opposed to that of the ordinary members, were responsible for the industrial strife and unrest besetting Britain. The various legislative measures that were introduced during the 1980's in Britain, were accordingly all to contribute to the increasingly complex requirements surrounding the management and functioning of the unions, inasmuch as industrial action was to be taken.

[2343] T Aidt & Z Tzannatos *Unions and Collective Bargaining: Economic Effects in a Global Environment* (2002) 59-60 – see the various discussion points around this in chapter 5 above.

[2344] In this regard, Goldberg "Global Democracy" in *Internal Governance* 79 states of the time: "Union control over employment opportunities for many workers was a factor often cited in calls for federal regulation of internal union affairs. That control was exercised through union-run hiring halls and through the closed shop, often operating in tandem with restrictive and discriminatory union admissions criteria" [footnotes omitted]. Writing in 1948, DH Wollett "Collective Bargaining, Public Policy, and the National Labor Relations Act of 1947" (1948) 23 *Wash L Rev & St BJ* 205 212 raises the following point regarding the broader view of closed shop agreements:

only until the promulgation of the LMRA (which effectively outlawed the closed-shop security agreements).[2345] However, a key difference between Britain and the USA is that Britain saw policy decisions towards organised labour being instituted primarily at the behest of the ruling party. In contrast, the USA saw the significant influence of various pro-management lobbying-groups.[2346] In this regard, St. Antoine quotes Cox, who states:

> "Business groups showed no genuine interest in reform. Spokesmen for such groups… beat the drums in an effort to swell the public outcry against the abuses revealed at the [Senate] hearings in order to obtain support for laws which would strengthen the bargaining power of management in relation to labor organizations".[2347]

As also discussed in chapter 5, a further significant influence on Britain's labour relations – albeit a decade later – was the short-lived IRA 1971.[2348] The extent to which the regulation of union internal procedures and the introduction of the so-called "Bill of Rights for union members" through the LMRDA overlaps with that which was attempted in the UK will become apparent as the various aspects of the LMRDA are explored in the sections to follow.

> "Probably no aspect of the trade union movement is so controversial as the matter of union security agreements. There is something unpalatable to the majority of Americans about an arrangement whereby membership in an organization is enforced by making the opportunity to earn a livelihood partially contingent upon it. A fortiori, an agreement which makes membership in a trade union essential before obtaining employment, i.e., the closed shop, has relatively little popular support outside union circles."

[2345] See further Wollett (1948) *Wash L Rev & St BJ* 214-215.

[2346] See Cox (1960) *Mich L Rev* 820-821, in his reference to the influence of, *inter alia*, the National Association of Manufacturers and the United States Chamber of Commerce – where is stated: "[Their] primary objective appears to have been to use the outcry against corruption within labor unions as an occasion for revising labor-management relations laws in a manner which would weaken the unions". Summers (1962) *MLR* 278 argues in turn that of those "forces" pressuring for regulation of internal union procedures, "[a]mong the most powerful were the forces of anti-unionism, led by employers' organisations which sought to weaken unions". This was to be achieved by means of "reduc[ing] the effectiveness of unions economically and politicially", and to "use the momentum of such legislation to curb the unions' economic weapons" – Summers (1962) *MLR* 278.

[2347] St. Antoine (1982) *Am J Comp L* 301, citing Cox (1959) *Minn L Rev* 258. Nelson (2000) *Geo Mason L Rev* 539, in turn, describes the improbability of the passing of the LMRDA as follows: "The fact that the coalition of Eisenhower, McClellan, the Republican minority and management enacted Landrum-Griffin and prevailed over the AFL-CIO and the interests of union officials in 1959 is nothing short of a legislative 'miracle'". Of importance, therefore, is the point that whilst various role-players were accordingly behind the LMRDA, they were *not* the ruling Democratic Party of the time.

[2348] See § 5 2 4 above.

The influence of the "coalition" in favour of the LMRDA is clearly demonstrated by Title I of the LMRDA, namely the Bill of Rights for trade union members. While the background of the various legislative bills and their passage through Congress fall outside the immediate scope of this study,[2349] it is noteworthy that Title I virtually slipped in through the back door. Bellace et al explain:

> "The next day, the Senate opened debate on this [Kennedy-Irvin] bill, S. 1555. Debate, at first, centered on the controversial title VI with proposed amendments to the Taft-Hartley Act that were favorable to labor only. The first major amendment to S. 1555, however, was not directed at Title VI On April 22, Senator John McClellan introduced an amendment which would add a new Title I, entitled 'Bill of Rights of Members of Labor Organizations'. After an impassioned two-hour speech by McClellan in support of his amendment, the bill of rights was passed by the Senate, 47 to 46. After this breakthrough, several other amendments, which had not been expected to carry, were approved."[2350]

[2349] See in general the following sources: Malin & Schmall *Individual Rights* 36-37; Cox (1960) *Mich L Rev* 821-823; Bellace et al *Landrum-Griffin Act* 4-8 and Nelson (2000) *Geo Mason L Rev* 537-542. Summers (1962) *MLR* 274, in describing the underlying approach of the various bills (and their sponsors) as the debates and amendments before Congress added to the milieu that was to become the LMRDA, says as follows of the final product: "The central thrust of the statute was no longer the prevention of financial malpractices but the protection of union democracy". Finally, in regards the influence of the ACLU in the preceding decade, in laying the groundwork for what was to increasingly bring union democracy to the forefront of legislators' minds (with due acknowledge to the impact of the McClellan hearings), see in general Aaron & Komaroff (1949) *Ill L Rev* 636-649 – who provide extensive detail, *inter alia*, about ACLU's 1947 "Trade Union Democracy" bill. See further S Rothman "Legislative History of the Bill of Rights for Union Members" (1960) 45 *Minn L Rev* 199 202-203 and EJ Imwinkelried "Substantive and Procedural Due Process in Union Disciplinary Proceedings" (1969) 3 *Univ SF L Rev* 385 407-408.

[2350] Bellace et al *Landrum-Griffin Act* 5-6. Regarding these other amendments, inasmuch as they impacted on Title I, Aaron (1960) *Harv L Rev* 858-859 states as follows:

> "Both representatives of organized labor, who had theretofore backed the Kennedy-Ervin bill, and the bill's supporters in the Senate were taken by surprise, therefore, when Senator McClellan's bill-of-rights amendment was adopted… Adoption of the McClellan amendment, however, did not put an end to surprises. Two days later, Senator Kuchel of California introduced … an amendment which he described the next day as 'keeping that which the Senator [McClellan] from Arkansas advocated, namely a bill of rights for labor, but … writing those rights in clear, unmistakable, reasonable, and just terms'... [T]he effect of the Kuchel amendment, which was adopted, with minor changes, by a vote of 77-to-14, was to moderate and make more workable the provisions of the McClellan bill of rights" [footnotes omitted].

Those "moderations" were not insignificant however – but importantly – they were nonetheless unanimously supported. As explained by Malin & Schmall *Individual Rights* 39, the rewording proposed a reasonableness protection, thereby allowing unions to hold as defence against member complaints, "reasonable rules and regulations" within their internal processes – and furthermore sought to remove "the Secretary of Labor's civil enforcement authority", whilst still allowing for "private civil actions [in the courts] by aggrieved union members". For specific details of the Kuchel proposal, and the extent to

Malin and Schmall explains that this meant three things: "the bulk of Title I was drafted on the Senate floor"; as such, "[i]t was the product of intense debate and political compromise"; which meant its legislative "language did not receive the careful scrutiny usually provided in the committee [drafting] process".[2351] Understandably, the initial introduction of Title I was not without opposition from pro-labour supporters within Congress.[2352] However, when compared with the rest of the proposed Titles (especially those aimed at making further changes to the LMRA), it was soon accepted as a necessary addition.

This discussion brought to light the various influences and legislative background to those aspects of the LMRDA relevant to this study. It furthermore serves to demonstrate how, despite a Democrat majority that was traditionally supportive of organised labour in both houses of the USA Congress, the LMRDA was not only promulgated but was far more "pro-management" than expected. The readjustment to

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which it differed from McClellan amendment, see Rothman (1960) *Minn L Rev* 207. On the matter of the Secretary of Labor's enforcement authority being removed from the ambit of Title I, see § 9 3 3 2 2 below.

[2351] Malin & Schmall *Individual Rights* 39. See further RA Smith "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 46 *Virg L Rev* 195 197-198, who states:

> "Moreover, the numerous questions of interpretation posed by its various provisions are likely to strain to the breaking point the established American legal habit of looking to the legislative history to ascertain legislative intent. The final enactment, as Congressman Griffin has candidly stated, was a 'scissors and paste' job conjoined with the results of intensive, high-pressure bargaining in the conference committee … Thus, resort to legislative history will at best be difficult, and may serve more to obscure than to illuminate legislative intent" [footnotes omitted].

[2352] Malin & Schmall *Individual Rights* 38 state as follows:

> "In the heated debate that followed Senator McClellan's proposal, several senators argued that rather than help the worker, the amendment would cripple union autonomy and grant the federal government dictatorial power. For example, Senator Kennedy argued that because most trade unionists were honest, issues concerning members' rights should be handled by the unions themselves. He urged that internal procedures would be preferable to involving the Secretary of Labor and the Attorney General in all matters that could arise from alleged violations of members' equal rights and privileges."

In this latter regard, the Kuchel amendments (as above) took care of those most pressing concerns. However, compare this with Summers (1962) *MLR* 279, who reasons that McClellan was "paradoxically" arguing for a statutory amendment, *in order to* bring about "the desirability of minimum intervention by the government" within internal union affairs, *by means of* empowering union members to make use of "their inherent constitutional rights" to fight union abuses. To put it more succinctly, Summers (1962) *MLR* 279 states: "Thus, guaranteeing democratic rights was limited intervention, for it promoted self-correction; it did not destroy union autonomy but rather it protected the union members' right of self-government."

unions, initially commenced in 1947, was now in full swing. What is now called for, is a consideration of the various aspects of the Act as they relate to the broader question of trade union accountability.

8 3 3 4 The structure of the LMRDA

The LMRDA is divided into seven titles, all individually aimed at the collective goal of combating union corruption:[2353] As mentioned, Title I contains the "Bill of rights of members of labor organizations". Title II is about "Reporting by labor organizations, officers and employees of labor organizations, and employers"; Title III speaks to "Trusteeships"; Title IV seeks to regulate "Elections"; Title V outlines the "Safeguards for labor organizations" (which includes thereunder the "fiduciary responsibility of [union] officers")[2354] while Title VI, as "Miscellaneous provisions", primarily regulates a selection of matters relating to the procedural implementation of the Act. Finally, Title VII addresses the impact of the Act on the broader American labour relations system (and prior legislation), given its title "Amendments to the Labor Management Relations Act, 1947, as amended".

Apart from touching on certain labour-management provisions of the LMRA (through its Title VII),[2355] the Act therefore implemented a statutory regime for the regulation of internal union affairs. To the extent that these various provisions, as introduced in 1959, impact on the broader question of union accountability, the wording and meaning of these provisions will be addressed in the discussion to follow.

[2353] Nelson (2000) *Geo Mason L Rev* 542. See further Sloane & Witney *Labor Relations* 131-133.

[2354] Nelson (2000) *Geo Mason L Rev* 542, in quoting Bellace et al *Landrum-Griffin Act* 283, who says of Title V that it "is 'the most direct response to the abuses [the McClellan Committee] uncovered'".

[2355] Hardin et al *Developing Labor Law I* 58-60 highlights the most important of these as including: recognition and organisational picketing requirements; changes to the secondary-boycott requirements; the redefinition of employer and employee; the addition of "hot-cargo" restrictions (it became an unfair labour practice for any labour organisation and any employer to enter into any contract requiring such employer to cease or refrain from handling any of the products of any other employer); the addition of "pre-hire agreement" requirements; the amendment of voting rights for economic strikers provisions; the delegation of board authority that was granted to regional NLRB directors; and finally, the repeal of certain Taft-Hartley provisions. A further noteworthy amendment, was the amendment to subs 303(a) of the LMRA, so as to simply refer back to the newly changed subs 8(b)(4) – the latter seeing the new picketing requirements, as introduced by s 704 of the LMRDA. The aforesaid are discussed in more detail, where appropriate, in the sections to follow below.

8 3 3 4 1 Title I – a Bill of Rights for union members

Title I comprises of five sections commencing with section 101, which sees its six subsections outline the "Bill of Rights". In turn, section 102 – the "civil enforcement" provision – provides that "[a]ny person whose rights secured by the provisions of this title have been infringed by any violation of this title may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate".[2356] Section 104 outlines the extent to which members are entitled to copies of collective bargaining agreements and the procedures associated therewith. Lastly, section 105 stipulates that "[e]very labor organization shall inform its members concerning the provisions" of the LMRDA.

Given the nature of this study, section 101 requires more specific consideration. Its first five subsections are entitled "Equal rights",[2357] "Freedom of speech and assembly",[2358] "Dues, initiation fees, and assessments",[2359] "Protection of the right to sue",[2360] and, "Safeguards against improper disciplinary action".[2361]

The Equal rights' provision affirms that "every member shall have equal rights and privileges" to nominate candidates for union office, vote in any elections or referendums within the union, and attend union meetings (and participate in the affairs/voting of such meetings) – subject to the reasonable rules of the union's constitution and bylaws).[2362] The Freedom of speech and assembly provision provides for the actions and rights of members in expressing their opinions and views without fear of reprisal, but is made subject to the right of a union to "adopt and enforce reasonable rules as to the responsibility of every member toward" the union.[2363] The Dues and fees subsection regulates the circumstances under which unions are allowed to increase dues, or introduce new levies. This includes the requirement that such changes take place following a vote by all affected members, by means of a

[2356] The remainder of the section's wording confirms the applicable jurisdiction of the relevant district court, based on the place where the alleged violation occurred, or the location of the principal office of the union involved.
[2357] Subsection 101(a)(1) of the LMRDA.
[2358] Subsection 101(a)(2).
[2359] Subsection 101(a)(3).
[2360] Subsection 101(a)(4).
[2361] Subsection 101(a)(5).
[2362] As per subs 101(a)(1).
[2363] As per subs 101(a)(2).

secret ballot.[2364] The content of the subsection regulating the Protection of the right to sue deserves to be quoted in full:

> "No labor organization shall limit the right of any member thereof to institute an action in any court, or in a proceeding before any administrative agency, irrespective of whether or not the labor organization or its officers are named as defendants or respondents in such action or proceeding, or the right of any member of a labor organization to appear as a witness in any judicial, administrative, or legislative proceeding, or to petition any legislature or to communicate with any legislator: *Provided*, That any such member may be required to exhaust reasonable hearing procedures (but not to exceed a four-month lapse of time) within such organization, before instituting legal or administrative proceedings against such organizations or any officer thereof: *And provided further*, That no interested employer or employer association shall directly or indirectly finance, encourage, or participate in, except as a party, any such action, proceeding, appearance, or petition."[2365]

The Improper disciplinary action subsection states that a member has to be "served with written specific charges", provided with a "reasonable time to prepare" and "afforded a full and fair hearing" *prior* to a member being "fined, suspended, expelled or otherwise disciplined". This is made subject to the proviso that this does *not* apply to disciplinary action for "nonpayment of dues".[2366]

Lastly, subsection 101(b) of the LMRDA is significant in that if affirms that "[a]ny provision of the constitution or bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect".

8 3 3 4 2 Title II – reporting

Title II of the Act imposes a "variety of reporting and disclosure obligations"[2367] on union officers and implements procedures through which the Secretary of Labor is "charged with the investigation of relevant union misconduct".[2368]

Section 201 outlines the details and procedures associated with the content and annual filing of specific reports, along with a copy of the union's constitution. Specifically, in terms of subsection 201(a), all unions are required "to adopt a

[2364] As per subs 101(a)(3).
[2365] Subsection 101(a)(4), [their emphasis].
[2366] As per subs 101(a)(5).
[2367] Sloane & Witney *Labor Relations* 128.
[2368] 128.

constitution and bylaws and shall file a copy thereof with the Secretary [of Labor], together with a report". In terms of subsections 201(a)(1) to (5), various aspects of the internal functioning of the union need to be included within the report. These range from the "regular dues or fees" to be paid by members;[2369] "detailed statements" pertaining to "qualifications for or restrictions on membership";[2370] the manner in which the use of union funds are authorised;[2371] the manner in which unions officials and the like are elected;[2372] to the "discipline or removal of officers or agents for breaches of their trust".[2373] The entirety of subsection 201(b), in turn, regulates the filing of an annual "financial report" that has to contain a host of information regarding the internal financial functioning of the union. The information to be provided includes the "assets and liabilities at the beginning and end of the fiscal year";[2374] the "salary, allowances, and other direct or indirect disbursements (including reimbursed expenses) to each officer and also to each employee who, during such fiscal year, received more than $10,000" from the union;[2375] and, "direct and indirect loans" made to any official or union member that exceeds $250 or more during that financial year.[2376] Subsection 201(c) requires all unions to also make these reports available to their members and further, subject to a civil suit (with a discretionary costs order) at the behest of a member, that the members be permitted to "examine any books, records, and accounts necessary to verify such report".[2377] The final two subsections speak to the amendment and repeal of specific subsections of the LMRA.[2378]

Section 202 regulates the details and procedures of a *further* report to be filed by each officer and employee of a union at the Secretary of Labor relating to any pecuniary or related interests held or received that stem from an employer where the union in question represents (or is seeking to represent) that employers'

[2369] As per subs 201(a)(4) of the LMRDA.
[2370] As per subs 201(a)(5)(A).
[2371] As per subs 201(a)(5)(D).
[2372] As per subs 201(a)(5)(G).
[2373] As per subs 201(a)(5)(H). In addition, any changes to any of the abovementioned, are to be included in the annual financial report to be filed in terms of subs 201(b) (as below) – as per subs 201(a)(5).
[2374] As per subs 201(b)(1).
[2375] As per subs 201(b)(3).
[2376] As per subs 201(b)(4).
[2377] As per subs 201(c).
[2378] Subsection 201(d) repeals subss 9(f)-(h) of the LMRA, whilst subs 201(e) amends subs 8(a)(3)(i) LMRA, by removing reference to subss 9(f)-(h) of the LMRA.

employees.[2379]

Section 203, in turn, regulates in detail a report to be filed – if specific circumstances are applicable – by *employers* (as essentially the converse of section 202).[2380] The categories of persons or entities covered by subsections 203(a)(1) to (4), include "any labor organization or officer, agent, shop steward, or other representative of a labor organization, or employee of any labor organization",[2381] any employees,[2382] or employees or group/committee of employees of that employer,[2383] or any labour relations consultant or "other independent contractor or organization".[2384] In these four instances, the type of *action towards or purposes for which* the persons/entities are engaged by the employer which trigger the reporting requirement involves: (i) Making "any payment or loan, direct or indirect, of money or other thing or value ... or any promise or agreement therefor";[2385] (ii) Attempting the persuasion of other employees to not exercise (and the like) their rights "to organize and bargain collectively through a representative of their own choosing";[2386] or finally, (iii) "[A]ny expenditure" that is again aimed at either interfering with, restraining or coercing employees in terms of exercising their collective bargaining rights, or, is "to obtain information concerning the activities of employees or a labor organization in connection with a labor dispute involving such employer".[2387] Lastly, subsection 203(b) places an obligation on "[e]very person who pursuant to any agreement or arrangement with an employer undertakes activities where an object thereof" is to, again, persuade employees not to

[2379] The requirements set out in subs 202(a) are to be viewed in the context of the broader purpose of the LMRDA, in that its focus is on union officials and employees declaring, by means of the report, their various financial interests that could have been obtained by virtue of the union's collective bargaining relationship with an employer. In effect, this was a direct attempt to either prevent employers from corrupting union officials, or to prevent officials from extorting unjust benefits from employers, in return for more beneficial bargaining agreements (at the possible expense of the broader membership within that bargaining unit).

[2380] By this is meant, the report envisaged in terms of s 203, regulates those situations where the *employer* has made payments or the like to a series of individuals or entities.

[2381] In terms of subs 203(a)(1) of the LMRDA.

[2382] As per subs 203(a)(3).

[2383] As per subs 203(a)(2).

[2384] As per subs 203(a)(4).

[2385] In terms of subs 203(a)(1), this involves any payment or the like to a union, or official (and the like) of that union.

[2386] As per subs 203(a)(2).

[2387] As per subs 203(a)(3). These same two criteria apply equally in the context of subs 203(a)(4), but involves the agreement or arrangement between the employer and a labour relations consultant/other independent contractor/organisation.

exercise their rights, or to supply information, to file a report "within thirty days after entering into such agreement".[2388]

Section 205 requires the publication of these reports, while section 206 requires the "retention of records" for a period "not less than five years after filing of the documents". Section 207, in turn, outlines the timelines and dates for filing of the reports.[2389] Section 208 empowers the Secretary of Labor to issue rules and regulations, or to amend same, in order to "prevent the circumvention or evasion of such reporting requirements".

Finally, section 209 specifies the criminal provisions applicable to the obligations contained in Title II of LMRDA – that is, where "[a]ny person … willfully violates this title". [2390] Furthermore, section 210 grants the power to the Secretary, upon the violation or attempted violation of the Title, to "bring a civil action for such relief (including injunctions) as may be appropriate".

8 3 3 4 3 Title III – trusteeships

Title III of LMRDA is headed "Trusteeships" and is comprised of six sections – it aims at regulating the situation where a labour organisation assumes control over the affairs of another (subordinate) trade union or branch of the trade union. Sections 301 and 304 are detailed, with these sections prescribing the processes and contents of a trusteeship report[2391] and the enforcement of Title III[2392]. Section 301 and 304 are discussed in more detail below in this section.

Section 302, entitled "Purposes for which a trusteeship may be established", clarifies (in a single paragraph) the parameters of the purpose of the Title III and confirms that establishment of a trusteeship must be done in accordance with the "constitution and bylaws of the organization which has assumed trusteeship over the subordinate body".[2393] The purpose of a trusteeship is described as: "correcting

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[2388] As is to be expected, in terms of subs 203(b), the report is also to contain a "detailed statement of the terms and conditions of such agreement".

[2389] In general (thereby disregarding the arrangements surrounding the promulgation of the), reports are to be filed "within ninety days after the end of each of [the union's] fiscal years" – subs 207(b) LMRDA.

[2390] Such persons "shall be fined not more than $10,000 or imprisoned for not more than one year, or both" – see subss 209(a), (b) and (c).

[2391] As per s 301(a)-(e).

[2392] As per subss 304(a)-(c).

[2393] As per s 302.

corruption or financial malpractice, assuring the performance of collective bargaining agreements or other duties of a bargaining representative, restoring democratic procedures, or otherwise carrying out the legitimate objects of such labor organization."[2394]

The different types of unlawful acts relating to trusteeships are outlined in section 303. The section proscribes voting/counting of votes for the purposes of appointing electing officers/officials for that subordinate union "unless the delegates have been chosen by secret ballot in which all the members in good standing of such subordinate body were eligible to participate".[2395] The section also prohibits the transfer of funds or assets from the subordinate body to the (superior) union body, unless this is part of the usual payments and processes "by subordinate bodies not in trusteeship", or made "in accordance with [the] constitution and bylaws" of the subordinate upon its "bona fide dissolution".[2396] Furthermore, in terms of subsection 303(b), "any person who willfully violates this section shall be fined not more than $10,000 or imprisoned for not more than one year, or both".

Section 306 provides that when a complaint is filed by the Secretary in terms of Title III, "the jurisdiction of the district court over such trusteeship shall be exclusive and the final judgment shall be" deemed final ("res judicata").

To return to sections 301 and 304: Section 301 outlines the specifics of what must be included in the trusteeship report and who is responsible for it. The report is owing by "[e]very labor organization which has or assumes trusteeship over any subordinate labor organization" and has to be filed within 30 days of the "imposition of any such trusteeship" and thereafter, on a semi-annual basis with the Secretary of Labor.[2397] The report, which must be signed by the applicable officials of the "superior" union as well as the trustees of the subordinate body, must contain specific information ranging from the reasons for establishing or continuing the trusteeship and the "nature and extent of participation by the membership of the subordinate" union in the selection/election of officials to represent it within the various processes of the superior union.[2398] Subsection 301(b) affirms that the reporting requirements found in sections

[2394] Section 302.
[2395] This in terms of subs 303(a)(1).
[2396] As per subs 303(a)(2).
[2397] As per subs 301(a).
[2398] As per subss 301(a)(1)-(4). In addition, subs 301(a) requires the initial report to "include a full and complete account of the financial condition" of the subordinate – with this and any future reporting on

201(c), 205, 206, 208 and 210 are equally applicable to a trusteeship report, while subsections 301(c) to (e) confirm the financial and pecuniary consequences of any violation of the section.[2399]

Section 304 regulates the enforcement of Title III. It empowers the Secretary – upon receiving a "written complaint of any member or subordinate body of a labor organization alleging that such organization has violated the provisions" of Title III – to investigate the complaint.[2400] Once completed, subsection 304(a) provides that the Secretary "find[ing] probable cause to believe that such violation has occurred and has not been remedied… shall, without disclosing the identity of the complainant, bring a civil action in any district court ... having jurisdiction ... for such relief (including injunctions) as may be appropriate". Subsection 304(a) adds that "[a]ny member or subordinate body of a labor organization affected by any violation of this title ... may bring a civil action in any district court" with the appropriate jurisdiction. It must be noted that any violations of section 301 are *not* dealt with in terms of section 304,[2401] since the former has its own internal processes with which to manage any contraventions of its provisions. Finally, subsection 304(b) confirms the jurisdiction of the applicable district courts, before concluding with a presumption, in section 304(c), that trusteeship is valid for eighteen months if "established by a labor organization in conformity with the procedural requirements of its constitution and bylaws and authorized or ratified after a fair hearing" by the relevant body (also in terms of the union's constitution and bylaws).[2402]

8 3 3 4 4 Title IV – union elections

Title IV comprises a mere four sections. Sections 403 and 404 are procedural in nature, focusing on the exclusive application of Title IV to elections (with due

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these finances, as required by the Title, to similarly be filed by the relevant officials of the superior union.

[2399] The amounts/sanctions in question are identical to that of subs 303(b). In addition, subs 301(e) reads:

> "Each individual required to sign a report under this section shall be personally responsible for the filing of such report and for any statement contained therein which he knows to be false."

[2400] As per subs 304(a).

[2401] This is brought about through the specific exception being written into the wording of subs 304(a).

[2402] As per subs 304(c), this presumption can be nullified "upon clear and convincing proof that the trusteeship was not established or maintained in good faith" – whilst *after* the period of eighteen months – a reverse onus applies in that the trusteeship will be presumed invalid unless "clear and convincing proof" can be provided in motivation of its necessary continuation.

acknowledgement to the union constitution and bylaws)[2403] and the "effective date" of Title IV (inasmuch as the promulgation of the LMRDA affected the internal procedures of unions).[2404]

Section 401 states, as point of departure, that "[e]very national or international labor organization, except a federation of national or international labor organizations, shall elect its officers not less often than once every five years either by secret ballot among the members in good standing or at a convention of delegates chosen by secret ballot".[2405] Furthermore, every "local" trade union is required to elect its officials (also by means of secret ballot) "not less often than once every three years".[2406] Subsection 401(c), in turn, sets out the various procedural requirements for the election process, including the following: (i) That the relevant officers of the applicable union "shall be under a duty, enforceable at the suit of any bona fide candidate for office" to comply with the reasonable requests to distribute (at the candidate's expense) any campaign literature amongst the union members; (ii) That access to the candidates of the union's member lists must be provided; and that, (iii) "Adequate safe-guards to insure a fair election shall be provided, including the right of any candidate to have an observer at the polls and at the counting of the ballots." Subsection 401(e) provides that any elections in terms of section 401 are to be held by means of a secret ballot and that all members in good standing are eligible to be a candidate and (if successful) hold office. However, this is made subject to section 504 of the LMRDA, which prohibits certain persons from holding office (this is discussed below). Furthermore, the subsection provides that all members shall be free to vote and support the candidate of their choosing, without fear of reprisals or untoward consequences, before concluding with the requirement that "the election shall be conducted in accordance with the constitution and bylaws" of the union, insofar as they are not inconsistent with the wording of Title IV.[2407] Subsection 401(g) confirms

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[2403] Section 403.

[2404] Reference is made here to how a union's constitution and bylaws might be amended for the purposes of alignment with the LMRDA. Two instances are catered for: Firstly, where amendment by the union's "constitutional officers or governing body" (NEC) is permitted/possible, as per subs 404(1) LMRDA. Secondly, where the amendment can only be made by the annual decision-making National Congress, or "constitutional convention" (in the American context) – with subs 404(2) providing for the necessary timelines.

[2405] Subsection 401(a).

[2406] Subsection 401(b).

[2407] Subsection 401(f) applies the key requirements of subs 401(e) to those officers elected "by a

that, while union funds may be utilised for the administration and actual holding of elections, no union funds may be used "to promote the candidacy of any person in an election".

Given the focus of this study, subsection 401(h) is of particular interest and is quoted in full:

> "If the Secretary, upon application of any member of a local labor organization, finds after a hearing in accordance with the Administrative Procedure Act[2408] that the constitution and bylaws of such labor organization do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct, such officer may be removed, for cause shown and after notice and hearing, by the members in good standing voting in a secret ballot conducted by the officers of such labor organization in accordance with its constitution and bylaws insofar as they are not inconsistent with the provisions of this title."[2409]

The "enforcement" procedures outlined in section 402 commence with an important qualification as to who can contest the legitimacy of union elections. In terms of subsection 402(a), a union member who has *either* "exhausted the remedies available under the constitution and bylaws" of the union "*and of any parent body*",[2410] or who has attempted such internal remedies, but has not received "a final decision *within three calendar months*", may invoke these procedures.[2411] The member may file a complaint with the Secretary of Labor "within one calendar month" after the alleged violation of section 401, which can include the "violation of the constitution and bylaws of the [union] pertaining to the elections and removal of officers".[2412] Should, after investigation, the Secretary find "probable cause to believe that a violation of this title has occurred and has not been remedied",[2413] the Secretary has 60 days within which to "bring a civil action" against the union in a district (federal) court (section

convention of delegates" – that is, at the union's National Congress.

[2408] Pub L 79-404, 60 Stat. 237 (1946), (5 U.S.C. §§ 500 et seq.) (2017).

[2409] Section 401(h) LMRDA. In addition, subs 401(i) requires of the Secretary of Labor to "promulgate rules and regulations prescribing the minimum standards and procedures for determining the adequacy of [these] removal procedures".

[2410] Subsection 402(a)(1) LMRDA [my emphasis].

[2411] Subsection 402(a)(2) [my emphasis].

[2412] Subsection 402(a). The remainder of the subsection confirms that the "challenged election shall be presumed valid pending a final decision … and in the interim the affairs of the [union] shall be conducted by the officers elected or in such manner as its constitution and bylaws may provide".

[2413] Subsection 402(b).

402(b)).[2414] Subsection 402(c) provides that if the district court finds, upon a "preponderance of the evidence after a trial upon the merits" (as per subsection 402(b)) that the election was not held within the prescribed timeframe,[2415] or that the violation "may have affected the outcome of an election",[2416] the court may declare the election void "and direct the conduct of a new election under the supervision of the Secretary".[2417]

8 3 3 4 5 Title V – fiduciary responsibilities

Title V commences with section 501 headed "[f]iduciary responsibility of officers of labor organizations". Section 502 regulates the "bonding" of a trade union official and any other person who "handles funds or other property" of the trade union, while section 503 outlines procedures pertaining to the making of loans or the payment of fines. Section 504 proscribes certain categories of persons from holding office in unions. Section 505 outlines the amendment of section 302 of the LMRA (this being the section that regulates the unlawfulness of payments by employers to employee representatives or union officials).

Several of these sections are of particular interest to this study. Firstly, section 501 provides that the "officers, agents, shop stewards, and other representatives of a labor organization occupy positions of trust in relation to such organization and its members as a group".[2418] As such, the subsection imposes four specific duties on these persons (while still "taking into account the special problems and functions" of a union), namely: (i) "[T]o hold its money and property solely for the benefit of the organization and its members"; (ii) To "manage, invest, and expend same" as per the constitution and bylaws of the union and any specific policy/procedural methods adopted by the relevant executive body of that union; (iii) To "refrain from dealing with such organization as an adverse party or on behalf of an adverse party in any matter connected with his duties and from holding or acquiring any pecuniary or personal interest which conflicts with the interests of such organization"; and finally, (iv) to

[2414] Subsection 402(b).
[2415] Subsection 402(c)(1).
[2416] Subsection 402(c)(2).
[2417] Subsection 402(c). Subsection 402(d) regulates the appeal of any of the aforementioned decisions by the court.
[2418] Subsection 501(a).

"account" to the union in respects of any profit(s) received by that person as related to any transactions concluded on behalf of the union.[2419]

Subsection 501(b), in turn, introduces an internal enforcement procedure. Where a union "refuse[s] or fails to sue or recover damages or secure an accounting of other appropriate relief within a reasonable time" from the time it was requested to do so by a union member, the member "may sue such officer, agent, shop steward, or representative" in a district (federal) court in order to effect same, or for "other appropriate relief for the benefit" of the union.[2420] It must, however, be noted that this is subject to the qualifier that the application has to show good cause (vexatious or frivolous applications will not be permitted).[2421] Finally, in terms of subsection 501(c), "[a]ny person who embezzles, steals, or unlawfully and willfully abstracts or converts to his own use, or the use of another, any of the moneys, funds, securities, property, or other assets of [a trade union] of which he is an officer, or by which he is employed, directly or indirectly, shall be fined not more than $10,000 or imprisoned for not more than five years, or both."

Secondly, section 502 regulates the "bonding" of a person[2422] who "handles funds or other property" to ensure "the faithful discharge of his duties". The bond is fixed at the beginning of the union's financial year. The total bonded amount shall "be in an amount not less than 10 per centum of the funds handled by [that official] and *his predecessor or predecessors, if any, during the preceding fiscal year*, but in no case more than $500,000".[2423] An additional requirement is that the bond "shall have a corporate surety company as surety thereon" and, furthermore, that any person who is *not* so covered by a bond shall *not* be "permitted to receive, handle, disburse, or otherwise exercise custody or control of the funds or other property" of the union in question.[2424] Subsection 502(b) provides for related offences and penalties, being a

[2419] Subsection 501(a).

[2420] Subsection 501(b).

[2421] Furthermore, the remainder of subs 501(b) confirms that the trial judge may award a "reasonable part" of any monies so awarded to cover the expenses (including costs of counsel) incurred by the member in instituting the action.

[2422] A qualifier is placed on this section not being applicable to unions "whose property and annual financial receipts do not exceed $5,000 in value – subs 502(a).

[2423] Subsection 502(a) [my emphasis].

[2424] Subsection 502(a). The remainder of the subsection confirms further that the surety company in question must not be affiliated with the union/the union may not have any direct/indirect "interest" in the surety company. Finally, the company in question "shall be a corporate surety which holds a grant of authority from the Secretary of the Treasury", as per the applicable statutory requirements, "as an

possible fine of $10,000, or imprisonment of not more than a year, or both.

Section 503 regulates the extension of loans and the payment of fines in those instances where the funds come from the trade union in question. In terms of subsection 503(a), no direct or indirect loan may be made by a union to an official (and the like) where it results in "indebtedness" to the union in excess of $2,000.[2425] Furthermore, in terms of subsection 503(b), no union may directly or indirectly "pay the fine of any officer or employee convicted of any wilful violation of this Act".[2426] Section 503 also concludes with an offences and penalties clause – albeit with the fine amount placed at "no more than $5,000" (and not more than one-year imprisonment, or both).[2427]

Section 504 prescribes which category of individual may not hold office in trade unions. Given the time period of adoption of the LMRDA, it is not surprising that subsection 504(a) prohibits any person who "is or has been a member of the Communist Party" from holding office. In addition, the subsection also proscribes any persons convicted of (or who have served part of a prison term for) "robbery, bribery, extortion, embezzlement, grand larceny, burglary, arson, violation of narcotics laws, murder, rape, assault with intent to kill, assault which inflicts grievous bodily injury", or any violation of Titles II and III of the LMRDA, from holding specific types of office in a trade union. These offices are outlined by subsections 504(a)(1) to (2) and include an "officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organizer, or other employee (other than as an employee performing exclusively clerical or custodial duties)".[2428] In addition, subsection 504(a) provides that no union is to "knowingly permit" any person to hold such an office or paid position. The section also concludes with an offences and penalties clause (subsection 504(b)), with provision for a fine (of $10,000) or imprisonment (for not

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acceptable surety on Federal bonds".

[2425] Subsection 503(a).

[2426] Subsection 503(b).

[2427] Subsection 503(c).

[2428] Subsection 504(a)(1). Of importance, however, is that the aforementioned is qualified by a time-criteria, in the sense that the remainder of subsection 504(a) outlines the circumstances where a period of 5 years or more (from either terminating membership in the Communist Party, or since being convicted/imprisoned), would see the sanction against holding office *not* being imposed. Further exceptions are made allowance for, in regards to the person either being exonerated, or motivation by the American "Board of Parole" (in the case of imprisonment) being received as to why their holding office would not contravene the purposes of the LMRDA.

more than a year), or both.

Section 505 outlines the extent to which amendments are made to section 302 of the LMRA. Section 302 of LMRA regulates payments from an employer to a trade union or its representatives and is focused on preventing such payments where the underlying intention is to persuade or influence either the union representatives or (through association) the affected employees.[2429] Section 505 of LMRDA concludes by outlining in detail – in what was to become the wording of subsection 302(c) of the LMRA – the acceptability of a payment in respect of that which was owing in the "ordinary course" of employment, or given the "ordinary relationship" between or duties of the parties involved.

8 3 3 4 6 Title VI – miscellaneous provisions

Title VI of LMRDA focuses on various "miscellaneous provisions" regarding the implementation of the LMRDA. Only those provisions relevant to the purposes of this study will be considered below.

Section 601 regulates the investigations that may be conducted by the Secretary of Labor in the context of the LMRDA. Subsection 601(a) provides that the Secretary "shall have power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (*except Title I* or amendments made by this Act to other statutes) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to determine the facts relative thereto."[2430] Of significance is the fact that this provision does *not* apply to Title I, namely the "Bill of Rights provisions.[2431] Regarding the "jurisdiction, powers, and duties" of the Secretary (or his designates) in these investigations, the subsection makes reference to the provisions of the Federal Trade

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[2429] See the new wording of subss 302(a)(1)-(4) of the LMRA, as contained in s 505 LMRDA. Similarly, in terms of subs 302(b)(1) of the LMRA, as contained in s 505 of the LMRDA – it "shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection [302](a) [of the LMRA].

[2430] Subsection 601(a) LMRDA [my emphasis].

[2431] The importance – and effect – hereof, is discussed in more detail in § 9 3 3 2 2 below. Suffice it to state at this point, as alluded to in the discussion on the background to the LMRDA above, this exclusion applies by virtue of the fact that complainants in respect of Title I matters, are required to approach the (civil) district courts – specifically so as to prevent the potentially domineering involvement within internal union affairs by a single federal institution *viz* the Secretary of Labor.

Commission Act[2432] and its provisions regarding "attendance of witnesses and the production of books, papers, and documents".[2433]

While sections 603 and 604 respectively regulate the retention of rights under other Federal and State Laws[2434] and the continued rights of states to institute criminal proceedings,[2435] section 605 confirms that the "service of summons, subpoena, or other legal process … upon an officer or agent of a [union] in his capacity as such shall constitute service" upon the union.[2436]

Section 608 regulates criminal contempt and provides that in the *absence* of a "verdict by a jury", criminal contempt charges cannot be brought against a person for those actions allegedly committed "outside the immediate presence of the court in connection with any civil action prosecuted by the Secretary or any other person in any court" of the US.[2437]

Finally, section 609 is noteworthy in that it proscribes the imposition of a fine, or the suspension or expulsion, or other discipline of a member by a union or its representatives for "exercising any right" to which that member is entitled in terms of the LMRDA.[2438] Section 610 provides that "[i]t shall be unlawful for any person through the use of force or violence, or threat of the use of force or violence, to restrain, coerce, or intimidate, or attempt to restrain, coerce, or intimidate any member of a labor organization for the purpose of interfering with or preventing the exercise of any right to which he is entitled under the provisions of this Act".[2439]

8 3 3 4 7 Title VII – amendments to the LMRA

The amendments to the LMRA, as introduced by Title VII of the LMRDA, saw the bulk of the changes focus on secondary boycotts and recognition picketing (see section 704).[2440] While the first of these falls outside the immediate scope of this study

[2432] 38 Stat. 717 (1914), (15 U.S.C. §§ 41-58) (2017).
[2433] Subsection 601(b) of the LMRDA.
[2434] Section 603.
[2435] Section 604.
[2436] Section 605.
[2437] As per s 608.
[2438] Section 609 states further that s 102, namely the "civil enforcement" provision (empowering any person to institute a civil action in a district federal court), is "applicable in enforcement of this section".
[2439] Section 610 also concludes with an offences/penalty clause, to the effect of a fine of $1,000 or imprisonment for not more than a year, or both.
[2440] Subsection 704(a) of the LMRDA made amendments in particular to subs 8(b)(4) of the NLRA,

(as do the remaining sections within Title VII), one section of Title VII of the LMRDA is of particular relevance, given its focus on the topic of "Federal-State Jurisdiction".[2441]

In this regard, section 701(a) amended section 14 of the NLRA by inserting a new paragraph that provides that the NLRB has the discretion to "decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the [NLRB], the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction".[2442] Related hereto, and in terms of subsection 14(c)(2) of the NLRA as inserted by subsection 701(a) LMRDA, "[n]othing in this Act shall be deemed to prevent or bar any agency or the courts of any State or Territory… from assuming and asserting jurisdiction over labor disputes over which the [NLRB] declines, pursuant to paragraph (1) of this subsection, to assert jurisdiction". In other words, where the NLRB uses its discretion and does *not* exercise jurisdiction over a labor dispute, "any agency of the courts" of US states (or territories) may assume or assert jurisdiction over that dispute.[2443] The jurisdiction and role of the NLRB are explored in more detail in chapter 9.

8 3 3 5 The reception and effect of the LMRDA

The LMRDA signalled the culmination of the gradual shift in American labour law policies that started with the NLRA. The NLRA (arguably pro-labour) introduced recognition of the majority-rule representation principle and the associated role of trade unions. The LMRA sought to redress the perceived imbalance between the rights of labour on the one hand, and the rights of employers on the other. This led to the LMRDA, which not only left in place the earlier "need to protect the rights of individual employees against labor organizations" (as per the LMRA),[2444] but expanded on this concept by making provision for the protection of members against corrupt union

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whilst paragraphs were added to s 8 and subs 8(b) of the NLRA – and subs 303(a) was amended to reflect the changes brought to subs 8(b)(4).

[2441] As per s 701 LMRDA.

[2442] This in terms of subs 701(a) of the LMRDA inserting subs 14(c)(1) into the NLRA. An important proviso to the aforementioned is that the standards to be used by the NLRB in determining what commerce would be "substantial" enough, is fixed as of 1 August 1959 (as per subs 701(a) LMRDA). In other words, the NLRB cannot lower the threshold below that which was accepted as founding jurisdiction immediately prior to the promulgation of the LMRDA.

[2443] The remainder of subs 701(a) sees the insertion of paragraphs into s 14 of the NLRA that makes administrative/procedural changes to certain structures and operational functions of the NLRB.

[2444] As stated by Sloane & Witney *Labor Relations* 114 in their discussion of the Taft-Hartley Act.

officials and practices. This process is described as follows by Murphy:

> "Our labor legislation has thus moved from first, the protection of unions from government and employers [the NLRA] to second, the protection of employers and non-union employees from unions [the LMRA] to third, the protection of union members from their own union [the LMRDA]."[2445]

However, Cox pointed out at the time that legislation can only do so much:

> "The law cannot create the spirit of self-government. It cannot compel union members to attend meetings or hold their officers to a strict accounting. It cannot compel members to see in labor unions something more than service organizations hired to obtain benefits in return for dues. The most the law can do is to secure the opportunity for workers who wish to take an active part in democratic unions without undue loss of personal freedom".[2446]

[2445] Murphy "Background" in *Symposium on LMRDA* 277. In expanding on this, the author states immediately prior to the quote above as follows:

> "The philosophy of Norris-LaGuardia [LDA] was one of government non-intervention, and since the prior intervention of the federal courts had been generally anti-union, the result was to enlarge the area of permissible union activities. The philosophy of the Wagner Act [NLRA] was one of pro-labor intervention, the purpose being to encourage the unionization of workers and the establishment of collective bargaining by protecting organizational activities from employer interference and by imposing a legal duty on employers to bargain with unions chosen by their employees. Under this act labor unions vastly increased their membership and became a major force in the economy, and in the process demonstrated that their possession of economic power was also capable of abuses which demanded regulation. The philosophy of the Taft-Hartley law [LMRA] was therefore one of restrictive regulation for the purpose of protecting employers, non-union employees and the public from various types of union activity, and this purpose has been carried forward and even enlarged in the 1959 statute. However, in the 1959 statute, as the saying goes, something new has been added, and that something new is the philosophy of regulation by the national government of the internal operation of labor unions" – Murphy "Background" in *Symposium on LMRDA* 277.

With this being said, whilst only referring directly to the NLRA and LMRA – Loftus "Retrospect" in *Symposium on LMRDA* 9 states that "[w]hereas unions could operate under the Wagner Act with a lawyer or two, none could live under Taft-Hartley without a competent legal staff". It therefore stands to reason, in light of the further procedures introduced by the LMRDA, that just as the progressive nature of the legislation saw developments and changes to the inter-relationship between employers, employees, unions and members – so too did this progression see an increase in the associated administrative burden, and complexity, of the American labour relations system.

[2446] Cox (1959) *Harv L Rev* 644. A counterpoint to this view, is provided by Murphy "Background" in *Symposium on LMRDA* 287, who states:

> "It has also been said frequently that the great obstacle to better union democracy is not repression by the leadership but apathy on the part of the members. It is doubtless true that many, probably most union members are satisfied so long as the union looks after their bread and butter interests, and have no desire to participate actively in the operation of the union or in the making of its decisions. This is but a counterpart of the disinterest on the part of many Americans with respect to public affairs generally. It is not difficult to understand. The increasing bigness of our institutions – government at all levels, business, labor – has been accompanied by an increased regulatory power,

Of course, one (key) manner in which the security of participation can be brought about is through the union constitution (and associated bylaws). The LMRDA certainly had an impact on union constitutions (already evidenced by the topics of the various titles that make up the Act). In this regard, Smith states that "[v]arious provisions of the [LMRDA] impose mandatory standards of internal union operation which require a review of union constitutions and bylaws, and, in some instances, fairly extensive changes in order to make them comport with the requirements of the statute."[2447]

Perhaps the most apt manner in which to end the discussion of the initial impact and effect of the LMRDA, is to quote Previant:[2448]

> "There will be found too, I believe, a virtual unanimity that in most instances the democratic structure or the potential of achievement of democracy is or was present, but has withered from disuse, because of the 'apathy' (the word most often used) of the membership, as well as the 'oligarchical' tendencies of any social, political or economic institution. Accepting then as my premise that with the few exceptions disclosed before the McClellan Committee there was substantial democracy in most unions, but that it was not being used, we are confronted with the paradox that the legislative prescription was another shot of democracy… It hardly makes sense to me that, to correct a few abuses, it should have been necessary to enact this all pervasive regulatory code which *preserves virtually all existing civil remedies in the state or federal courts* (other than challenges to elections already held or to the validity of trusteeship already established)…[2449] *adds eight new civil remedies to be invoked by union members*…[2450] and then, in addition to these already existing and new remedies available to the union membership, *establishes ten new enforcement procedures through the intercession, or under the direction, of the Secretary of Labor*…[2451] This whole mixture is further compounded and confounded by the creation of *13 new federal crimes directed principally at officers*

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public and private, over the affairs of men. These developments have been largely an inevitable result of the increased complexity and interdependence of our society, and are more likely to accelerate than to abate. In all of this the individual tends to shrink more and more in influence and significance."

[2447] Smith (1960) *Virg L Rev* 200. The author makes the point that, apart from specific provisions within the LMRDA that directly compel the alignment of union constitutions with that of the Act (such as found within Title I) – the practical effect of the numerous procedural changes required by the LMRDA would no doubt see the necessary changes having to be brought about within the constitutions – see Smith (1960) *Virg L Rev* 200-201.

[2448] D Previant "Have Titles I-VI of Landrum-Griffin Served the Stated Legislative Purpose?" (1963) 14 *Lab LJ* 28 29 [their emphasis].

[2449] Referring to ss 102, 306, 403, 603(a) and 604 LMRDA, as per Previant (1963) *Lab LJ* 29.

[2450] This being in reference to ss 104(4), 102, 201(c), 304(a), 401(c), 402(a), 501(b) and 609 LMRDA, as per Previant (1963) *Lab LJ* 29.

[2451] Referring to ss 104, 205, 208, 210, 301(3), 304, 401(h), 402(b), 601 and 607 LMRDA, as per Previant (1963) *Lab LJ* 29.

and members of labor unions".[2452]

This quotation, in terms remarkably similar to the discussion in chapter 5 about the impact of the IRA 1971 and CROTUM in Britain, highlights the insight that the provision of rights enforceable against unions or their officials does not necessarily translate into an active and challenging trade union membership. Even so, what is clear is that similar to Britain (albeit at a later stage) the USA saw a sweeping legislative adjustment in response to a (largely) non-existent problem. Or rather, the LMRDA was a vast and voluminous solution to a very specific – and largely constrained – union characteristic.[2453] Be that as it may, the legislative cure for organised labour's sickness

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[2452] Referring to ss 209(a), (b), (c), 310(c) and (d), 303(d), 501(c), 502(b), 503(c), 505(a), 504(b), 602 and 610 LMRDA, as per Previant (1963) *Lab LJ* 29. Rothman (1960) *Minn L Rev* 219, in speaking on the civil suits between members and their unions in the enforcement of the Title I provisions, writes as follows shortly after the promulgation of the Act:

> "[I]t is interesting to note that during the first year of Title I, the flood of litigation in the federal courts that some opponents of the Bill of Rights feared has not materialized. Reported decisions have been rendered in only 20-odd cases, and the overwhelming majority of those cases were dismissed on the ground that Title I did not encompass the right alleged by the plaintiff-member or did not apply retroactively, or that the plaintiff had not exhausted available internal remedies."

The aforementioned quote is in itself a summary of the author's finding in S Rothman "Judicial Interpretation of the Bill of Rights for Union Members" (1961) 45 *Minn L Rev* 995 995-1017, where he analyses the "slightly more" than 30 cases that were heard by the lower Federal courts "in the first 18 months of the Act". With this being said, Rothman (1960) *Minn L Rev* 996 raises the important query as to why the case-load number was so low, and postulates that it lies within the fact that "Title I suits must be brought by union members, who frequently are short on financial and legal resources". The reason for this, is of course as a result of the enforcement powers of the Secretary of Labor being *excluded* from the ambit of Title I.

[2453] As was touched on above, in his analysis of the prevalence of alleged union violation of the LMRDA in the immediate period following the introduction of the LMRDA, Taft (1961) *Ann Am Acad Pol Soc Sci* 139 states as follows, in this regard:

> "On the other hand, the belief that the [LMRDA] would seriously affect many organizations of labor is fallacious and merely shows that the views of the reformers have been unduly influenced by a few cases of evil and venal conduct. The Bureau of Labor-Management Reports [now the Office of Labor-Management Standards (OLMS) – discussed at § 9 3 4 2 below], which maintains field offices in twenty-two cities and is charged with investigating alleged violations, has reported investigating 1,445 cases involving 2,041 violations. Of those, 1,130 were closed while 911 were pending at the end of the year [being 1960]. Compliance was obtained in 170 investigations, and 960 were closed because they involved actions which either occurred before the enactment of the law or were not prohibited by the statute. Complaints were also somewhat higher because investigations were made on the basis of charges without attempts to determine where there existed grounds for believing a violation had taken place or the conduct against which a complaint was made was among those prohibited. Even assuming that every complaint was valid, the number filed would tend to show a high level of behavior on the part of American unions and their officers. It is also significant that many complaints are over trivial matters, that charges are frequently made out of ignorance or

had been prescribed – whether such medication was required or welcomed. What remains for purposes of this chapter, is to explore a series of key judgments handed down by the Supreme Court in the immediate aftermath of the LMRDA and which provided further clarification of the parameters within which the new post-LMRDA labour relations system was to operate.

8 4 Further developments through the courts

8 4 1 Arbitration, CBAs, and the courts

In 1960, and in three decisions by the Supreme Court (known as the "Steelworkers Trilogy"),[2454] the court "further [expanded] the use of Section 301 suits to not only compel performance of grievance arbitration agreements but also to enforce arbitration awards" generally.[2455] (Note that the section 301 referred to here is the section 301 of the LMRA providing for the enforcement of CBAs, not section 301 of the LMRDA regulating trusteeships). Put differently, Gregory et al state that the Supreme Court effectively "endorsed arbitration over litigation as the preferred means of resolving grievances in private-sector, labor-management relations".[2456] The sum-effect of the *Trilogy* cases was that labour-related arbitration awards, made in terms of applicable dispute resolution clauses in CBAs and in compliance with the principles set out in the *Trilogy* being "being very difficult, albeit not impossible" to have overturned by the federal courts.[2457] Le Roy and Feuille, in their detailed analysis of

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malice, and that the overwhelming majority of unions are well and honestly run … Up to the present, the [LMRDA] had had no serious effect on the functioning of unions."

[2454] *United Steelworkers v American Manufacturing Co.* 363 US 561 (1960); *United Steelworkers v Warrior & Gulf Navigation Co.* 363 US 574 (1960); and *United Steelworkers v Enterprise Wheel & Car Corp.* 363 US 593 (1960) – as per Twomey *Labor & Employment* 285. DL Gregory et al "The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions – Will Gold Turn to Rust" (2010) 60 *Cath U L Rev* 47 47 describe the *Trilogy* as being "one of the most important blocks of decisions in [American] labor law". All three judgments were handed down by Douglas J.

[2455] Twomey *Labor & Employment* 285.

[2456] Gregory et al (2010) *Cath U L Rev* 47. Therefore, in succinctly contrasting the *Trilogy* decisions to that of *Lincoln Mills*, PJ Cihon & JO Castagnera *Employment & Labor Law* 7 ed (2011) 529 state as follows: "The decisions in the *Steelworkers Trilogy* emphasized that arbitration was a substitute for industrial strife. The *Lincoln Mills* decision stated that the employer's agreement to arbitrate disputes is the quid pro quo for the union's agreement not to strike over arbitrable disputes" [their emphasis].

[2457] Gregory et al (2010) *Cath U L Rev* 48. Regarding the "principles" identified by the Supreme Court in the *Trilogy*, the first (care of *American Manufacturing*) proscribes the courts from judging the merits of the claims involved, and must thereby "leave arbitrators to interpret the [CBA] contract" – Gregory et

decisions made in the thirty-odd years after the *Trilogy*, write as follows: "At the time they were decided, the Supreme Court's rulings in these cases were hailed as an important public policy breakthrough in securing a speedy, efficient, conclusive, and privately negotiated system for the resolution of union-management grievance disputes."[2458]

However, the Supreme Court was still to give rulings in two further areas of section 301 interpretation. The *Lincoln Mills* and *Garmon* decisions of the mid-to-late 1950s were significant milestones in confirming the jurisdiction of the federal courts (and the associated enforceability of arbitration clauses contained in collective agreements) and establishing the primacy of jurisdiction of the NLRB over that of state courts in ensuring uniformity in America's labour relations system. 1962, was to see further refinement.

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al (2010) *Cath U L Rev* 52. As explained by Gregory et al (2010) *Cath U L Rev* 52, the aforementioned further reiterates one of the key principles of *Lincoln Mills*, that since the accepted practice is to include a grievance clause within the CBA (which sees any and all grievances in terms of that agreement being submitted for arbitration if unresolved) – and since the equally prevalent no-strike clause (which prohibits strike action during the term of the CBA) is enforceable to the point of being remedied by means of a s 301 LMRA civil suit – the arbitration clause "is the *quid pro quo* for the" no-strike clause. As such, it behoves the courts to refrain from interfering in the arbitration clause, since "[t]here is no exception in the 'no strike' clause and none therefore should be read into the grievance clause" – Gregory et al (2010) *Cath U L Rev* 52. The second principle, as espoused in *Warrior & Gulf*, is that a "positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute" is required before an "order to arbitrate the particular grievance" can be denied – and that consequently, any "[d]oubts should be resolved in favor of coverage." See in this regard Gregory et al (2010) *Cath U L Rev* 53, quoting from *Warrior & Gulf* 582-583, care of Douglas J. As a result, in again quoting the Court (*Warrior & Gulf* 581), Gregory et al (2010) *Cath U L Rev* 53 affirms the Supreme Court's characterisation that "the grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government". The third principle, clarified in *Enterprise Wheel*, is that – firstly – "arbitrators are not obliged to provide reasons for an award" (*Enterprise Wheel* 598), secondly, "a mere ambiguity" in an arbitrator's award does not warrant involvement/interpretation by the courts (*Enterprise Wheel* 598), and thirdly – in again reinforcing *American Manufacturing* – that "issues of contract interpretation were best resolved by arbitrators, and courts should decline to review the merits of an arbitration award" (*Enterprise Wheel* 596) – as per Gregory et al (2010) *Cath U L Rev* 54-55.

[2458] MH LeRoy & P Feuille "The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond" (1991) 13 *IRLJ* 78 79. The authors make the point that, by the 1990's in America, the "lower federal courts have been criticized for straying from the protective principles announced by the Court in the *Trilogy* decisions" [their emphasis] – LeRoy & Feuille (1991) *IRLJ* 79. This notwithstanding, the Supreme Court has yet to reconsider the matter subsequent thereto – meaning that, despite the lower courts being more prepared to stretch the limits of the *Trilogy* – the judgments, and their principles, still stand.

The decisions in *Charles Dowd Box Co. v Courtney*[2459] and *Local 174, Teamsters Union v Lucas Flour Co*.[2460] were both handed down in the same Supreme Court term.[2461] *Charles Dowd* was to see the Court consider both the *Lincoln Mills* decision[2462] and the underlying intention of the LMRA[2463] before concluding that "the purpose of conferring jurisdiction upon the federal district courts was not to displace, but to supplement, the thoroughly considered jurisdiction of the courts of the various States over contracts made by labor organizations."[2464] Thus, in finding that "Congress deliberately chose to leave the enforcement of collective agreements 'to the usual processes of the law'",[2465] the Supreme Court effectively extended the enforcement (or rather, made clear that this was not pre-empted) of CBAs to the state courts. Post *Lincoln Mills* and *Dowd Box* therefore, the American federal and state Courts have concurrent jurisdiction over non-compliance (by unions or employers) with their CBAs – in other words, in actions brought in terms of section 301 of the LMRA. This issue is explored in more detail in § 9 3 2 2 below.

In *Lucas Flour*, in turn, it was held that when it comes to *interpreting* the applicable CBAs, only the federal courts are permitted to adjudicate.[2466] In considering the

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[2459] 368 US 502 (1962).

[2460] 369 US 95 (1962).

[2461] MI Sovern "Section 301 and the Primary Jurisdiction of the NLRB" (1963) 76 *Harv L Rev* 529 529.

[2462] *Charles Dowd Box Co. v Courtney* 368 US 502 (1962) 507.

[2463] The court states as follows in this regard:

> "The legislative history makes clear that the basic purpose of s 301(a) was not to limit, but to expand, the availability of forums for the enforcement of contracts made by labor organizations. Moreover, there is explicit evidence that Congress expressly intended not to encroach upon the existing jurisdiction of the state courts. The Labor Management Relations Act of 1947 represented a far-reaching and many-faceted legislative effort to promote the achievement of industrial peace through encouragement and refinement of the collective bargaining process. It was recognized from the outset that such an effort would be purposeless unless both parties to a collective bargaining agreement could have reasonable assurance that the contract they had negotiated would be honored. Section 301(a) reflects congressional recognition of the vital importance of assuring the enforceability of such agreements." [*Charles Dowd Box Co. v Courtney 368 US 502 (1962)* 508-509].

[2464] 511.

[2465] 513.

[2466] By way of brief background, a union member was dismissed due to poor work performance, whereafter the union initiated strike action lasting eight days. The employer claimed the losses suffered as a result of the industrial action, with the lower courts holding that the union's strike was contrary to the provisions of the existing CBA. The argument raised by the union against the aforementioned, was that the state jurisdiction was pre-empted, on account of the *Garmon* doctrine – and as such, the Supreme Court granted certiorari to consider the question of pre-emption. See *Lucas Flour* 97-98; Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 738-739.

application of section 301, along with the *Dowd Box* decision,[2467] the Court reasoned that "[t]he possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements".[2468] As such, "issues raised in suits of a kind covered by s 301 [are] to be decided according to the precepts of federal labor policy".[2469] Ultimately, and in light of the *Steelworkers Trilogy*,[2470] the Supreme Court affirmed the "basic policy of national labor legislation to promote the arbitral process as a substitute for economic warfare".[2471] In this particular case, the union initiated strike action in spite of an arbitration clause in the existing CBA[2472] and, while the lower state court's jurisdiction was indeed pre-empted, the Supreme Court affirmed the factual findings of the lower court and held the union in violation of its contractual (CBA) obligations.[2473]

This refinement of the interpretation of section 301 of the LMRA's in the wake of the

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[2467] *Lucas Flour* 101-102.

[2468] 103.

[2469] 103.

[2470] 105 – citing *Warrior & Gulf Navigation.*

[2471] *Lucas Flour* 105.

[2472] For a discussion surrounding the potential overlap between the facts presented in *Lucas Flour*, and the NLRB, see in general the reasoning of Sovern (1963) *Harv L Rev* 532, and onwards.

[2473] *Lucas Flour* 106. A cursory reading of the main text above, might give rise to the query of what the actual difference is between the *Dowd Box* and *Lucas Flour* decisions were, as at first blush, there appears to be significant overlap. Simply put, *Dowd Box* holds that Federal and State courts have concurrent jurisdiction over the section 301 enforcement of CBAs (with state law to "supplement" the Federal law). Hardin et al *Developing Labor Law I* 1310 explain as follows in this regard:

> "In *Dowd Box* the Court held that state courts have concurrent jurisdiction with the federal courts over suits brought under Section 301. Affirming the Supreme Judicial Court of Massachusetts, the Supreme Court held that Section 301 does not divest the state courts of jurisdiction, but rather supplements state jurisdiction. Section 301 provides that suits of the kind described 'may' be brought in the federal district courts, not that they must be. The Court noted that 'nothing in the concept of our federal system prevents state courts from enforcing rights created by federal law'" [footnotes omitted, their emphasis].

Lucas Flour holds that in interpreting the individual CBA clauses, in order to ensure uniformity, state courts *are* preempted. MJ Fortunato "Lingle v. Norge Division of Magic Chef, Inc.: Revolutionizing the Application of Substantive State Labor Law to Unionized Employees" (1989) 38 *Cath UL Rev* 769 781 explain as follows:

> "The Court, faced with the dilemma of applying conflicting local and federal law regarding the interpretation of a no-strike clause, expressly held that federal law, not state law, must govern adjudication of section 301 claims. In so holding, the Court attempted to further the policy of uniform interpretation of labor statutes. The Court concluded that federal law must control when defining the terms in a collective bargaining agreement. It reasoned that federal law prevails over state law in order to minimize inconsistent interpretation of the terms of a labor contract" [footnotes omitted].

LMRDA confirms that by the turn of the 1960s, private arbitration was a central component of organised labour-management dispute resolution.[2474]

8 4 2 Fair representation, and the courts

In 1967 the Supreme Court handed down judgment in *Vaca v Sipes*.[2475] *Vaca* was one of a series of key judgments touching on (and important for this study) a union's duty of fair representation ("DFR").[2476] The DFR, in the words of Osborne et al, "regulates the very purpose of the union", namely "its function as the exclusive bargaining agent for its constituents".[2477] However, the point needs to be made that the origins of the DFR are found in an area of law that was initially not strictly related to labour:

> "At first, the duty of fair representation filled the void created by the absence of civil rights laws: Although no statute prohibited employment discrimination, unions could not foster race discrimination… *The duty permits employees to challenge the quality of their representation not against a statutory standard but against a common-law standard of basic adequacy*."[2478]

The final sentence of this quotation demonstrates the direct relevance of the DFR to the underlying question of this study. The DFR involves the question whether unions (or their representatives) *represent their members* (or a specific group of members) "to a standard of basic adequacy".[2479]

The DFR – which emanates from the USA's unique system of exclusive representation in bargaining units – sees its origins in the Supreme Court decision of

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[2474] Lenz Jr (1980) *J Corp L* 205. BR Naar "The Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases" (1979) 32 *Rut L Rev* 520 524 explains the relative simplicity of the process as follows:

> "The settlement of a dispute under the collective bargaining agreement typically involves two phases. Initially the union and the employer representatives will discuss the dispute. These discussions will continue among representatives at progressively higher levels of the bureaucracies involved. If the disputes are not resolved through this phase of the grievance process, arbitration is invoked" [footnotes omitted].

[2475] 386 US 171 (1967).

[2476] Given the direct relevance of the DFR to the topic of this study, the broader concept (and its application) is explored in specific detail in § 9 4 below.

[2477] Osborne et al *Labor Union Law* 281.

[2478] 281 [my emphasis].

[2479] The specific application of this "standard" – and the judicial development to reach that point – is discussed in the more detail at § 9 4 below, and as such, this section will provide the briefest of overviews inasmuch as it pertains to the historical development of unions in the USA.

Steele v Louisville & Nashville Railroad Co.,[2480] three years prior to the promulgation of the LMRA.[2481] *Steele* revolved around "a class of black locomotive fireman [who] challenged a contractual provision [within a CBA] that ultimately would have excluded all black firemen" from the service.[2482] After comparing the power of a union to that of a legislature,[2483] the Supreme Court stated that the RLA (applicable here) "implicitly obligated the exclusive bargaining representative 'to exercise fairly the power conferred upon it in behalf of all those for whom it acts, without hostile discrimination against them'".[2484] However, this was the situation *prior* to the promulgation of the LMRA and therefore prior to the introduction of unfair *union* labour practices (in terms of subsection 8(b) of the LMRA) and the federal enforcement of CBA violations (section 301 of the LMRA).[2485] Thus, 1952 saw the Supreme Court in *Ford Motor Co. v Huffman*[2486] start to bridge the gap between the RLA and the NLRA/LMRA,[2487] with the court referring back to *Steele* (and the "comparable provisions" of the RLA)[2488] and concluding that the DFR was engaged in terms of sections 7 and 9(a) of the NLRA (as amended by the LMRA).[2489] This process was completed by 1955, when the Supreme Court (in *Syres v Oil Workers International Union*)[2490] ruled that "federal courts, as well as state courts, had jurisdiction to resolve fair representation claims".[2491] In so doing, it reversed an earlier Federal Circuit Court decision that held "that federal courts lacked jurisdiction over [DFR] actions by employees protected by the NLRA".[2492]

[2480] 323 US 192 (1944).

[2481] Given the fact that several cases are entwined within the development of the DFR, in order to reach the point of the *Vaca* decision – these are to be touched on here, rather than leaving them interspersed through the chronological discussion of the preceding sections.

[2482] Osborne et al *Labor Union Law* 282 paraphrasing from *Steele* 195.

[2483] Osborne et al *Labor Union Law* 283 quoting *Steele* 198.

[2484] Osborne et al *Labor Union Law* 283 quoting *Steele* 202. The authors point to the further decision of *Wallace Corp. v NLRB* [323 US 248 (1944)] – handed down on the same day – where the Court again reiterated that "the duties of a bargaining agent … extend beyond the mere representation of the interests of its own group members", and that "[b]y its selection as bargaining representative, it has become the agent of all employees, charged with the responsibility of representing their interests fairly and impartially" – Osborne et al *Labor Union Law* 283 quoting *Wallace Corp* 255-256.

[2485] Osborne et al *Labor Union Law* 284.

[2486] 345 US 330 (1953).

[2487] Osborne et al *Labor Union Law* 284.

[2488] *Huffman* 337.

[2489] 337.

[2490] 350 US 892 (1956).

[2491] Osborne et al *Labor Union Law* 284.

[2492] The 5th Circuit decision that was reversed (following the petition for writ of certiorari being granted),

It was to be another seven years before the NLRB was to confirm, in the 1962 decision of *NLRB v Miranda Fuel Co*.,[2493] that "a breach of a union's duty of unfair representation was an unfair labor practice"[2494] and that the NLRB, with section 10 of the NLRA (which gives the NLRB jurisdiction over unfair labour practices), could "directly enforce" a trade union's DFR.[2495] As per Osborne et al, a NLRB "three-member majority"[2496] found as follows:

> "[T]hat Section 7[2497] protects employees from 'unfair or irrelevant or invidious treatment by their exclusive bargaining agent' and that Section 8(b)(1)(A)[2498] prohibits a union from 'taking action against any employee upon considerations or classifications which are irrelevant, invidious, or unfair.'"[2499]

The DFR, and the role of the courts and the NLRB herein, are discussed in more detail in chapter 9.

8 4 3 Standards of conduct, injunctions, and the courts

In *Vaca*, handed down five years after *Miranda Fuel*, the Supreme Court

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was that of *Syres v Oil Workers' International, Local No. 23* (223 F.2d 739 (1955)).

[2493] 140 NLRB 181 (1962).

[2494] Osborne et al *Labor Union Law* 284. The decision was – given the broader context of America's labour relations system – not without controversy. See in this regard GL Hellrung "The National Labor Relations Board and the Duty of Fair Representation: National Labor Relations Board v. Miranda Fuel Co., 326 F. 2d 172 (2nd Cir. 1963)" (1964) 13 *Cath UL Rev* 171 171 and M Floyd "Administrative Enforcement of the Right to Fair Representation: The Miranda Case" (1964) *U Pa L Rev* 711 731-732. The Supreme Court in *Vaca* (discussed in the section to follow), had the following to say [*Vaca* 176]:

> "[The] [p]etitioners [in *Vaca*] rely on Miranda Fuel Co …, where a sharply divided Board held for the first time that a union's breach of its statutory duty of fair representation violates N.L.R.A. § 8(b), as amended."

[2495] Hellrung (1964) *Cath UL Rev* 173.

[2496] 175.

[2497] See Hellrung (1964) *Cath UL Rev* 175-176, quoting from *Miranda Fuel* 185.

[2498] See Hellrung (1964) *Cath UL Rev* 176, quoting from *Miranda Fuel* 185.

[2499] Osborne et al *Labor Union Law* 285. Hellrung (1964) *Cath UL Rev* 177 quotes the two-member dissenting opinion in *Miranda Fuel* 199, who offer a succinct overview of the majority decision, inasmuch as it finds the basis of the DFR within the terms of the NLRA (as amended):

> "[The majority finding] proceeds upon the premise that Section 9 imposes upon a bargaining representative the duty to represent all the employees in the bargaining unit fairly and impartially; that this duty must be read into the rights guaranteed by Section 7 of the Act so that any default in the performance of the Section 9 duty is an infringement upon a Section 7 right; and that any such infringement trenches upon the prohibitions of Sections 8(b)(1)(A) and 8(a)(1) which insulate Section 7 rights against union or employer intrusion."

"promulgat[e] various formulations of the required standard of minimum representation".[2500] The case involved a worker who alleged wrongful dismissal on account of his health along with a claim that his union had arbitrarily refused to process his claim through arbitration, as per the grievance procedure clauses of the relevant CBA.[2501] The Court considered the history and development of the DFR doctrine[2502] and found that the NLRB does not have *exclusive* jurisdiction in such cases and held that "the governing federal standards" need to be applied.[2503] The court reiterated the underlying premise of the DFR: "Since that landmark decision [in *Steele*], the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law".[2504] In considering the facts of the matter, the Supreme Court reasoned as follows:

> "But where the employer has committed a wrongful discharge in breach of [the] agreement, a breach which could be remedied through the grievance process to the employee-plaintiff's benefit *were it not for the union's breach of its statutory duty of fair representation to the employee*. To leave the employee remediless in such circumstances would, in our opinion, be a great injustice. We cannot believe that Congress, in conferring upon employers and unions the power to establish exclusive grievance procedures, intended to confer upon unions such unlimited discretion to deprive injured employees of all remedies for breach of contract. *Nor do we think that Congress intended to shield employers from the natural consequences of their breaches of bargaining agreements by wrongful union conduct in the enforcement of such agreements…* For these reasons, we think the wrongfully discharged employee may bring an action against his employer in the face of a defense based upon the failure to exhaust contractual remedies, provided the employee can prove that the union as

[2500] Osborne et al *Labor Union Law* 286.

[2501] For a detailed discussion of the case, see in particular Anonymous "Individual Control over Personal Grievances under *Vaca v. Sipes*" (1968) 77 *Yale LJ* 559, JC Falkin "Union's Duty to Fairly Represent Its Members in Contract Grievance Procedures – The Impact of Vaca v. Sipes" (1967) 19 *Syr L Rev* 66–86 and Lenz Jr (1980) *J Corp L*.

[2502] The Supreme Court states at *Vaca* 177, as per White, J as follows:

> "[The DFR] was soon extended to unions certified under the N.L.R.A., see Ford Motor Co. v. Huffman, supra. Under this doctrine, the exclusive agent's statutory authority to represent all members of a designated unit includes a statutory obligation to serve the interests of all members without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct [citing] Humphrey v. Moore, 375 US [335 (1964)] at 375 US 342. It is obvious that Owens' complaint alleged a breach by the Union of a duty grounded in federal statutes, and that federal law therefore governs his cause of action. E.g., Ford Motor Co. v. Huffman, supra. Although N.L.R.A. § 8(b) was enacted in 1947, the NLRB did not, until Miranda Fuel, interpret a breach of a union's duty of fair representation as an unfair labor practice." [their emphasis].

[2503] *Vaca* 174, 183. For a succinct discussion on this point, see JK Robinson "Labor Law – Federal Preemption – NLRA Does Not Preempt Court Jurisdiction of Suit against Union for Breach of Its Duty of Fair Representation" (1966) 13 *Wayne L Rev* 602–610.

[2504] *Vaca* 182.

bargaining agent breached its duty of fair representation in its handling of the employee's grievance."[2505]

The Court furthermore affirmed that the provision under which the member/employee can bring such a suit is section 301 of the LMRA. Furthermore, "[i]f a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy".[2506] This was the first of several cases over the following decades to clarify what the "standards of conduct" expected of unions in representing their members entail, summarised as follows by Osborne et al:[2507] Firstly, that "[a] breach occurs 'only when a union's conduct toward a member… is arbitrary, discriminatory, or in bad faith";[2508] and, secondly, that "[a] union may not 'arbitrarily ignore a meritorious grievance or process it in a perfunctory fashion…'".[2509] While the Supreme Court ruled (on the facts) that the member had not established the breach by the union,[2510] the *Vaca* decision remains of significant importance – both in light of what it was the first to address, as well as in terms of what was to come.[2511] The DFR is investigated in more detail in chapter 9 below (at § 9 4).

A further noteworthy decision of this period was the so-called *Boys Markets* decision of 1970,[2512] where the Supreme Court used "judicial inventiveness"[2513] to re-open the possibility of injunctions against strike action, "despite the Norris-LaGuardia Act's [LDA] ban on federal court injunctions in labor disputes".[2514] Atleson maintains that the decision was broadly supported by academic commentators since the

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[2505] 185-186 [my emphasis].

[2506] 186-187.

[2507] Osborne et al *Labor Union Law* 286.

[2508] *Vaca* 190, citing *Humphrey* and *Huffman*.

[2509] Osborne et al *Labor Union Law* 286, quoting from *Vaca* 191 – the full sentence of which, reads as follows: "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective bargaining agreement."

[2510] See *Vaca* 193-195. In essence therefore, the Court found that the union had *not* acted in an arbitrary manner, or "bad faith conduct" [*Vaca* 193], or processed the claim in a "perfunctory fashion" [*Vaca* 191], nor was there any malice on the part of the union – in the decision not to proceed to arbitration.

[2511] As mentioned, the further decisions that were to develop the *Vaca* principles, are discussed in further detail in the appropriate sections below.

[2512] *Boys Markets, Inc v Retail Clerks Union*, Local 770 [398 US 235 (1970)]. For a detailed discussion of the case, see Anonymous "The New Federal Law of Labor Injunctions" (1970) 79 *Yale LJ* 1593.

[2513] JB Atleson "The Circle of Boys Market: A Comment on Judicial Inventiveness" (1985) 7 *IRLJ* 88 88.

[2514] 88.

underlying reasons that saw the promulgation of the LDA were no longer at issue in the then-present-day America – the courts were no longer viewed as being anti-union and organised labour was now effectively established and no longer in need of statutory protection.[2515] Furthermore, the fact that the extension involved the violation of no-strike clauses within CBA's, meant that standards existed to protect against judicial abuse, since they would have to be determined in light of breaches of written contracts (with the latter therefore serving as a form of interpretive restraint).[2516] This last point by Atleson further highlights the increased deference to private arbitration as a form of dispute resolution: "Most importantly, perhaps, it was believed that injunctions against strikes which violated no-strike promises were necessary for the integrity of the arbitration process, which had received substantial judicial attention and support."[2517]

The final important judgment was *Carbon Fuel Co. v United Mine Workers of America*.[2518] This decision provided clarity regarding the question whether or not a parent/international-union should be held liable in damages for an unauthorised ("wildcat") strike instigated by the local/subsidiary union. In this case, despite CBAs between the employer and UMWA, the latter's attempts to verbally persuade members of the local union to desist from their industrial action in violation of the two applicable CBAs, was unsuccessful. Carbon Fuel Co. instituted suit against UMWA as the parent-union for damages suffered as a result of the series of strikes. The Supreme Court considered the underlying intention of Congress in framing the LMRDA, before finding no merit in the arguments of the employer.[2519] The judgment was criticised by some writers for its focus on section 301 of the LMRA as the basis for determining the

[2515] 89.

[2516] 89.

[2517] 89. However, Cihon & Castagnera *Employment & Labor* 529 make the following important point: "The decision in *Boys Markets* allowing federal courts to enjoin strikes in violation of no-strike clauses does not mean that a union may never go on strike during the term of a collective agreement. The *Boys Markets* holding is limited to strikes over issues subject to arbitration under the agreement" [their emphasis].

[2518] 444 US 212 (1979).

[2519] As per *Carbon Fuel* 216, these were that there was an obligation on UMWA and District 17 "to use all reasonable means to prevent and end unauthorized strikes in violation of the collective-bargaining agreement" – and that this obligation "is either (a) implied in law because the agreement contains an arbitration provision or (b) in any event is to be implied from the provision of the agreement that the parties 'agree and affirm that they will maintain the integrity of this contract …'".

underlying congressional intention (as opposed to earlier decisions).[2520] It nonetheless provides insight into the factors relevant to the relationship between a union and its members that are of importance in determining union liability.[2521] Key to this, remains the common law doctrine of "agency".[2522]

However, as explained by Zimarowski, a further avenue of liability was left open by the Supreme Court, namely whether this can exist "through the use of the contractual relationship."[2523] Carbon Fuel's secondary argument was that the terms of the CBA imposed an implicit obligation on the union to end the strike action and to "maintain the integrity of the contract".[2524] The Supreme Court considered the terms of the CBA (as well as prior versions of it) and came to the conclusion that – based on their "bargaining history" – this argument could not be sustained.[2525] The court did not rule out the possibility of a contractual obligation either. In summary, this means that "unions have no liability and therefore no accountability for the wildcat work stoppages, unless the union can be brought in under section 301(b) and (e) [of the NLRA, as amended], agency principles, or an express contract provision."[2526] Two final remarks about the judgment in *Carbon Fuel* are, firstly, that it is still "good law" in the USA. Secondly, in the words of Gould, while "[t]his decision [of *Carbon Fuels*] does not deal with local union liability", what must be kept in mind is that "[t]he question is often an academic one, since locals often do not have much money in their treasuries".[2527]

[2520] *Carbon Fuel* 216-217. Regarding the criticism, see Lenz Jr (1980) *J Corp L* 213, 215-216.

[2521] As explained by Lenz Jr (1980) *J Corp L* 213, the court focused on there being no evidence or proof "that the union had actually authorized, participated in or ratified the strike" [*Carbon Fuel* 218, citing the decision in the Court of Appeals]. Furthermore, along with the fact that UMWA had "orally denounced the strikes when they had occurred", the court considered the applicable union constitution – which "prohibited local unions from conducting walkouts without authorization from the national leadership" [Lenz Jr (1980) *J Corp L* 213, citing *Carbon Fuel* 218, respectively].

[2522] "Insofar as petitioner's argument relies on the history of § 301 and the congressional plan to prevent and remedy strikes in breach of contract by encouraging arbitration, the legislative history is clear that Congress limited the responsibility of unions for strikes in breach of contract to cases when the union may be found responsible according to the common-law rule of agency" – *Carbon Fuel* 216.

[2523] JB Zimarowski "The Limits upon a Labor Union's Duty to Control Wildcat Strikes" (1982) 84 *W Va L Rev* 933–959 947.

[2524] 946, citing from *Carbon Fuel* 218. At risk of stating the obvious, it is the obligation to dispute resolution through arbitration within the CBA, that saw Carbon Fuel argue that the "integrity" of the contract was *not* being maintained.

[2525] Zimarowski (1982) *W Va L Rev* 946, citing *Carbon Fuel* 221.

[2526] Zimarowski (1982) *W Va L Rev* 949.

[2527] WB Gould *A Primer on American Labor Law* 4 ed (2004) 158 n44. See further Cane Jr (1979) *Calif L Rev* 1033-1034.

This concludes the discussion of the legislative readjustment to trade unions and their accountability in the USA – roughly between the Second Word War and the 1960s. As mentioned, this legislative regime has remained largely intact to the present day. In chapter 9, the current application of this regime, placed in the broader context of developments in the economy and labour relations system of the USA will be discussed.

8 5 The development of common law principles applicable to trade unions and their accountability

In the introduction to this chapter, it was mentioned that the common law principles applicable to trade unions and their accountability did not, as was the case in Britain, form such a clear-cut part of the readjustment phase in the development of trade union regulation in the USA. Even so, and despite these principles spanning the divide between the three phases of the development of trade union regulation in the USA that inform this study, it is included in this chapter, primarily for purposes of uniformity with the discussion of the position in Britain.

At the outset, the point has to be made that, while Britain (as discussed in chapter 5), the USA and South Africa (discussed below at § 11 4), are jurisdictions that see the continued influence of the common law, there is significant variance in the depth and breadth of this influence. Other than in Britain (where the complex regulatory scheme operates to the virtual exclusion of the common law), common law principles in the USA remains of central importance to understanding collective labour law and, by implication, the functioning of trade unions and their accountability. Despite the existence of legislation, the common law is still used. In many instances this is the result purely of the silence of statutes with regard to the question facing the parties. To some extent, this is exacerbated by the relative “age” of America’s primary collective labour legislation – with its last wholesale formal amendment some 60 years ago.

Even so, the common law discussion to follow focuses on the same broad topics as identified in chapter 5 – but *primarily* only to the extent that it offers insight into the common law similarities between Britain and the USA. Note that contemporary developments relating to the interpretation and application of the various statutes in the USA will be considered in the context of the current legislative regulation of trade

unions and their accountability in chapter 9 below.

8 5 1 The common law in the USA – introduction

Prior to the promulgation of the various federal acts that sought to regulate labour relations discussed in chapter 7 and earlier in this chapter (starting with the LDA in 1932),[2528] the common law was the primary yardstick against which unions, their relationships with their members and their activities were measured.[2529] Given that federal labour law is a fairly recent phenomenon in the USA and that it developed in a piecemeal fashion, it is not surprising that the common law has been (and continues to be) utilised to a significant extent in the USA, at least in the absence of specific guidance by or application of state or federal labour legislation.[2530] Lieberwitz says, for instance, that the LMRDA was enacted "against a background of state common law concerning the procedural due process rights of union members disciplined by their union" and that "the state courts decided union discipline cases for more than sixty

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[2528] Says St. Antoine (1982) *Am J Comp L* 300 in this regard:

> "Symptomatic of the unpredictable, sometimes inadvertent, development of federal labor policy was the way the Norris-La Guardia Act ushered in the modern era of American labor law in 1932. Norris-La Guardia was not so much a piece of regulation as of *de*regulation. Its primary aim was to get the federal judiciary out of the business of enjoining strikes. The immediate effect was to remove federal controls as factors in the nation's labor disputes, apart from the rail industry. This anachronistic invocation of *laissez-faire* could hardly endure. Barely three years later, partly in response to growing industrial unrest that had been exacerbated by the Great Depression and partly in response to an increasing recognition of workers' claims to broader social justice, Congress passed the National Labor Relations (Wagner) Act, the first comprehensive federal regulation of the relations between American employers and unions" [footnotes omitted; their emphasis].

[2529] As discussed in the early unionism section of chapter 7 at § 7 2 1 above, the "criminal conspiracy" doctrine arose from its common law foundation as the initial attempt at regulating (or rather, proscribing) the early labour associations. For a useful overview of this period, and the gradual transition in acceptance of the role of unions with the American labour relations system, see RC Hartley "The Framework of Democracy in Union Government" (1982) 32 *Cath U L Rev* 13 26-39.

[2530] With this being said, RA Smith & WJ DeLancey "The State Legislatures and Unionism: A Survey of State Legislation Relating to Problems of Unionization and Collective Bargaining" (1940) 38 *Mich L Rev* 987 987 make the obvious, albeit necessary point, that the state laws were also introduced in a piecemeal fashion, as determined by the individual needs of the various States:

> "It will come as a surprise to some to note the extent to which the state legislative power has been invoked to deal with problems arising out of the development of trade unionism. Legislation exists in many forms, employing every variety of sanction. Some statutes have long been on the books; others are of recent origin. Some very obviously are the product of political exigency; others give evidence of serious deliberation" [footnotes omitted].

For a list of the State legislation being referred to, see Smith & DeLancey (1940) *Mich L Rev* 996 n30.

years before the LMRDA".[2531] Summers observes of the LMRDA, that the "[f]ederal legislative protection was thus superimposed on state judicial protection, reinforcing and not supplanting it".[2532] Osborne et al, in turn, summarise the position as follows:

> "Over the course of 200 years, and in particular during the past half century, the nature of the legal relationship between union and union member has undergone a series of substantial changes, both in the content of the law and in the process of its enforcement. The primary mile posts in the development of the current law are: (1) the state common law of union membership and of the union constitution, which was the exclusive source of *internal* union law from the 1800s until 1959;[2533] (2) the federal statutory law embodied in the ... [LMRDA], enacted by Congress in 1959; (3) the assertion by the ... [NLRB] of administrative jurisdiction over *internal* union disputes beginning in the 1960s;[2534] and (4) the creation of a new federal common law and jurisdiction for judicial enforcement of union constitutions under Section 301(a) of the ... [NLRA], beginning in 1981."[2535]

The development and use of common law in the context of contemporary American collective labour law, essentially runs parallel to the promulgation of the primary legislative instruments regulating labour. In this time, the courts were not hesitant in

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[2531] RL Lieberwitz "Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace" (1987) 1 *Bost Coll L Rev* 21 30 – in the latter quote, citing CW Summers "The Law of Union Discipline: What the Courts Do in Fact" (1960) 70 *Yale LJ* 175 175. Summers (1960) *Yale LJ* 175 adds further that the state courts have "[t]o some degree", "been protecting many of the same rights now guaranteed by the [LMRDA]".

[2532] Summers (1960) *Yale LJ* 176.

[2533] See for instance B Aaron & MI Komaroff "Statutory Regulation of Internal Union Affairs – I" (1949) 44 *Ill L Rev* 425 427, who state: "Prior to the enactment of the [LMRA of] 1947, there was no federal statute which specifically regulated, in even a slight degree, the internal affairs of labor unions" [footnotes omitted].

[2534] This being in reference to the NLRB starting to interpret subs 8(b)(1)(A) of the NLRA in such a manner as to find "it to be an unfair labor practice for a union to impose discipline on members for filing [ULP] charges without first exhausting internal union remedies" – Osborne et al *Labor Union Law* 8.

[2535] Osborne et al *Labor Union Law* 4, [my emphasis]. Point four speaks to the Supreme Court decision in *United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, AFL-CIO v Local 334, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada* 452 US 615 (1981), which saw specific wording within subs 301(a), as highlighted ["Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, *or between any such labor organizations*, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties"], be defined as meaning that "federal subject matter jurisdiction for adjudication of disputes between a local union and its parent organisation [that arose] under an international union constitution", was duly established – Osborne et al *Labor Union Law* 28. The various implications of the points listed above will, to the extent that they are required to be addressed, be examined further under the appropriate sections to follow below.

looking to the common law to assist employers (and to a lesser extent, trade union members)[2536] in instances where the activities being complained of were deemed worthy of censure. Even so, there was also evidence of periods of an underlying reluctance, particularly the so-called "Lochner era",[2537] where the American judiciary, following the 1905 judgment in *Lochner v New York*,[2538] applied a form of "laissez-faire constitutionalism" which may be[2539] described as non-interference in the affairs of private entities or persons in the commercial sphere.[2540]

The influence of the British experience and precedent[2541] and established principles of the common law in the USA only started to lead to an adjustment at federal level in light of the increased prominence of organised labour as late as the 1922 *Coronado* decision.[2542] However, *Coronado* only took the law further in one particular aspect.[2543] This process was compounded by the fact that, unlike Britain and South Africa, the law applicable to American trade unions and their members did not develop holistically. Given the size of the USA and its nature as a federal system comprised of many states, (union) labour law remained complex. As explained by Forkosch:

> "Despite this judicial softening of the common law's rigors, the union, as an entity, did not, in legal theory, exist on any stable basis, absent incorporation, even though in fact it conducted its affairs,

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[2536] B Aaron "United States Report" (1964) 18 *Rut L Rev* 279 285.

[2537] The period is widely held to be from 1905 to the mid-1930's (MC Harper et al *Labor Law: Cases, Materials, and Problems* 5 ed (2003) 52) – more precisely 1937, with the *Jones & Laughlin* decision, confirming the constitutional validity of the NLRA (see JG Pope "Labor's Constitution of Freedom" (1997) 106 *Yale LJ* 941 941).

[2538] 198 US 45 (1905). By way of brief summary, as per Harper et al *Labor Law* 49, "[t]he Court held unconstitutional a New York statute providing that no employee shall 'work in a biscuit, bread or cake bakery or confectionary establishment more than sixty hours in any one week, or more than ten hours in any one day'" – as this was deemed to interfere with the right of contract between the employer and employees.

[2539] Pope (1997) *Yale LJ* 941.

[2540] See Harper et al *Labor Law* 52 for a brief summation of some of the key judgments during this time – including, *inter alia*, *Adair v United States* 208 US 161 (1908), which saw the Supreme Court declare s 10 of the Erdman Act of 1898 [Ch. 370, § 10, 30 Stat. 434 (1898)] unconstitutional. The latter targeted the railway industry, and attempted to ban the imposition of "yellow-dog" contracts, which held as a requirement of employment that the worker would not join a union – Hardin et al *Developing Labor Law II* 1964.

[2541] TR Witmer "Trade Union Liability: The Problem of the Unincorporated Corporation" (1941) 51 *Yale LJ* 40 41.

[2542] MD Forkosch "The Legal Status and Suability of Labor Organizations" (1954) 28 *Temp L Q* 1 5, 8.

[2543] This being, essentially, the possibility of unions being sued as entities in the federal courts, despite their common law status.

> its holdings, and its relationships more permanently than did many entrepreneurial groups. In addition, the states were separate jurisdictions, with different approaches, resulting in anomalous consequences, e.g., a union might not be an entity in its 'home' state, but suable in an adjoining state, while, in a third, it could not sue or be sued except for trade-mark protection, and, in a fourth jurisdiction, the officers might find the union suable but the judgment ultimately collectible against the individual members. This confusion was compounded by the intransigence of the unions themselves, for their early fears of criminal, legal, and then equitable suits made them shy from the judiciary's olive branch".[2544]

This in mind, an analysis of developments in the 50 States falls outside the scope of this study.[2545] The reasons are simple: Firstly, in the words of Hay – "[t]o a large extent, labor law and social legislation are federal law".[2546] Secondly, to serve as comparative yardstick, a coherent uniformity of approach needs to be distilled from that comparative jurisdiction, a virtually impossible ask were the study to include – over and above federal law – the law of 50 states. In short therefore, American federal labour law is to provide the foundation for the present discussion. However, certain aspects of the various states' common law will be considered, at least to the extent that these approaches provide examples of how a common law jurisdiction approached the regulation of trade unions and their accountability.

8 5 2 The status of trade unions

In terms of the common law in the United States, a trade union can achieve entity status through incorporation.[2547] A union's ability to incorporate and the status that it achieves once this happens, are determined by the relevant laws (regulating not-for-profit and membership corporations) of the specific state where that particular association is based.[2548] Therefore, in terms of the early common law a trade union

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[2544] Forkosch (1954) *Temp L Q* 2.

[2545] Notwithstanding, there are instances where – absent the matter having been heard before the Supreme Court – a Federal Appeals or District court will be cited, in cases necessary for the examination of the relevant section. But in general, the focus of this study will remain on the judgments/decisions of the apex court. For an overview of the federal legal system, and its interaction with American labour law, see the "Federal courts" section at §9 3 4 4 below.

[2546] P Hay *The Law of the United States: An Introduction* (2017) 254. Osborne et al *Labor Union Law* 6-7 states further: "From 1959 to the present, state law has been all but completely eclipsed by federal laws".

[2547] MH Malin & LA Schmall *Individual Rights Within the Union* (1988) 2.

[2548] Malin & Schmall *Individual Rights* 2 – the authors state further [at 2] in this regard: "Most unions, however, are unincorporated associations." AL Goldman *Labor and Employment Law in the United*

that was not incorporated was not recognised as a legal entity. It could not sue or be sued and actions that were sought against the union had to be made instead against each individual member of that association.[2549] The union could not hold property in its own name and, in addition, a member could not sue or be sued by the union since union and member were indistinguishable from one another (that is, the member would be both plaintiff and defendant in the same action).[2550] In this regard, the American approach understandably mirrors that of the UK prior to *its* development in terms of the *Taff Vale* decision. This was initially remedied by the Supreme Court in *Coronado*, at least in the federal sphere.[2551] While one result of the *Coronado* case was that many States were to eventually confer entity status on labour unions either by statute or judicial decision,[2552] the main catalysts for this process were the gradual recognition afforded to unions within the states and the associated development of their procedures to allow for suits against/involving them as entities (rather than this being due to the influence of the Supreme Court or federal legislation).[2553] At the same time, developments at federal statutory level also played a role.[2554] One example is that of Rule 17(b) of the Federal Rules of Civil Procedure (as amended), which provides that in a suit involving federal statute/a federal action, and despite an "unincorporated association" not holding capacity within applicable *state* law, "it may sue or be sued in its common name to enforce a substantive right".[2555] However, the change in status of

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States (1996) 232 in turn explains this as follows: "In addition to being controlled by their charters and by-laws, labor unions are regulated in accordance with the common law of private associations.

[2549] Malin & Schmall *Individual Rights* 2. See also PW Cane Jr "Parent Union Liability for Strikes in Breach of Contract" (1979) 67 *Calif L Rev* 1028 1031; Witmer (1941) *Yale LJ* 41.

[2550] Malin & Schmall *Individual Rights* 2.

[2551] Witmer (1941) *Yale LJ* 41. Thus, the separate identity of a union was recognised for the first time in *Coronado* in response to attempts by the union to avoid liability by claiming that since it was not incorporated, it had no legal existence. Malin & Schmall *Individual Rights* 2-3.

[2552] Malin & Schmall *Individual Rights* 3 n10. The point must however be made that this was gradual process. Writing in 1941, Witmer (1941) *Yale LJ* 42 states that *Coronado* "has not won favour with the State Courts" – and "has been rejected in case after case that has been decided since 1922". See Witmer (1941) *Yale LJ* 42 n9 for a list of State cases where the entity approach in respect of unions were rejected.

[2553] See Anonymous "Unions as Juridical Persons" (1957) 66 *Yale LJ* 712 714, where is stated: "A developing recognition of the need to make unincorporated associations such as unions legally responsible led most jurisdictions to impose on them by statute various characteristics of juridical persons, particularly that of suability".

[2554] Central hereto, were the interpretations afforded to sections 301 and 303 of the LMRA – discussed in more detail at § 9 3 2 2 below.

[2555] See Witmer (1941) *Yale LJ* 42. Of course, the consequence of this is that, where there is *no* federal

unions for the purposes of suit is best left for discussion in the appropriate section at § 8 5 4 below.[2556] Rather, in returning to the question relating to the common law status of trade unions in the USA and despite the federal system promoting uniformity, development at state level proceeded idiosyncratically.[2557] Writing in 1982, St. Antoine describes the position as follows:

> "Under the common law applicable in most states, labor unions are classified as voluntary, unincorporated associations like fraternities or social clubs. Except for the rare organization that becomes incorporated, there are no formal prerequisites for formation or dissolution. Furthermore, under the traditional view, unincorporated labor unions have no separate legal identity apart from their members, and therefore may neither sue nor be sued in their common names. All this was changed for purposes of federal law by the [LMRA] in 1947, which authorized suits by and against unions on labor contracts and thereby confirmed the federal concept of a labor organization as a juridical entity. State law remains controlling, however, with regard to a union's holding of property, its execution of ordinary commercial contracts, and even many of its relationships with members

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substantive right involved, the *state* procedure then applies – Anonymous (1957) *Yale LJ* 738. As furthermore stated in Anonymous (1957) *Yale LJ* 715-716: "In 1922 the Supreme Court incorporated *Taff Vale* into American federal law in *United Mine Workers v. Coronado Coal Co.*, and on the basis of *Coronado* later promulgated Federal Rule of Civil Procedure 17(b) governing suability of unincorporated associations" [their emphasis; footnotes omitted]. As per A Kamin "The Union as Litigant: Personality, Pre-Emption, and Propaganda" (1966) *Sup Ct Rev* 253 261, "the *Coronado* principle was incorporated into Rule 17(b)" in 1938 [their emphasis]. Regarding the interplay between what was decided in *Coronado*, and what was to be included under Rule 17(b), Anonymous (1957) *Yale LJ* 721-722 sees the following being said:

> "The Supreme Court's *Coronado* decision should be interpreted as applying this method of statutory construction to make unions juridical persons as a matter of federal substantive law. *Coronado* is generally thought to have established the 'merely procedural' rule that any unincorporated association may sue or be sued to enforce a federal substantive right. And federal rule 17(b) is said to 'codify' the decision. But as to unions, distinct from other unincorporated associations, *Coronado* went much further. Although the union was sued under the Sherman Act, the Court's unanimous conclusion, that unions could be sued and held liable for acts of their agents, rested upon considerations independent of the act. This rule was not limited to cases enforcing Sherman Act or other federal substantive rights" [their emphasis].

The complete wording of the relevant rule-subsection, is as follows:

> "[R 17(b)] Capacity to sue or be sued is determined as follows:
> … [R 17(b)(3)] for all other parties, by the law of the state where the court is located, except that: … [R 17(b)(3)(A)] a partnership or other unincorporated association with no such capacity under that state's law may sue or be sued in its common name to enforce a substantive right existing under the United States Constitution or laws; …".

[2556] On this point, the questions of "is a union a legal entity", and "can it sue or be sued", or – for obvious reasons – very close to one another, and are frequently approached collectively. See in this regard Forkosch (1954) *Temp L Q* 5.

[2557] In this regard, Forkosch (1954) *Temp L Q* 9-27, and before that, Smith & DeLancey (1940) *Mich L Rev*, provide a useful and succinct overview of the status of unions in the various American states, as of 1953-1954/1939-1940, respectively.

under its own constitution and bylaws".[2558]

The "change" spoken of above – that is, the LMRA that "stressed the differentiation of union from members"[2559] – was preceded by the Supreme Court decision in *United States v White*[2560] where "the case for judicial personality of unions" was emphasised.[2561] Thus, while it can be accepted that "trade unions have outgrown their legal classification as unincorporated associations",[2562] a dichotomy nonetheless exists between the federal and US states' approach towards the status of unions.[2563] However, to conclude with the words of Newell, what must be kept in mind is that "[t]his dichotomy has not caused many problems in the sphere of industrial dispute regulation owing to the federal statutory framework of US labour law under which specific rights, duties and causes of action have far more significance than common law actions in tort."[2564]

[2558] St. Antoine (1982) *Am J Comp L* 302, [footnotes omitted].

[2559] Anonymous (1957) *Yale LJ* 725. The author reasons accordingly [at 725], in light of the LMRA, that "American legislation now [as it was then, *prior* to the LMRDA] has much stronger implications of union juridical personality than the British statutes" – this being especially so in light of the NLRA, which "affirmatively secured the right to organize unions" and the like.

[2560] *United States v White* 322 US 694 (1944).

[2561] As discussed in chapter 8 at § 8 2 above, the court concluded that since the union was deemed separate from that of its members, a union official could "not invoke the privilege against self-incrimination to withhold subpoenaed union records" – Anonymous (1957) *Yale LJ* 725. See Kamin (1966) *Sup Ct Rev* 261-263 for a brief overview of the case. The court [as per Murphy J, at 701-703] outlined a variety of factors that were considered, in concluding that the union and membership were separate from one another. The "test" is based on "whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only" – *White* 701. The factors include, *inter alia*, that the union's existence is "as perpetual as that of any corporation", and is not dependent on "the life of any member"; that it "operates under its own constitution, rules and by-laws which, in controversies between member and union, are often enforced by the court"; and that "duly elected union officers have no authority to do or sanction anything other than that which the union may lawfully do".

[2562] D Newell "The Status of British and American Trade Unions as Defendants in Industrial Dispute Litigation" (1983) 32 *ICLQ* 380 380. See further Anonymous (1957) *Yale LJ* 750, where is stated:

> "In the United States, a far more extensive pattern of regulation creates correspondingly stronger reasons for holding unions juridical persons. The view that unions are mere aggregates of individuals is no longer consistent with the power they possess and the functions they exercise."

[2563] 381.

[2564] 381.

8 5 3 The union-member contract

8 5 3 1 The imperative of the union constitution

With regard to the trade union constitution, Osborne et al state as follows:

> "The union constitution – the organization's charter of self-governance – is the primary source of substantive legal rights and obligations between a member and the union. It defines both the process by which the organization is governed and the substantive rules by which its affairs are administered."[2565]

As such, and in similar fashion to Britain, the union constitution and bylaws form the basis of the regulation of the procedures of a trade union and the relationship between a trade union and its members.[2566] Upon the individual worker becoming a member of the union, the worker then "[becomes] contractually bound by the constitution and the bylaws" of that trade union.[2567] As explained by Twomey, when remedying [of] any unfair or arbitrary actions by union officials is required, it requires the constitution and the related bylaws to be considered first and foremost, prior to any further (possibly external) solutions being sought.[2568]

However, Osborne et al make the further point that unions "are unusual, in comparison with other private institutions, in the degree to which their internal affairs

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[2565] Osborne et al *Labor Union Law* 25, [footnotes omitted].

[2566] Malin & Schmall *Individual Rights* 4. AH Cook "Dual Government in Unions: A Tool for Analysis" (1962) 15 *ILRR* 323 325 states as follows:

> "In internal union government, the constitution of the national union and the bylaws of the locals are the basic law. In them, the executive officers are listed, together with their duties and the method of their election. The convention, and between conventions in many unions the executive board, are the national law-making bodies, while the local meetings and executive boards legislate for the local unions. A judicial procedure complete with a system of appeals for handling a variety of crimes against the union and its officers is spelled out in provisions usually headed 'discipline' or 'trials and appeals.' Rules covering admission, payment of dues, transfers, withdrawals, and the like define membership and its rights and duties. Constituency and representation are inherent in the election system, as are the relationship of locals to national unions, the make up of executive boards, and the organization of the union's subordinate bodies".

[2567] BS Feldacker & M Hayes *Labor Guide to Labor Law* 5 ed (2014) 322.

[2568] Twomey *Labor & Employment* 298. WW Stafford "Comments – Disputes Within Trade Unions" (1936) 45 *Yale LJ* 1248 1263, writing in 1936, states as follows:

> "Jurisdiction of the issues once established, courts regard union constitutions and the by-laws and resolutions adopted pursuant thereto as 'contracts' in which are defined the rights, duties, and powers of members and leaders respectively."

are subject to regulation and the variety of external laws that apply".[2569] In this regard, St. Antoine points out that while the union's constitution and bylaws "spell out the substantive and procedural rights of members within their organization",[2570] the introduction of the LMRDA in 1959 saw a "substantially different concept" being introduced to serve as "the basis of members' institutional protections"[2571] (discussed in more detail below).

8 5 3 2 Contract and property theories – further "fictions" of intervention

As is evident from the discussion above, the constitution and bylaws of a union serve as its central rules and regulations. The question that arises is how the American judicial system found jurisdiction to regulate the internal affairs of trade unions *prior* to the extensive statutory guidance mentioned above?[2572] As a point of departure, Osborne et al state that "[a]s a general matter, union constitutions were traditionally enforced under state common law, by borrowing from preexisting concepts of contract law".[2573] The contract theory is described as follows:

> "Many courts, emphasizing the consensual basis of the member's relation to the group, have found a solution to the question of justiciability and a rationale for decision on the merits by treating the group's rules as terms of a contract, which is the sole source of legally cognizable rights and is enforceable in accordance with ordinary contract doctrine."[2574]

However, "if the association has acted in accordance with its rules, and those rules do not violate public policy, there is no occasion for judicial intervention".[2575] Furthermore, in terms of the common law approach, "a nonmember has no legally enforceable right, since he is not party to the contract".[2576] But contract law was not the only basis for judicial intervention. As explained by Aaron:

[2569] Osborne et al *Labor Union Law* 5.
[2570] St. Antoine (1982) *Am J Comp L* 303. The author adds further [at 303] that "those rights are generally enforceable in state courts as a matter of common law contact".
[2571] 303.
[2572] Says B.R.S. "Rights of Union Members: The Developing Law under the LMRDA" (1962) 48 *Virg L Rev* 78 78 in this regard: "Historically, control of the internal affairs of labor organizations was delegated primarily to the courts, with no legislative guidance".
[2573] Osborne et al *Labor Union Law* 25.
[2574] Anonymous (1963) *Harv L Rev* 1001.
[2575] 1001.
[2576] 1001.

> "The theories which [the courts] devised to justify such intervention were based on principles of property or contract. The property theory asserted that expulsion might result in the loss of substantial property rights, because each member owns an undivided share of the organization's property. Moreover, membership sometimes carried a right to valuable insurance policies. The premise of the contract theory was that the constitution and bylaws of a voluntary association are a contract between the members, and expulsion in violation of the constitution and bylaws is a breach of contract for which courts will grant a remedy. *Both theories are legal fictions*, and neither adequately explains either the reasons for the courts' interventions or the remedies they have fashioned."[2577]

In similar vein, Lieberwitz explains that the courts, prior to the era of legislation, "had to determine the source of the right" and did this by means of finding "either a property right in union membership or a contractual right under the union constitution and bylaws, which courts viewed as a contract between the union and the members or as a contract entered into by all union members".[2578] However, this judicial intervention was not without its challenges. In the attempts to enforce these contract or property "fictions", "the voluminous law which resulted was, in the aggregate, 'inadequate' and 'uncertain'."[2579] Additionally, in those instances where an individual

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[2577] Aaron (1964) *Rut L Rev* 285, [my emphasis]. Osborne et al *Labor Union Law* 5-6 state as follows in this regard:

> "From the early 1800s until the late 1950s, legal controversies regarding the affairs of unions were primarily resolved by reference to common law decisions reached in state court cases interpreting union constitutions – primarily by reference to state contract law jurisprudence. Alternative state law precedents were based on the state common law of property, by which the state courts held that they would 'not interfere in the internal affairs of unions unless property rights [were] involved.' The state common law principles were relatively simple and straightforward, and reflected the reluctance of courts to become overly involved in refereeing internal union controversies. The traditional judicial view held that, like other private associations, unions should be allowed to govern their own internal affairs free of substantial external regulation" [footnotes omitted].

[2578] Lieberwitz (1987) *Bost Coll L Rev* 30.

[2579] B. R. S. (1962) *Virg L Rev* 78. B. R. S. at n3 quotes from Summers [C Summers "The Impact of Landrum-Griffin in State Courts" (1960) NYU 13th Annual Conference on Labor 333 350], where is said in this regard:

> "Judicial indecision as to the proper role of the courts and uncertainty as to basic policies for the governing of internal union affairs inevitably produce vacillation. Torn by such tension and lacking any unifying principle, judges are constant only in inconsistency, but erratic results are concealed by a facade of logic appealing to the neutral principle of contract. Other judges, less perceptive and more mechanical, mistake form for substance and woodenly follow the logic to ridiculous results, thus multiplying the uncertainty and confusion".

See further Lieberwitz (1987) *Bost Coll L Rev* 30-31, who explains how state courts, in making use of either the contract or property theories, were quite prepared to "rewrite union disciplinary procedures in union constitutions and bylaws" – and that the "courts exercised broad judicial power in order to protect

member (or several as a class) sought assistance in court against the conduct of their union on the basis of contract, they would frequently meet with "limited success".[2580] One important reason for this was that "[i]f the union's constitution did not touch upon the subject of the member's complaint or did not set up democratic procedures, *the member was without a remedy at law because the union had not breached its contract with the member*".[2581]

Criticism of the "contract fiction" is largely based on the "artificiality" of the theory[2582] – when viewed against the question of who the actual parties to the contract are[2583] – and on its "rigidity" in not "afford[ing] room for several principles which ought to govern the internal affairs of associations".[2584]

In turning to the "property theory" of intervention, the approach in the USA was also underpinned by the *Rigby v Connol* decision[2585] (discussed in chapter 5). In this decision "the court, emphasizing the impropriety of equity's imposing a social relationship, denied reinstatement to an expelled union member on the ground that an injunction could not issue where no property interest was present".[2586] Given the importance traditionally afforded by courts to the protection of property rights,[2587] the fiction provides for the "taking of jurisdiction" in matters involving associations such as

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the property or contract right regardless of the actual terms of the contract" between union and member.

[2580] J Bellace et al *The Landrum-Griffin Act: Twenty Years of Federal Protection of Union Members' Rights 19* (1979) 1.

[2581] 1, [my emphasis]. However, certainty and uniformity in application, there was not. Stafford (1936) *Yale LJ* 1265 for instance opines that both property *and* contract rights' breaches had to be established:

> "Furthermore, courts do not feel bound by the terms of the membership contract as spelled out in the union rules, but consider the significant economic circumstances relevant to the status of trade union membership in general to support a grant of relief against conduct expressly authorized in the union constitution or by-laws. Concepts of due process and natural justice have been incorporated into this branch of the law."

[2582] Z Chafee Jr "The Internal Affairs of Associations Not for Profit" (1930) 43 *Harv L Rev* 993 1002.

[2583] Chafee Jr (1930) *Harv L Rev* 1003 makes the point that in an instance involving an unincorporated association, the contract in question would then be between the joining member and *each* of the existing members, a legally infeasible scenario. Furthermore, the logical extension of such would see a claim for unlawful expulsion (on account of breach of contract) lie against each and every member who voted for such expulsion, rather than against (as expected) only the union itself or its officers or applicable committee – Chafee Jr (1930) *Harv L Rev* 1003.

[2584] Chafee Jr (1930) *Harv L Rev* 1004.

[2585] *Rigby v Connol* (1880) 14 Ch. D 482, as discussed above at § 5 3 3 2 in chapter 5.

[2586] Anonymous (1963) *Harv L Rev* 998, citing *Rigby* 487.

[2587] See Anonymous (1963) *Harv L Rev* 998, where is stated:

> "[T]he property interest takes the dispute out of the exclusive jurisdiction of the private group and that an injury to a property interest is always serious enough to warrant judicial concern".

trade unions.[2588]

Examples of property interests that were sufficient for jurisdictional purposes,[2589] include instances where a claim was sought "in the right to use the association's physical property",[2590] and in cases involving "a member's right to a pro rata share of the association's assets in the event of dissolution".[2591] Furthermore, the property interest can be "considerable"[2592] in instances where "expulsion from a labor union may deprive an individual of rights to draw on pension and welfare plans".[2593] The application of the property theory was not without its critics in the USA either,[2594] with particular focus on the mechanical approach adopted by courts in stretching the fiction beyond its "questionable historical basis" and thereby stifling the equitable development of a broader underlying principle of intervention.[2595] As explained by Chafee:

> "The property theory is thus unsatisfactory because it requires the courts to base their decisions on an immaterial factor in the situation, and distracts their attention from the real interests of the member which have been injured and the true reasons which may make it undesirable to grant him relief."[2596]

[2588] Anonymous (1963) *Harv L Rev* 999. See further Chafee Jr (1930) *Harv L Rev* 999, in citing the eminent American legal academic Roscoe Pound [R Pound "Equitable Relief Against Defamation and Injuries to Personality" (1915) 29 *Harv L Rev* 640 678], who states that "this alleged property interest is largely a fiction, under the guise of which the courts are really protecting interests of personality".

[2589] Anonymous (1963) *Harv L Rev* 999.

[2590] 999 n9, citing *Davis v Scher* [356 Mich. 291, 97 N.W. 2d 137 (1959)] and *Heaton v Hull* [51 App. Div 126, 64 N.Y. Supp. 279 (1900)].

[2591] Anonymous (1963) *Harv L Rev* 999 n10, citing, *inter alia*, *Stein v Marks* [44 Misc. 140, 89 N.Y. Supp. 921 (Sup. Ct. 1904)].

[2592] Anonymous (1963) *Harv L Rev* 1000.

[2593] 1000-1001, citing *Rueb v Rehder* [24 N.M. 534, 174 Pac. 992 (1918)] and *Heasley v Operative Plasterers Ass'n* [324 Pa. 257, 188 Atl. 206 (1936)], respectively.

[2594] See the discussion in chapter 5 at § 5 3 3 1 and § 5 3 3 2 above, surrounding the criticism towards the approach of the British courts historically, which gave rise to the legal development heralded by the likes of Denning LJ in the *Lee* decision.

[2595] See Anonymous (1963) *Harv L Rev* 999, where is stated:

> "The almost fictional nature of such 'property' interests accentuates the inadequacies of the property requirement. Growing out of an equitable doctrine of questionable historical basis and a concern on the part of courts to avoid matters not easily susceptible of judicial resolution, it became a purely mechanical test which prevented articulation of the real considerations in deciding whether a dispute should be judicially resolve".

[2596] Says Chafee Jr (1930) *Harv L Rev* 1000 further in this regard:

> "It seems plain that the club member's interests of personality should be the object of consideration regardless of the nature of the club, and that the real question is whether the injury to these interests is sufficiently serious to warrant judicial interference with the internal affairs of a social organization. The court's willingness to decide this fundamental question ought not to depend on the presence or

8 5 3 3 Custom, practice, express and implied terms

The basic premise underlying the policy of the federal labour relations system is one that is adverse to undue judicial interference in internal union affairs.[2597] However, this does not preclude a court from enforcing the union constitution (as in Britain) as a contract. Notwithstanding this involvement, the court is required to "defer to a union's interpretation of its own constitution as long as that interpretation is reasonable".[2598] In amplification hereof, the outcome of Osborne et al's discussion of the federal common law approach following the *Plumbing & Pipefitting* case (as discussed above),[2599] is that the "case law that has developed since 1981 for interpreting and enforcing union constitutions is not substantially different from the preexisting state common law".[2600]

Where the union constitution is either ambiguous or silent, the court will consider the union's consistent past practices to assist in interpreting the relevant clause, subject to the proviso that if the trade union's past practice is in conflict with the plain language of the constitution, the practice will *not* be considered in order to interpret

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absence of an insignificant interest in club property".

[2597] In this regard, writing shortly after the introduction of the LDA and NLRA, Stafford (1936) *Yale LJ* 1269 states:

> "While the remedies of equity are sufficiently flexible from a technical point of view to provide relief in a variety of situations, in internal affairs unions must be permitted a large measure of autonomy and their leaders, broad discretion. Courts may properly interfere only in the most flagrant cases of injustice and autocracy."

[2598] Malin & Schmall *Individual Rights* 14.

[2599] See § 8 5 1 above.

[2600] Osborne et al *Labor Union Law* 29. The authors state further: "[J]udicial deference to union self-government and to a union's reasonable interpretation of its own constitution are recognized under federal law", before citing a series of cases in support – Osborne et al *Labor Union Law* 30 n121. These include, *inter alia*, *Sim v New York Mailers Union No. 6* 166 F.3d 465 (1999) 270, where Walker, CJ held that "'[a] union's interpretation of its own constitution is entitled to great deference … in order to avoid interference with internal union affairs … and [t]herefore, the interpretation of bylaw provisions by union officials will be upheld unless patently unreasonable". Furthermore, Osborne et al *Labor Union Law* 30 point to *Millwright Local 1079 v Carpenters* 878 F.2d 960 (1989) 962, where Contie SCJ ruled that a court's interference within the internal affairs of a union, and its interpretation of its own constitution, should only be done where "the official's interpretation is not fair or reasonable". Finally, in *Motion Picture & Videotape Editors Guild Local 776 v Theatrical Stage Employees Local 695* 800 F.2d 973 (1986) 975, the 9th Circuit Court of Appeals, care of Anderson CJ, concluded that "absent bad faith or special circumstances, an interpretation of a union constitution by union officials, as well as interpretations of the union's rules and regulations, should not be disturbed by the court" – as per Osborne et al *Labor Union Law* 30.

the ambiguous clause. This is so even where the practice itself (in spite of being in conflict with the constitution) is completely reasonable.[2601]

The interpretive approach followed "[w]hen the rules are ambiguous or do not cover the point in dispute, and there is no available authoritative interpretation by an organ of the group", is that the court will read in a "reasonable provision" in the same manner that any other ordinary contract would be interpreted.[2602] In other words, the same principles developed in the broader field of the law of contract are applied in interpreting the union constitution.[2603] This mimics application of the "implied terms doctrine" adopted by British courts (discussed in chapter 5).[2604]

Where the issue facing a court relates to the status of a custom of the trade union, the following approach has been suggested:

> "A different problem arises where the association rules are not in writing but are based on custom. The burden of proving the custom would seem to lie with the member claiming that the group action was invalid, but in a case in which the tribunal was proceeding under an alleged custom which the member considers nonexistent, such an approach would require him to prove a negative. It might be proper in those circumstances to place on the member the burden of proving that the custom's existence was doubtful and to require the association then to establish it. Where an asserted customary rule conflicts with a written rule, the courts have held that the latter governs, but in these cases the written rule has been the one which provided the greater protection for the interest of the member. Rather than mechanically adopting an analogue of the parol evidence rule, or an approach which automatically favors the more liberal of the alternatives, it seems preferable for the courts to attempt to determine, under the general standards for proving custom, whether the written or the unwritten rule is normally operative in the circumstances."[2605]

However, where the rules (or customs) of the union are considered "unduly harsh [then the] courts will refuse to enforce them",[2606] with the added qualifier that "the inequality of bargaining power which frequently exists in the associational context makes the judiciary particularly willing to test rules by concepts of natural justice and

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[2601] Malin & Schmall *Individual Rights* 14.

[2602] Anonymous (1963) *Harv L Rev* 1001.

[2603] See further Anonymous (1963) *Harv L Rev* 1025, where is stated: "While in most cases association rules are unambiguous, on occasion their meaning is not free from doubt. The courts will not assume any rule to exist without proof of its existence, and in interpreting rules they are inclined to follow the normal doctrines of contract and statutory interpretation" [footnotes omitted].

[2604] See § 5 3 3 5 above.

[2605] Anonymous (1963) *Harv L Rev* 1026, [footnotes omitted].

[2606] 1001.

reasonableness".[2607] This is not dissimilar to use of the broader concept of "public policy" in Britain (discussed above in chapter 5).[2608] Cox, in exploring the approach of the courts in instances of expulsion of a member from a trade union, remarks: "The familiar formula is that the expulsion must be set aside if it is inconsistent with the union constitution or bylaws, contrary to 'natural justice,' or contrary to 'public policy.'"[2609] Chafee, in his examination of what would constitute the lawful expulsion of a union member (in the still-formative years of the American collective labour law), adds to this:

> "Besides filling gaps in the rules, the courts will apply natural justice to upset an express rule which is contrary thereto. The principle is thus a sort of unwritten 'due process' clause which invalidates the statute of the association. Its meaning is equally vague. We can be certain that it usually involves the right of the accused member to a notice and a hearing, but little else is settled."[2610]

Despite these developments, questions remain on how the common law is suited to giving content to trade union constitutions. The following remarks highlight some of these challenges:

> "In a case involving the internal affairs of an association, a court may find it proper to refer to the association's practices, rules, or purpose as standards for determining the legitimacy of rival claims. For example, if a claimant asserts that he was wrongfully expelled from a group, it might be open to the group to show that its action was in accordance with its rules and that it was a practice necessary to fulfill what is commonly understood to be the group's purpose. If a court undertakes to examine the group's rules or past usages, its inquiry may lead it into what Professor Chafee has called the 'dismal swamp,'[2611] the area of its activity concerning which only the group can speak with competence. Rules and usages which have taken on a peculiar meaning over a period of time, when interpreted by a court which is unfamiliar with the group or unsympathetic to its practices, may be construed in a way which does not reflect the understanding of the members prior to the dispute … Even where there is no such element of mystery, the group assumedly possesses special competence in interpreting the significance of its own practices. Further, by substituting its interpretation of a rule for that of the group, the court risks interfering inadvertently with the group's activity".[2612]

[2607] 1001.
[2608] See § 5 3 4 1 above.
[2609] A Cox "The Role of Law in Preserving Union Democracy" (1959) 72 *Harv L Rev* 609 615.
[2610] Chafee Jr (1930) *Harv L Rev* 1015-1016.
[2611] This being a quote from Chafee Jr (1930) *Harv L Rev* 1023-1026.
[2612] Anonymous (1963) *Harvard Law Review* 991.

8 5 4 Judicial intervention in trade union internal governance

8 5 4 1 Members against unions

1941 saw the point being made that "[j]udicial intervention to correct abuses of trade union power is well established in cases involving expulsion of members from the union, and scattered decisions have given redress against racketeers and against violations of civil liberties".[2613] These remarks confirm the focus of American courts at the time on trade union member expulsion[2614] and obvious manifestations of corruption. This is understandable in the context of 1940s America, a period also marked by the fact that organised labour was swiftly moving to the forefront of American society.[2615] A mere one year later the following was said: "Courts have been intervening with increasing frequency in situations where labor unionists seek to free themselves of allegedly oppressive leadership".[2616]

One commentator confirmed that most "intra-union disputes which reach the courts"[2617] are "suits for injunction against proposed disciplinary measures, or for mandamus for reinstatement after expulsion; and occasionally requests for damages are joined" and adds that "[a]s a general policy, the courts refuse to intervene in intra-union disputes except under one of two broadly-defined conditions".[2618] These

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[2613] Anonymous "Rights of Workmen against Union Officials during Collective Bargaining Negotiations" (1941) 51 *Yale LJ* 331 332 n5. To this was added, that the "[r]emedies to protect workmen can be given by injunction or damages" – Anonymous (1941) *Yale LJ* 332 n5.

[2614] See for instance P Taft "Judicial Procedure in Labor Unions" (1945) 59 *Q J Econ* 370 372-373 for a discussion of cases involving union member expulsion in the 1930s and 1940s – and the permissibility of the members taking their claims to the courts, on the grounds of being expelled for criticizing their union, and not participating in strike action, respectively.

[2615] See for instance Taft (1945) *Q J Econ* 376, who states as follows:

> "It is clear that the courts are reluctant to intervene in the internal affairs of trade unions Whatever merit the bracketing of trade unions with sewing circles and private clubs may have legally, it is doubtful whether such classification can be defended on economic grounds Labor unions are powerful organizations, and their impact upon their members can be extremely serious. An expelled member may not only lose his particular job; under some circumstances, a worker might lose the use of skill and experience he had acquired over years. The protection of the individual against arbitrary conduct is therefore extremely important."

[2616] Anonymous "Judicial Intervention in Revolts against Labor Union Leaders" (1942) 51 *Yale LJ* 1372 1372.

[2617] 1372.

[2618] 1372. See further Stafford (1936) *Yale LJ* 1260, where is stated:

> "At the outset, courts hesitate to interfere in the internal affairs of labor unions. Under the law applicable to voluntary unincorporated associations not for profit, from which the principles relevant to disputes within unions have developed, their managers were permitted wide discretion over

"conditions" refer to alleged breaches of the "union charter" (that is, breach of contract) and instances where a "property right is threatened, such as the 'right to work', the right to maintain union membership, or a claim to special-benefit or general fund".[2619] In this sense, Stafford's words from the previous decade still held true:

> "Such conflicts come before the courts in the guise of suits to test the permissible scope of union discipline, involving mainly the interpretation of union constitutions and by-laws to discover what measure of individual freedom members have surrendered for the attainment of the discipline essential to effective union activity".[2620]

However, other legal grounds upon which trade union members could challenge their unions were being recognised. "Concepts of tort",[2621] agency,[2622] "or due process of law"[2623] were becoming part of the collective labour law milieu. To this may be added applications where unions with "serious financial irregularities in [their] administration", were placed in "receivership" (which is similar to a trade union placed under administration).[2624] Members frequently had no choice *but* to approach the courts – as suggested by Stafford: "[B]ein[g] without effective remedy elsewhere, union members

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internal matters; and even corporate bodies enjoy considerable autonomy on questions of business policy. Likewise, in deference to the requirements of union discipline, courts are reluctant to interfere with the exercise of authority by union officers, and in some cases even allow them the conclusive interpretation of the documents which spell out their powers" [footnotes omitted].

[2619] Anonymous (1942) *Yale LJ* 1372.

[2620] Stafford (1936) *Yale LJ* 1248.

[2621] Which then included malice or conspiracy – Anonymous (1942) *Yale LJ* 1248.

[2622] Which then focused on define a union "officer's duties" – Anonymous (1942) *Yale LJ* 1248.

[2623] In order to have the courts assess the "fairness of internal procedures" – Anonymous (1942) *Yale LJ* 1248. In this regard, see Stafford (1936) *Yale LJ* 1255 for discussion of internal issues identified within various American unions during the course of the mid-to-late 1930s, where is stated:

> "In the struggles for the attainment and maintenance of leading positions in the organizations, goals worth striving for because of the centralization of authority in the prevailing American type of national ('International') craft union, the rules of the game are often violated. Those groups which stand to lose in democratic choice of officers frequently resort to violence and terror as well as simple fraud to gain or keep their places. Positions once secured are retained within the dominating group by other common devices, such as highly exclusive union election eligibility rules, wholesale use of powers of appointment, packing of conventions, or simply the prevention of new elections. Incumbencies in office not uncommonly exceeding thirty years indicate how closed union official circles are" [footnotes omitted].

[2624] Stafford (1936) *Yale LJ* 1259-1260. The author lists a series of cases from the 1930s in evidence of the aforementioned – Stafford (1936) *Yale LJ* 1260 n56. See Anonymous (1942) *Yale LJ* 1373-1375 for a more detailed discussion of two of these cases. See HA Katz & IM Friedman "Members' Control Over Officers, Elections, and Finances: Equitable Remedies and Modern Developments" (1961) 22 *O St LJ* 97 101-104, for a (relatively-speaking) more modern interpretation of the remedy.

are therefore compelled in the more flagrant cases to resort to the courts for vindication of their membership rights".[2625]

In providing a broad overview of the types of cases before the American courts at this time, Kovner first outlines a series of decisions before various state courts between the 1920s and 1940s where basic rights pertaining to freedom of speech are emphasised (inasmuch as members are permitted to be critical of their own unions and are owed judicial protection for this, where necessary).[2626] Another commentator discusses three broad "cases" of internal union strife, involving racketeering, criminal assault and constitutional manipulation for the purposes of securing closed-shop arrangements;[2627] member expulsions, "gerrymandering" of local unions and union election voting irregularities;[2628] and unlawful interference in the local union affairs by its international union, embezzlement of union funds, and union member expulsion.[2629]

[2625] Stafford (1936) *Yale LJ* 1259. The author lists a series of articles within American "legal periodicals" spanning between 1916 and 1936, that discuss various "[c]ases involving disputes within unions" across America – Stafford (1936) *Yale LJ* 1259 n50.

[2626] J Kovner "The Legal Protection of Civil Liberties within Unions" (1948) 1 *Wisc L Rev* 18 21-23. The author states further at 23, regarding the above:

> "The legal protection of civil liberties does not mean that members can abuse their rights. The line between free speech and slander, between opposition and rebellion, has been drawn by the courts. They have denied relief to an expelled member who made reckless charges against the officers".

[2627] See Anonymous (1942) *Yale LJ* 1373-1375, in discussing, *inter alia*, the cases of *Walsche v Sherlock* [110 N. J. Eq. 223, 159 Atl. 661 (Ch. 1932)], *Local 11 v McKee* [114 N. J. Eq. 555, 169 Atl. 351 (Ch. 1933)] and *Local 373 v International Association of Ironworkers* [120 N. J. Eq. 220, 184 Atl. 531 (1936)].

[2628] See Anonymous (1942) *Yale LJ* 1375-1377, in discussing, *inter alia*, the cases of *Rodier v Huddell* [232 App. Div. 531, 250 N. Y. Supp. 336 (1st Dep't 1931)], *Irwin v Possehl* [145 Misc. 907, 261 N. Y. Supp. 164 (Sup. Ct. 1932)] and *Rowan v Possehl* [173 Misc. 898, 18 N. Y. S. (2d) 574 (Sup. Ct. 1940)].

[2629] See Anonymous (1942) *Yale LJ* 1377-1379, in discussing the several cases involving, *inter alia*, *Dusing v Nuzzo* [26 N. Y. S. (2d) 345 (Sup. Ct. 1941) and 177 Misc. 35, 29 N. Y. S. (2d) 882 (Sup. Ct. 1941)]. The author states further, in opining on the suitability of these matters being properly resolved by the courts/judiciary:

> "The cultural backgrounds typical of our judiciary leave them rather ill-fitted at comprehending the personal relations between union men, particularly when those relations have reached a stage of high tension. If decisions are to be made which will take account of the real factors in the problem, probably union men can make them best. Since these disputes usually arise in metropolitan areas, it might be best to place them before a quasi-court composed of responsible and disinterested leaders of the important labor groups in the area concerned. Appeals to the regular judiciary could follow, but the insight of the experts would clarify future action. At any rate, continuance of the present judicial system of handling an intra-union revolt as a 'purely legal question' is unlikely to solve any problems" – Anonymous (1942) *Yale LJ* 1380.

A novel suggestion then, to solve internal union disputes by means of a union-based solution. More on this aspect, will be discussed at § 8 5 6 below.

Two final examples may be mentioned, although they are placed much further along the timeline (being post-LMRA, but immediately prior to the introduction of the LMRDA and the *Garmon* decision).[2630] In the first of these two Supreme Court decisions – *International Association of Machinists v Gonzales*[2631] – "a union member, claiming expulsion from the union in violation of its by-laws and constitution, brought suit in equity for reinstatement and damages resulting from breach of the contractual relationship between the union and its member".[2632] In *International Union, United Automobile Workers v Russell*[2633] the court was faced with a dispute lodged by a "non-union employee" who alleged damages on account of his being unable to work as a result of picketing action (that is, the union was charged with "wrongful interference with his lawful occupation").[2634] While both decisions were focused on whether or not a party could claim the damages sought in a state court,[2635] the decisions illustrate the extent to which the American courts were broadly accepting of a range of actions being possible between a union and its members.

8 5 4 2 Union's internal disciplinary rules

In considering the imposition of external standards as procedural safeguards on private associations,[2636] the point is made that the courts are generally "more willing to apply a [higher] standard of fairness" in the context of associations, since "the individual member seldom can be considered to have negotiated the content of the association's rules".[2637] In amplification of the above in the context of trade unions, Kovner states as follows:

"These three standards of procedural and substantive due process – fair trial, equal protection under

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[2630] This pertaining to the so-called "Garmon rule", briefly touched on in chapter 8 at § 8 3 2 above – and considered in more detail in the "Federalism and pre-emption" section at § 9 3 2 below.
[2631] *International Association of Machinists v Gonzales* 356 US 617 (1958).
[2632] Anonymous "Notes – Labor Law: Damage Suits as a Means of Controlling Union Unfair Labor Practices Under the Taft-Hartley Act" (1959) *Wash U LQ* 69 69.
[2633] *International Union, United Automobile Workers (UAW-CIO) v Russell* 356 US 634 (1958).
[2634] Anonymous (1959) *Wash U LQ* 69.
[2635] This as a result of the fact that the union was deemed to have committed a ULP (and would therefore see its actions being subject to the NLRB/NLRA). The primary question was thus whether or not damages could *also* be claimed in a state court. Suffice it to state at this point, that such was to be clarified in a later decision (*Garmon*) and is discussed in § 9 3 2 3 below.
[2636] Anonymous (1963) *Harv L Rev* 1026.
[2637] 1028.

> the laws, and freedom of individual expression – are favored criteria of the judicial process. They provide clear, simple, minimum, yet adequate, standards for the legal protection of the rights of union members. Their application makes it unnecessary to pry into the internal affairs of unions or to pass upon the merits of differences among the membership."[2638]

Noteworthy is that the position in the USA with regard to the common law principles applicable to the internal disciplinary rules of trade unions labour associations is very similar to that of Britain (as discussed in chapter 5 above).[2639] Simply put, "[u]nions, like other voluntary associations, are subject to the dictates of public policy and natural justice" and, as such, "the courts have imposed the requirement of a fair trial upon union disciplinary proceedings, *even if union laws* do not provide for it".[2640] In discussing the Supreme Court decision in *Steele*,[2641] Kovner cites the court's statement that unions "are bound … to the same standards of fairness as those governing public legislature".[2642]

As far as a comparison of the common law with the provisions of LMRDA is concerned, Cox states that "the courts evolved satisfactory rules applicable to the expulsion of union members long prior to enactment of the" 1959 Act.[2643] After making the point that "improper expulsion violates the member's [property] interest" or breaches the contract *inter se* the members and the union,[2644] Cox posits five grounds

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[2638] Kovner (1948) *Wisc L Rev* 26.

[2639] See § 5 3 4 2 above. It can be added, as will become apparent from the discussion in the chapters to follow (see § 11 4 5 2), that the similarities with that of the approach in South Africa, is also marked.

[2640] Kovner (1948) *Wisc L Rev* 20, [my emphasis]. The author states further:

> "The courts require due notice, a hearing before an impartial tribunal, and the opportunity to present and cross-examine witnesses. It has long been held contrary to public policy for unions to punish members for the exercise of civil rights outside the union even though the right is exercised against the union. Thus, a union may not expel a member for going to court against a disciplinary penalty imposed on him by the union. Nor may it punish a member who testifies in a judicial or administrative hearing against the interests of the union" [footnotes omitted].

[2641] *Steele v Louisville & Nashville Railroad Co.* 323 US 192 (1944).

[2642] Kovner (1948) *Wisc L Rev* 20-21, citing *Steele* 202.

[2643] A Cox "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959" (1960) 58 *Mich L Rev* 819 835. See further TG Frankel "Judicial Review of Union Discipline" (1955) 4 *J Pub Law* 464 464, who states:

> "Since the late 1930's, when the constitutionality of labor legislation was established, there has been no doubt that society, operating through government, has the power to intervene in the field of labor relations, including the internal management of unions. The question, thus, is not *whether* such power can be exercised, but that of defining the *extent* of such intervention and of refining the details", [their emphasis].

[2644] Cox (1960) *Mich L Rev* 835.

(based on "the tortious interference with an advantageous relationship") that will see the expulsion being set aside.[2645] These include:[2646] (i) The violation of the union's constitution;[2647] (ii) The action being *ultra vires* in the sense that it was not authorised in terms of the constitution;[2648] (iii) Despite compliance with the constitution, the member was still not afforded "a fair hearing";[2649] (iv) The expulsion was contrary to public policy, or natural justice, or was unreasonable;[2650] and, finally, (v) The expulsion was "in bad faith because the purported ground was only a pretense for getting rid of a troublesome member".[2651]

8 5 4 3 Exhaustion of internal remedies

The so-called doctrine of exhaustion of internal remedies "is concerned with the question whether the court should adjudicate when all remedial procedures available within the association have not been resorted to by the complainant".[2652] This point of departure does suggest agreement within the judiciary about the application of the doctrine,[2653] but is quickly qualified: "[H]owever, the principle is subject to gaping

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[2645] 835

[2646] 835-836.

[2647] 835 n53 cites the following cases in the support hereof: *Harris v National Union of Marine Cooks* [98 Cal. App. (2d) 733, 221 P. (2d) 136 (1950)]; *Walsh v Reardon* [274 Mass. 530, 174 N.E. 912 (1931)]; *Howland v Local 306, UAW-CIO* [323 Mich. 305, 35 N.W. (2d) 166 (1948)]; *Savard v. Industrial Trades Union of America* [76 R.I. 496, 72 A. (2d) 660 (1950)].

[2648] Cox (1960) *Mich L Rev* 836 n54 cites the following case in the support hereof: *Otto v Journeymen Tailors' Union* [75 Cal. 308, 17 P. 217 (1888)].

[2649] Cox (1960) *Mich L Rev* 836 n55, *inter alia*, cites the following case in the support hereof: *Gilmore v Palmer* [109 Misc. 552, 179 N.Y.S. 1 (1919)].

[2650] Cox (1960) *Mich L Rev* 836 n56 cites the following cases in the support hereof: *Swaine v Miller* [72 Mo. App. 444 at 446 (1897)] and *Spayd v Ringing Rock Lodge No. 665*, *Brotherhood of R.R. Trainmen* [270 Pa. 67, 113 A. 70 (1921)].

[2651] Cox (1960) *Mich L Rev* 836 n57 cites, *inter alia*, the following cases in the support hereof: *Otto v Journeymen Tailors' Union* [75 Cal. 308, 17 P. 217 (1888)]; *Fleming v Moving Picture Machine Operators* [16 N.J. Misc. 502, 1 A. (2d) 850 (1938), affd. 124 N.J. Eq. 269, 1 A. (2d) 386 (1938)].

[2652] Anonymous (1963) *Harv L Rev* 1069. Stating further at 1069-1070, the author says:

> "These remedies differ greatly in the precision with which procedure is described in the bylaws or constitution, in the number of levels of review, and especially in the impartiality effected by the design of the tribunals. But these semi-judicial arrangements absorb and conclude a great many of the grievances arising in associations, and frequently the association rules make such internal review mandatory". [footnotes omitted]

[2653] "American courts uniformly agree that a member may not maintain an action against his organization until his internal remedies have been exhausted" – Anonymous (1963) *Harv L Rev* 1070.

exceptions even in theory".[2654] One commentator remarked in 1961:

> "Since union constitutions normally include a provision requiring aggrieved members to utilize the available internal remedial procedures, at common law, due to the contractual nature of labor organizations, the exhaustion of internal remedies is a condition precedent to a civil action. In practice, however, this prerequisite has been 'substantially qualified if not nullified' by a series of comprehensive exceptions".[2655]

Malin and Schmall have reasoned the principle to be "grounded in judicially created public policy"[2656] because it avoids unnecessary judicial interference in the internal affairs of trade unions and allows parties to achieve resolution prior to litigation, with the benefit of not over-loading the judicial system with potentially frivolous lawsuits.[2657] Blumrosen reasons that one of the justifications made for the common law "exhaustion doctrine", is "promotion of democratic values of self-government and private decision-making", with this "intimately related to the theory that the union-member relationship is governed by a contract voluntarily entered into between union and member".[2658] In short, since the parties agreed to the terms of their contract grievance proceedings contained in the constitution, this should be utilised *prior* to external remedies.[2659]

However, Blumrosen reasons that the primary weakness of this contractual

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[2654] Anonymous (1963) *Harv L Rev* 1070.

[2655] B. R. S. (1962) *Virg L Rev* 91, [footnotes omitted].

[2656] Malin & Schmall *Individual Rights* 29. In citing a host of articles discussing the concept, AW Blumrosen "The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship" (1962) 61 *Mich L Rev* 1435 1457 states as follows:

> "The common-law doctrine requiring the union member to utilize internal review procedures before seeking equitable relief against an expulsion was adopted against a background of confusion as to the basic legal theory regulating the relation of union and member" [footnotes omitted].

[2657] See T Boyle "The Labor Bill of Rights and the Doctrine of Exhaustion of Remedies – A Marriage of Convenience" (1964) 16 *Hast LJ* 590 591, who in exploring the common law "doctrine of exhaustion", states as follows:

> "The exhaustion doctrine as applied to unions is based on three underlying policies. First, it is desirable to reduce the burdens placed on the courts by allowing unions to correct their own internal difficulties. Second, it is desirable to give the courts the benefit of the supposedly expert judgment of union tribunals. Third, it is desirable that courts allow the union full latitude in correcting its own mistakes. The chief difficulty in applying the exhaustion doctrine stems from the many exceptions created by the courts" [footnotes omitted].

However, compare this with Blumrosen (1962) Mich L Rev 1457, who makes the further point that "[t]his conservation may, however, be illusory, since, at common law, the exhaustion requirement was applied only after the court had heard the merits of the case".

[2658] 1457.

[2659] 1457.

justification[2660] is that, in reality, "the terms of the contract – the constitution and the bylaws of the union – are beyond the control of the individual member":[2661]

> "[The member] has no choice but to accept [the terms] or remain outside the union. The union-member 'contract' is as much a *contract of adhesion*, with the terms already set and beyond bargaining, as is the typical automobile sales contract. It is incumbent upon the courts to interpret, construe and apply this 'contract' so as to preserve those interests of the weaker party which are entitled to judicial protection. Thus, even under a 'contract' analysis, the application of the exhaustion of remedies requirement is subject to judicial policy considerations."[2662]

These remarks echo the sentiments expressed by Grunfeld, Selznick and Elias and Ewing (discussed in chapter 5 above)[2663] regarding the "contract of adhesion" between member and union in the British context. Blumrosen reasons that one of the abstract reasons for questioning this doctrine is simply that unions have not "generally developed *independent* judicial machinery" to process intra-union disputes[2664] which, in turn, calls into (justifiable) question the likelihood of the claim being successful.[2665] Blumrosen also points to this as one of the reasons why the courts were inclined to first hear the merits of the claim, before considering the "exhaustion" question.[2666]

[2660] As explained by Anonymous (1963) *Harv L Rev* 1070:

> "Many courts explain the general rule in contract terms: under the association bylaws the member has agreed to exhaust his internal remedies, and thus exhaustion is a condition precedent to a suit enforcing the association's obligation to the member".

[2661] Blumrosen (1962) *Mich L Rev* 1457-1458.

[2662] 1458, [my emphasis, footnotes omitted].

[2663] See § 5 3 3 3 above.

[2664] See for instance the discussion by JH Brooks "Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline" (1961) *O St LJ* 65 71-72, regarding the various roles, duties and procedures – as held between the so-called "international union", as opposed to the local (or regional) union(s) – inasmuch as this impacts on internal union processes, where is stated:

> "The imbalance exists in respect to the judicial functions. In many instances the very decision or action the aggrieved member desires to appeal has been promulgated by the official or officials who will sit in judgment on the appeal. This is hardly the separate judicial branch of government contemplated for rendering decisions in a democratic way."

[2665] Blumrosen (1962) *Mich L Rev* 1458. Coupled hereto, were the member to have gone externally for assistance, and was denied on the "exhaustion grounds" – it would be likely that his options internally would in any event have expired, given the usual time-frames associated with same – Blumrosen (1962) *Mich L Rev* 1458.

[2666] Blumrosen (1962) *Mich L Rev* 1458. By way of explanation, the author explains further as follows:

> "Prior to the LMRDA, then, the courts usually handled union-member disputes in the following manner: (1) The court would hear the merits of the case. (2) If, after hearing the merits, the court concluded that the member was entitled to prevail, it would avoid the exhaustion requirement by applying an exception. (3) If the court did not believe plaintiff was entitled to prevail, it would apply

Furthermore, were the courts (after hearing the merits) to then apply the "exhaustion doctrine", the decision was "a clear expression of the court's view of the merits of the case". Put differently, it served, in effect, as "a procedural way of stating a substantive conclusion".[2667]

The exceptions to the requirement of exhaustion of remedies, in general, mimic those identified and discussed in the context of the DFR (earlier in this chapter and also in chapter 9). Malin and Schmall describe these as: (i) Where resort to internal remedies would prove futile; (ii) The internal procedures would excessively delay a member's access to a remedy; and, (iii) The internal procedures could not provide a complete or satisfactory remedy.[2668]

8 5 5 Trade union liability for advice

While it may be expected that this section would contain a discussion equivalent to that under the similar heading in chapter 5, the particular nature of trade union advice to its members (or, for that matter, to employees within the applicable bargaining unit) in the context of the USA precludes this possibility.

The reason is simply that, as shown in the discussion earlier in this chapter of the decision of *Steele v Louisville & Nashville Railroad* and its subsequent development in seminal cases such as *Huffman*, *Miranda Fuel* and *Vaca*,[2669] the DFR fully encapsulates the overarching duty and obligations of unions to properly advise their members. This is so not only in the context of (as will become apparent below) ULP claims in terms of subsection 8(b)(1)(A) of the LMRA and breach of contract claims in terms of section 301 of the NLRA, but also with regard to general advice to members for purposes of protecting their rights. This also includes – in a similar vein to that which was discussed in the context of Britain – a consideration of the interplay between unions and their counsel/attorneys.

As such, the discussion of a trade union's liability for advice to their members is addressed in § 9 4 5 under the discussion of the DFR.[2670]

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the doctrine and leave the member to the judgment of the union tribunal" – Blumrosen (1962) *Mich L Rev* 1458-1459, [footnotes omitted].

[2667] 1459.

[2668] Malin & Schmall *Individual Rights* 29. See further Brooks (1961) *O St LJ* 74, who simply describes them as follows: "[F]utile, illusory or vain, or amount to a practical denial of justice."

[2669] See § 8 4 2 above.

[2670] See § 9 4 onwards below, which is where the DFR discussion commences.

8 5 6 Inter-/internal-union disputes – a possible model?

In chapter 5 the 1924 "Bridlington Principles" (as adopted by the TUC) were discussed inasmuch as it served as evidence of a formalised approach by British trade unions to regularise their interactions with regard to inter-union poaching of members. It constituted an endeavour by British unions to monitor and regulate themselves internally, without the need for external interference. Its importance is its potential as an alternative to the courts in regulating trade unions and trade union accountability. What remains to be examined, is the extent to which similar examples are present in the USA.

It will be recalled from the discussion in chapter 7 and the earlier discussion in this chapter that at various stages the most prominent union federation – the AFL – was in dispute (both internal and external) with what would at different stages be a separate and component labour federation – the CIO. Similarly, and to a large extent underpinning these struggles, was the broader tension and associated strife between the craft and industrial unions. It is against this background that similar developments to the Bridlington Agreement (and its related structures) were seen.

As early as 1892, the AFL had its internal "Committee on Grievances",[2671] which attempted to regulate and settle (primarily) "jurisdictional disputes" between affiliate unions.[2672] The Committee was not particularly effective in the early stages of the Federation: "Between 1900 and 1910, the irritation caused by jurisdictional disputes became acute" – "Gompers in report after report commented dolefully on the failure of the Federation to settle jurisdictional disputes."[2673] In analysing the jurisdictional matters that the Committee unsuccessfully dealt with, Jaffe points to amendments to the Federation's (1907) constitution[2674] to bolster the right to revoke or suspend those unions/affiliates who simply "refuse to abide by its judgment."[2675] Jaffe then states as follows with regard to the appetite of the AFL to actually enforce its jurisdictional authority:

[2671] LL Jaffe "Inter-Union Disputes in Search of a Forum" (1940) 49 *Yale LJ* 424 432.
[2672] 433.
[2673] 433 – referring to Samuel Gompers – founder of the AFL.
[2674] 433.
[2675] 433.

> "Nevertheless, the weapon of revocation or suspension is of limited utility. The Federation, with an occasional inexplicable exception, will rarely invoke it even in support of its considered and reiterated declarations of jurisdiction, at least until years of conferences and arbitrations have worn out even the half-humorous assumption that the dispute is arbitrable – and then rarely against a powerful union".[2676]

The present AFL-CIO's constitution[2677] declares in section 8(a) that it "is a basic principle of this Federation that it must be and remain free from any and all corrupt influences and from the undermining efforts of authoritarianism, totalitarianism, terrorism and other forces that suppress individual liberties and freedom of association and oppose the basic principles of our democracy and of free and democratic trade unionism".[2678] In terms of subsection 8(b), the Executive Council shall "have the power to conduct an investigation, directly or through an appropriate standing or special committee appointed by the President, of any situation in which there is reason to believe that any affiliate is dominated, controlled or substantially influenced in the conduct of its affairs by any corrupt influence".[2679] Finally, in terms of subsection 8(c), upon the investigation being finalised (which can include a hearing) and subject to the necessary requirements being met, the affiliate involved can be suspended if found guilty.[2680]

However, it is within Article XX, entitled "Settlement of Internal Disputes" that the initial powers of the Committee of Grievances live on. After outlining the application of the Article,[2681] the basic obligations of the AFL affiliates,[2682] and a provision for affiliates who are not in agreement with its application,[2683] sections 6 to 20[2684] regulate the internal dispute process. Section 7 outlines the process:

> "The President shall establish procedural rules for the handling of complaints under this Article so

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[2676] 433-434, [footnotes omitted].

[2677] See AFL-CIO "Constitution of the AFL-CIO" (2017) *American Federation of Labor & Congress of Industrial Organizations (AFL-CIO)* <https://aflcio.org/sites/default/files/2017-11/17157_AFL-CIO_Constitution_10-17.pdf> (accessed 12-10-2018).

[2678] AFL-CIO Constitution, Art X, subs 8(a), 32-33.

[2679] AFL-CIO Constitution, Art X, subs 8(b), 33.

[2680] AFL-CIO Constitution, Art X, subs 8(c), 33.

[2681] AFL-CIO Constitution, Art XX, s 1, 53.

[2682] AFL-CIO Constitution, Art XX, ss 2-3, 54.

[2683] AFL-CIO Constitution, Art XX, s 4, 55-56.

[2684] Section 5 deals with bringing affiliates into disrepute during an organisational campaign, whilst s 21 regulates any amendment to Article XX.

> that all affiliates involved in or affected by a dispute will have notice of them, will have an opportunity for the voluntary settlement of the dispute, and, in the event of a failure to reach a voluntary settlement, will have a full and fair hearing before an Impartial Umpire. The rules shall be such as to ensure a speedy and early disposition of all complaints arising under this Article."[2685]

To all the requirements contained in section 7, section 8 adds the appointment of mediators "knowledgeable about the labor movement"[2686] and section 12 makes provision for an appeal.[2687] Regarding the impartial umpires, the relevant wording of section 9 reads as follows:

> "A panel of Impartial Umpires composed of prominent and respected persons shall be established. The members of the panel shall be selected by the President with the approval of the Executive Council. If voluntary settlement of a dispute is not reached within 14 days after the appointment of a mediator or mediators, a hearing shall be held before an Impartial Umpire selected from such panel. Impartial Umpires shall be assigned on a rotating basis, subject to their availability to conduct hearings."[2688]

The umpire "shall make a determination, after hearings, based upon the principles set forth in" Article XX.[2689] After making his determination and notifying the parties accordingly, the umpire "shall request any affiliate that the Impartial Umpire has found to be in violation of this Article to inform him or her as to what steps it intends to take to comply with such determination".[2690] Provision is also made for the further steps and procedures to resolve the dispute, the implementation and monitoring of the decision taken and procedures to allow for the denial of future AFL-CIO benefits and rights, and the restoration of those rights.

One further example from the USA experience deserves mention – namely that of the UAW. This is an example of a trade union (not a federation like the AFL-CIO) embracing similar principles relating to its internal regulation and oversight over its

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[2685] AFL-CIO Constitution, Art XX, s 7, 56.

[2686] AFL-CIO Constitution, Art XX, s 8, 57. In terms of the provision – the mediators are tasked with the initial attempts at bringing about a settlement of the dispute, prior to it being escalated further (after fourteen days, subject to adjustment).

[2687] AFL-CIO Constitution, Art XX, s 12, 58-59. The grounds of appeal, are as follows:
"Any affiliate that is adversely affected by a determination of the Umpire, and that contends that the determination is not compatible with this Constitution, or is not supported by facts, or is otherwise arbitrary or capricious, may file an appeal" – AFL-CIO Constitution, Art XX, s 12, 59.

[2688] AFL-CIO Constitution, Art XX, s 9, 57.

[2689] AFL-CIO Constitution, Art XX, s 10, 58.

[2690] AFL-CIO Constitution, Art XX, s 10, 58.

local or regional subsidiary members, or the members of such union-member affiliates.

According to Brooks, the origin of the UAW's "Public Review Board" ("PRB"), stems from April 1957,[2691] when the President of the UAW at that time (Walther Reuther) "advocated that they adopt amendments to the UAW constitution which, under proper circumstances, would empower an outside group to remove Reuther or any other international union officer from office".[2692] This was duly done. Brooks continues: "[i]t is doubtful that any other private association of individuals of comparable size and power has ever voluntarily relinquished power of this magnitude to another group."[2693] The current UAW constitution[2694] provides for the PRB in Article 32 of its constitution:

> "For the purpose of ensuring a continuation of high moral and ethical standards in the administrative and operative practices of the International Union and its subordinate bodies, and to further strengthen the democratic processes and appeal procedures within the Union as they affect the rights and privileges of individual members or subordinate bodies, there shall be established a Public Review Board consisting of impartial persons of good public repute not working under the jurisdiction of the UAW or employed by the International Union or any of its subordinate bodies".[2695]

[2691] See further the discussion in Anonymous "Public Review Boards: A Check on Union Disciplinary Power" (1958) 11 *Stan L Rev* 497 503-504, on the even earlier establishment of the (much smaller) Upholster's International Union of North America (UIU)'s "public review board". More details of the UAW's PRP are discussed by Anonymous (1958) *Stan L Rev* 505-507, with the functioning of both, being discussed at Anonymous (1958) *Stan L Rev* 507-513.

[2692] Brooks (1961) *O St LJ* 64. J Eaton "Union Democracy and Union Renewal: The CAW Public Review Board" (2006) 61 *RI/IR* 201 205-206, in his discussion of an equivalent PRB in Canada – first traces its origins in America, and states as follows:

> "As UAW president, Walter Reuther stated when asking the union's convention delegates to create the UAW PRB: 'You ought to recognize that this is the real thing, there are no ifs, ands, buts, or loopholes… you ought to recognize that this gets into an area that we are either going to have to deal with voluntarily or the government will deal with it for us'… By adopting a system of impartial public review, the UAW leadership hoped to reduce effectively the possibility of improper practices within their internal structures and, at the same time, to repair in some measure the tattered image of the labour movement" [references omitted].

[2693] Brooks (1961) *O St LJ* 64. Says the author further at 64:

> "The initial press reaction to the UAW's action making impartial public review available to its membership was varied: to some it was a panacea; to others, a palliative or, worse yet, mere window dressing; most maintained a wait-and-see attitude".

[2694] UAW "Constitution of the International Union" (2018) *United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW)* <https://uaw.org/wp-content/uploads/2019/01/2018-UAW-Constitution.pdf> (accessed 12-10-2018). Further mention can be made of the public website of the PRB, available at <https://uawpublicreviewboard.com/about/> (accessed 10-03-2019).

[2695] UAW Constitution, Art 32, s 1, 82, [my emphasis]. For information of the current board members of the PRB, see the webpage available at <https://uawpublicreviewboard.com/prb/> (accessed 10-03-2019). At the time of writing, the four-person panel consists out of three professors, and one dean, all of whom have a background in labour and employment law.

While section 2 of Article 32 outlines the composition and structure of the PRB, section 3 confirms the PRB's authority to "make final and binding decisions" with regards to the various cases either referred or appealed to it in terms of the constitution.[2696] Section 4, in turn, provides for a 60-day time period within which the complaint must be lodged,[2697] while section 5 outlines the procedures to be followed in referring the dispute.[2698] Section 6 empowers the PRB to formulate its own rules and procedures,[2699] while section 7 states as follows:

> "In case the Public Review Board or the panel thereof finds that the accused is obviously innocent of any violation of the Ethical Codes, the Board or the panel thereof, may make judgment with respect to the lack of good faith of the accuser, and if the facts indicate that the accuser acted in bad faith or with malicious intent and in a willful effort to divide and disrupt the Union, the Public Review Board may assess a non-monetary penalty against the accuser; provided, however, that such penalty shall be limited to suspension from membership for a period of not less than three (3) months."

Finally, sections 8 and 9 outline various procedural aspects of the PRB relating to reporting and budgeting,[2700] while Article 33 (and its sections 1 to 5) sets out in detail the various procedures pertaining to appeals within the union.

This discussion demonstrates the broad strokes of the UAW's PRB mechanism. Its effect, and also its importance, for this study, become evident from the following remarks by Brooks:

> "Finally, the outstanding contribution from a system of voluntary impartial public review such as the UAW's is that which flows from its mere existence. The UAW's PRB is constantly looking over the shoulder of every international and local union official in the sense that his actions ultimately may come before that body for review. With few exceptions, the conduct of such officials – from shop steward to international officer – reveals they are aware of this potential scrutiny. Many other

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[2696] UAW Constitution, Art 32, subs 3(a)-(b), 82.

[2697] UAW Constitution, Art 32, s 4, 82.

[2698] UAW Constitution, Art 32, s 5, 83-84. Broadly stated, the complaint will first be investigated – with a finding made – by the International Executive Board. Should the complainant still be dissatisfied with the outcome thereof, the complaint is then presented to the PRB.

[2699] UAW Constitution, Art 32, s 6, 84. Further mention can be made of the Rules and Procedures of the PRB, which is now at Series 18.1, which has been effective since January 2012. They are available online, at the PRB website available at <https://uawpublicreviewboard.com/rules/> (accessed 10-03-2019).

[2700] UAW Constitution, Art 32, ss 8-9, 85.

organizations, labor and non-labor, throughout our American pluralistic society might do well to emulate the UAW's system of resolving internal disputes".[2701]

Brooks also discusses the search for a way to "to overcome objectionable local trial procedures whereby the majority of those in attendance at a general membership meeting *elected* the trial committee which acted as judge and jury in the case."[2702] Article 30 and 31 of the UAW constitution regulate the "charges and trials of international officers", and "trials of members", respectively. In terms of sections 5 to 8, and 7, of the respective Articles, a procedure is outlined to select, respectively, an "International Trial Committee"[2703] or (local/regional) "Trial Committee".[2704] The two committees are charged with presiding over the complaint and declaring its findings.[2705]

The basic procedure (in both Articles) is as follows: Eligible members for the purposes of serving on the trial committee are identified and have their names added to "slips of paper/uniform cards", which are placed in a suitable sealed container with a specified number of them, to then be randomly "drawn" by specific officials in a transparent manner. These "drawn" names are then allocated to a new list. Once on the new list, the "charging member" and "charged member" then have options to strike/remove from the new list a specified number of names (for whatever reason). Once this has been done, a final list is compiled of the persons (remaining after the striking-off process) to constitute the respective trial committees.

The process is one example of a trade union constitutional provision that obviates many of the issues surrounding the possible impartiality or bias that might otherwise threaten the objectivity of an internal disciplinary process.

The experience with the AFL-CIO and the UAW is, therefore, important for three reasons. Firstly, it serves as an example of self-regulation as a substitute for the legal regulation of trade unions and their accountability. Secondly, it shows how the trade union constitution may be used to address these issues in detail and effectively. Thirdly, at the same time, it is built on the legal deference afforded union constitutions

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[2701] Brooks (1961) *O St LJ* 96, [footnotes omitted].
[2702] 72.
[2703] UAW Constitution, Art 30, ss 5-8, 70-71.
[2704] UAW Constitution, Art 31, s 7, 74-75.
[2705] This in terms of, respectively, the UAW Constitution Art 30, ss 13-14, 71-72 and Art 31, ss 10-14, 76-78.

by the common law – the common law contract entered into by members of a trade union.

8 6 Conclusion

This chapter focused on the period of readjustment (primarily through legislation) to trade union regulation in the USA. Perhaps the most significant moment of this development, for purposes of this study, is the example constituted by Titles I to V of the LMRDA. As such, this aspect will be discussed separately below.

The first aspect worthy of mention is that the discussion showed the impact of internal strife in the trade union movement, which resulted in the movement's inability to marshal sufficient political influence to effect the legislative change they professed to so desperately need after the LMRA. In comparison with Britain, it contains an important lesson of the close relationship between the levels of influence of the trade union movement and how labour legislation looks.

The chapter also highlighted the clear relationship between the rapid growth and expansion of unions (and their associated influence and power) and a legislative response at the behest, through political lobbying, of employers and their interest-groups/supporters. The LMRA saw the introduction of *union* unfair labour practices. As mentioned, a swing from protection *for* unions against the employers/state, to protection *against* unions for employers and non-union workers, and finally, to protection *in* unions, between that of the latter and its members, became evident.

The chapter also considered the key provisions of both the LMRA and LMRDA. Included in this discussion was consideration of the LMRA's unfair labour practices (which also influenced the unfair industrial practices included in Britain's IRA 1971); the internal union democracy provisions of section 9 of the LMRA and the various parts ("Titles") of the LMRDA (as adopted by Britain, primarily into section 65 and Schedules 4 and 5 of IRA 1971); the reporting required of unions, to (initially) the Secretary of Labor as regulated by the LMRDA (as adapted in Britain as the reporting requirements owing to the new Registrar created by the IRA 1971); Sections 11 to 12 of the LMRA, which confirm the direct relationship between the provisions outlined in the Act and the enforcement/investigation of non-compliance by the NLRB, along with the powers of the Secretary of Labor in terms of the LMRDA provisions (as adapted by Britain into the various statutory mechanisms for the settlement of member disputes

under the IRA 1971); and, finally, the secret balloting required by the LMRA (with regard to electing bargaining unit representatives) and the various LMRDA provisions (with regard to general, internal union balloting).

Secret balloting was to be incorporated in the British IRA 1971 through section 65 of that Act. However, as will become apparent in the chapters to follow, South Africa's major labour law enactment of 1956 saw the introduction of secret voting requirements for all union ballots pre-dating both the (broader) American and British requirements by three and fifteen years, respectively.

Furthermore, in contrast to Britain during the corresponding time period, the LMRA effectively outlawed closed-shop agreements in the USA, a feature that was to remain a key aspect underpinning union strength in Britain and was to be responsible for increasing pressure being brought to bear on British unions by the courts.

The effects of sections 301 and 303 of the LMRDA are of obvious importance, signalling the increasingly important role of the federal court system in the interpretation and enforcement of CBA's and secondary strike/boycott violations, which, as will be seen below, was to have a significant impact on the unique characteristics of American labour law.

The period under discussion in this chapter also saw the affirmation of the importance of union democracy. In the context of the USA, it owes its importance to the "simple" American notions of civil and political democracy and, in the context of the industrial relations system, to the fact that a single representative trade union effectively represents *all* workers in a bargaining unit (irrespective of their union membership or even affiliation). In short, America's particular labour relations system effectively *demanded* democratic foundations.

The McClellan hearings provide an interesting comparison with the Botha Commission (in 1951) and the earlier Commissions of Enquiry focusing on the South African Mineworkers' Union (discussed below)[2706] and also the Donovan Commission in Britain (discussed in chapter 5 above).[2707] Three different bodies in three different jurisdictions (South Africa, the US and Britain) all investigated the internal affairs of unions with a view to addressing union malfeasance and corruption. Lessons from this will be further explored below.

The discussion of the implementation of the LMRDA also confirmed, in the first

[2706] See § 10 3 6 3 and § 10 3 6 4 respectively below.
[2707] See § 5 2 3 above.

instance, that targeting both the corruption of union officers and employers for personal enrichment and the lack of democratic processes in internal union operations often serve as the explanation for trade union regulation. The solutions offered by the LMRDA focused on reporting to introduce greater transparency, a union *member* bill of rights, more effective management of internal union elections and the regulation of trusteeships. The discussion highlighted the variance between the reasons cited by the British Government under Thatcher and its actual reasons for intervention compared to the motivation for the LMRDA. What is also noteworthy is that the British trigger for readjustment was essentially brought about through prolonged strike action by organised labour in direct opposition to the government's attempts at introducing national reform. This is in contrast to the USA readjustment triggered by a broader American society becoming aware of significant corruption and malfeasance within a handful of prominent unions, involving a handful of prominent union leaders, but on a national stage.

Mention must also be made of the underlying point of departure of the reporting focus of the LMRDA described as the "goldfish bowl concept" – that is, that a trade union's members, given the necessary tools, will ensure that the leadership of their unions is kept in check and remains accountable to the broader membership.

Of significant importance is the realisation that, despite the various legislative endeavours, law cannot create a spirit of self-government. Legislative measures can only take things so far – it remains the duty of the general membership to actually make *use* of the opportunities for accountability created in terms of statutory provisions. This is an important factor to be kept in mind when considering any model for trade union regulation and will be raised again in the concluding chapters. This is in line with the discussion of and insights from the implementation and impact of the IRA 1971 and CROTUM in the British context.

The chapter further considered Supreme Court decisions in the immediate aftermath of the LMRDA. The *Steelworkers Trilogy*, *Lincoln Mills*, *Garmon* and *Lucas Flour* decisions affirmed the significant shift towards the use of private arbitration (under the guise of CBA's) for the resolution of industrial disputes in America. The examination of the *Miranda Fuel* and *Vaca* decisions (along with their judicial precedents) showed the development of a duty to fairly represent on the side of trade unions (this duty will be explored in more detail in chapter 9). In particular, the *Vaca* decision also brought to light the important question of what is to be understood by the

standard of conduct expected of unions as representatives of their members – a significant question in light of the purposes of this study. As such, it will also see further consideration in the chapters to follow. Lastly, *Carbon Fuel* serves as affirmation, with reference to the nature of the relationship between the "parent/international" union and a subsidiary/local branch union, of the unique nature of the American labour relations system and the apportionment of liability (and the legal bases for this) – also given the immense size of the US – within union structures.

The chapter also introduced Titles I to V of the LMRDA as part of the readjustment process in the USA (these provisions will be discussed in more detail in chapter 9). The core aspects contained in these Titles of the LMRDA, namely a bill of rights *for members*, reporting duties, trusteeships, election processes and fiduciary responsibilities were deemed necessary, following a comprehensive investigation into union corruption in America, as sufficient to allow trade union members to regain control over or compel union leadership to be accountable to trade union members. The extent to which the LMRDA can serve as an example for South Africa will be considered in the further chapters of this study.

The chapter concluded with a consideration of the common law principles applicable to trade unions and their regulation in the USA. Unlike the position in Britain, these principles remain important. The justification for intervention is found based on contract or property, augmented by a broader notion of fairness.

In sum, the chapter continued the discussion started in chapter 7 and also serve as the basis for the further discussion of the current regulation of trade unions and their accountability in the USA in chapter 9 below, a discussion that has to be mindful of the changes in society in the long period since adoption of the statutes – still applicable – discussed in this chapter.

CHAPTER 9: THE CURRENT LEGISLATIVE REGULATION OF TRADE UNIONS AND TRADE UNION ACCOUNTABILITY IN THE USA

"If labor organizations also exercise autocratic powers over their members, then workers may merely be substituting dictatorial rule of union officials for the arbitrary authority of the employer or his managers."[2708]

"Unions exist… [t]o improve the lot of the working members … When any union fails in that purpose it no longer has reason to exist. And, of more importance, when an officer of a union, at any level, devotes his energies and the members' money to retaining his power and profit rather than performing this elemental duty, he must forfeit his right to this office."[2709]

"Only a procedure developed by union members themselves is appropriate for resolving the conflicts of interest and of policy which arise within unions … neither [courts] nor administrative bodies could adequately solve fundamental dissensions on matters of union policy."[2710]

9 1 Introduction

This is the third and final chapter dealing with the regulation of trade unions and their accountability in the USA. While chapter 7 described the process of trade union assimilation and chapter 8 focused on the period of readjustment and provided an overview of (still) applicable common law principles, this chapter focuses on the current statutory regulation of trade unions and their accountability in the USA. At the outset, it should be noted that this regulation remains largely based on the statutory initiatives and legislation adopted during the period of readjustment described in chapter 8, legislation that will be considered in more detail in this chapter through its interpretation and application.

In particular, the chapter will commence with an overview of developments in the broader American industrial relations system, from 1959 (the year that saw adoption of the LMRDA) through to the final years of this decade. This will be followed by an examination of the legislative regulation of unions against the backdrop of federalism, pre-emption and the US Code, paying particular attention to the regulation of the promotion of collective bargaining, the direct regulation of unions, as well as regulation

[2708] SJ Hadley "Union Elections and the LMRDA: Thirteen Years of Use and Abuse" (1972) 81 *Yale LJ* 409 411, quoting W Leiserson [American Trade Union Democracy (1959) 54].
[2709] WW Osborne et al (eds) *Labor Union Law and Regulation* (2003) 137 quoting from *Crocker v Weil* 227 Or. 260 (1961) 275.
[2710] Stafford (1936) *Yale LJ* 1271.

of union representation of their members. This will be followed (as was done in chapter 6 in the British context) by a discussion of the role of the various statutory bodies (including the NLRB, the Office of Labor-Management Standards ("OLMS"), the FMCS and the federal courts) in regulating trade unions and their accountability. The chapter will conclude with an examination of a particularly significant (and unique) aspect of the regulation of organised labour in the USA, namely the DFR. This last aspect signifies a notable departure from the approach of chapter 6 (which dealt with current regulation in Britain). That chapter concluded with a lengthy discussion of the strike provisions of British legislation. One reason for this is that the regulation of strikes (the primary economic weapon of trade unions and their members) in Britain served as a further (and important) example of the regulation of trade union accountability (especially through the balloting requirements of British legislation) in an area where accountability often proves to be important. This is not the case in the USA: as the discussion will show, primarily due to its system of exclusive representation (and also the weak protection of strikers), the DFR developed perhaps as *the* idiosyncratic example of the US experience of trade union regulation of interest to this study (much more so than the regulation of strikes). As such, it requires careful consideration.

9 2 The current dispensation

The discussion of legislative adjustment in the previous chapter concluded by highlighting key examples of judicial interpretation and development of core labour concepts in the immediate aftermath of the LMRDA. Since 1959, no further major

labour law[2711] legislation[2712] or amendments[2713] that directly impacted on trade unions were adopted.[2714] This has preserved the NLRA and its subsequent amendments (by

[2711] WR Corbett "The More Things Change: Reflections on the Stasis of Labor Law in the United States" (2011) 56 *Vill L Rev* 227–249 237 states as follows in this regard:

> "One key to understanding the stasis of labor law is appreciating the distinction made in the United States between labor law and employment law. Labor law refers to one type of regulation of the workplace, and employment law refers to another. Labor law is the name given to the law governing labor-management regulation principally in unionized workplaces. Employment law, on the other hand, is the body of individual employment rights law regulating non-unionized workplaces. Labor law deals primarily with the NLRA and the Railway Labor Act, which protect the rights of employees to engage in collective bargaining and other forms of collective action. Employment law encompasses the federal and state statutes and state case law regarding individual employment rights" [footnotes omitted].

[2712] As stated above, this is not to suggest that there were no legislative enactments in the field of *employment* law – as evidenced by the promulgation of, *inter alia*, the following: Title VII of the Civil Rights Act of 1964 (Pub L 88-235, 78 Stat. 241 (1964)); the Occupational Safety and Health Act of 1970 (Pub L 91-596, 84 Stat. 1590 (1970), (29 U.S.C. §§ 651 et seq.) (2017)); and, the Employee Retirement and Income Security Act ("ERISA") of 1974 (Pub L 93-406, 88 Stat. 829 (1974), (29 U.S.C. §§ 1001 et seq.) (2017)) – as per AL Gitlow "Ebb and Flow in America's Trade Unions: The Present Prospect" (2012) 63 *Lab LJ* 123 128). Rather, these Acts simply did not, *to the extent that is being focused on in this study*, effect organised labour, as opposed to individual employees (or classes thereof). See further Corbett (2011) *Vill L Rev* 238 who states as follows:

> "In the past two decades during which the WFA and the EFCA failed, several employment laws of the individual employment rights variety have been enacted in the United States, including: the Americans with Disabilities Act of 1990; the Civil Rights Act of 1991; the Family and Medical Leave Act of 1993; the ADA Amendments Act of 2008; the Genetic Information Nondiscrimination Act of 2008; and the Lilly Ledbetter Fair Pay Act of 2009" [footnotes omitted].

For statutory details of the aforementioned legislation, see Corbett (2011) *Vill L Rev* 238 n61-66.

[2713] See Corbett (2011) *Vill L Rev* 273, who furthermore cites CL Estlund "The Ossification of American Labor Law" (2002) 102 *Colum L Rev* 1527 1535. The exception to this was in 1978, as explained by Estlund (2002) *Colum L Rev* 1535 n32, when the LMRDA was extended to apply to certain public sector employee unions as well – namely the US Postal Service. For the details of the significant categories of workers *not* covered by the NLRA (such as Federal employees), see MJ Nelson "Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement" (2000) 8 *Geo Mason L Rev* 527 570-571 and P Hardin et al (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 1* 4 ed (2001) 61-64. Regarding government employees, the Federal Service Labor-Management Relations Statute was enacted in 1978 (Pub L 95-454, 92 Stat. 1111 (1978), (5 U.S.C. §§ 7101 et seq.) (2017)), and "provides a permanent legislative basis for labor-management relations in the federal sector" – as per DP Twomey *Labor & Employment Law: Text and Cases* 15 ed (2013) 333. See Twomey *Labor & Employment* 333-339 for a succinct overview of the Act, and its application.

[2714] For reasons as to why potential amendments have been so scarce, see Estlund (2002) *Colum L Rev* 1536 who states: "Part of the Act's durability may come from the enduring power of its core provisions, which continue to command a broad political consensus (in principle). The statutory rights of workers under section 7 of the Act to associate, to discuss their grievances, to form a union, and to bargain collectively over terms and conditions of employment appear to be politically untouchable (again, in principle)". However, it must be added that many attempts to amend various aspects of the NLRA were introduced in Congress at various stages throughout the 1970s and 1980s, but, due to

the LMRA and LMRDA) as the core of American collective labour law.[2715] Estlund makes the following observation in this regard:

> "One is hard pressed to identify any other major American legal regime – any other body of federal law that governs a whole domain of social life – that has been so instituted for so long from significant change as labor law. The result of this many-faceted phenomenon of ossification is a labor law regime that has fallen badly out of sync with dramatic changes in the labor force, the organization of work, and global product markets."[2716]

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fierce opposition, were never passed. As mentioned above, where appropriate, these initiatives are discussed below in more detail. However, the wording of the NLRA alone does not explain why statutory changes have been non-existent. Arguably, the primary reason lies with the American legislature. In this regard, JJ Brudney "Gathering Moss: The NLRA's Resistance to Legislative Change" (2011) 26 *ABA J L Emp L* 161 177 states:

> "[T]he significant increase in filibusters is also due to a more ideologically polarized party structure and the concomitant decline in moderate or centrist members. This polarization is especially evident in the case of NLRA reform, an issue on which the business community has been fiercely united since the late 1970s. In diverse policy areas addressing health care, financial institutions, and unemployment benefits, the increase in filibusters has often resulted in delayed or modified enactments, but it has not foreclosed all chance of success. Even for policy proposals affecting workplace law, real and threatened filibusters have not prevented the Senate from approving significant new regulation on employment discrimination, plant closings, or family and medical leave. What makes labor law reform unusual is the unrelenting opposition of a unanimous business community, encompassing large employers and small firms, manufacturers and service providers, and companies with liberal as well as conservative reputations on social justice matters. While unions and their members have prevailed in the Senate since 1970 on bills where 'business opposition is divided or less than fully committed,' NLRA reform does not belong in that universe" [footnotes omitted].

[2715] See Hardin et al *Developing Labor Law I* 61. Put differently, the current NLRA consists almost entirely of the original Wagner Act of 1935, together with the major LMRA (Taft-Hartley) amendments of 1947, and the relatively minor (yet significant) changes of Title VII of the LMRDA (Landrum-Griffin) of 1959. See further Estlund (2002) *Colum L Rev* 1532. J Getman "The National Labor Relations Act: What Went Wrong; Can We Fix It?" (2003) 45 *Bost Coll L Rev* 125 146 n3 explains as follows:

> "[T]he current NLRA, codified as amended at 29 USC §§ 151-169 (2000), is a combination of the major provisions of the Wagner Act … (designated as the National Labor Relations Act); the 1947 Taft-Hartley Amendments… (designated the Labor Management Relations Act); and the 1959 Landrum-Griffin Amendments … (designated the Labor-Management Reporting and Disclosure Act of 1959".

However, compare this with K Andrias "The New Labor Law" (2016) 126 *Yale LJ* 27 n127, who describes it as follows:

> "There was one significant reform in the post-Taft-Hartley era: The Landrum-Griffin Act of 1959 imposed a regime for the regulation of internal union affairs and union democracy, while tinkering with some elements of Taft-Hartley."

[2716] C Estlund "The Ossification of American Labor Law and the Decline of Self-governance in the Workplace" (2007) 28 *J Lab Res* 591 593.

One consequence of this is that legislation which initially served the needs of organised labour (or at the very least did not impede it),[2717] now consists of a body of law that often is used strategically by management as a tool with which to combat union power and influence.[2718] The USA accordingly serves as a unique example of a country whose labour relations system, in spite of the vast numbers of potentially-impacted employees, is effectively regulated in terms of legislation that was most recently revised sixty-odd years ago. And yet, in speaking of some of the underlying reasons for this state of affairs, Kochan argues that the "impasse" has been in place since 1978.[2719] Writing in 2003, he states:

> "There is another silver anniversary that just passed worth noting, but perhaps not celebrating. Since the labor law reform bill of 1978 failed to get the one additional vote needed to make it through the Congress, the United States has been locked in an impasse over national labor and employment policy. For the past quarter century, neither labor nor business has been able to enact reforms of labor or other employment laws either believes are needed. Yet both groups are powerful enough to block most of the initiatives of the other. The deep ideological divide between these two powerful political adversaries has discouraged a succession of Republican and Democratic Presidents and Congressional majorities from challenging this divide."[2720]

At the same time, this quotation provides three convenient time periods for consideration, namely 1959 to 1978, 1978 to 2003, and 2003 onwards, in order to sketch developments in the USA before considering applicable legislation and its application in more detail.

9 2 1 Post-LMRDA: 1959 to 1978

In considering the initial impact of the LMRDA, St. Antoine notes that the Act – given its focus on internal union procedures – gave rise to an unforeseen consequence for employers:

[2717] Getman (2003) *Bost Coll L Rev* 125.

[2718] J Slater "The Rise of Master-Servant and the Fall of Master Narrative: A Review of Labor Law in America" (1994) 15 *Berk J Emp Lab L* 141 142, quotes Lane Kirkland, the former president of the AFL-CIO (1993), who said:

> "The law, as it stands, is not sufficient to ensure working people of their basic right to join a trade union. Rather, it has been perverted and has become a tool in the hands of those who would dominate and suppress working people".

[2719] Kochan "A Silver Anniversary Not Worth Celebrating: The Impasse Over American Labor and Employment Policies" (2003) 25 *Comp Lab L & Pol'y J* 79 79.

[2720] 79.

> "Yet irony has been piled upon irony. Not only is this wellspring of union members' rights the construct in considerable part of employer lobbyists bent on weakening labor organizations; in the two decades since being enacted, Landrum-Griffin's internal controls have done much to advance the cause of participatory democracy within unions while doing little if any damage to the structure of the labor movement. And perceptive management representatives have lived to rue the day they helped empower feisty rank-and-filers to speak up and reject the 'responsible' collective bargaining settlements negotiated by their unions' leadership."[2721]

Simultaneously, major changes were taking place in the broader American labour relations system and these were, as so often is the case, closely linked to underlying economic changes. Prior to these changes, "the postwar years were marked by relative prosperity among organized workers."[2722] This was in no small part due to the organisational successes of unions within the traditional manufacturing industries of the USA. The significant density of trade unions within those workplaces allowed for favourable collective bargaining negotiations, frequently at industry-wide levels.[2723] Furthermore, increased productivity amongst the manufacturing workforce, together with associated expansion of industries, led to "a substantial increase in real wages for most of this period, despite a falling rate of profit", lasting until the mid-1970s.[2724] However, there was also increasing "complacency" on the part of organised labour.[2725]

A further dimension of the story of organised labour during this time relates to the fact that on the 15th of October, 1970, President Nixon signed into law the Racketeer Influenced and Corrupt Organizations Act ("RICO")[2726] (this Act is considered in some detail later in the chapter). Interestingly, the Act was introduced by Senator McClellan (he of the McClellan Committee hearings discussed in the previous chapter). In the words of Hardin et al, the "statute was aimed at rooting out corruption relating to

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[2721] TJ St. Antoine "The Regulation of Labor Unions" (1982) 30 *Am J Comp L* 299 301.
[2722] Andrias (2016) *Yale LJ* 19.
[2723] 19. The benefits – in return for promised industrial peace – were "substantial wage increases with cost of living adjustments, pensions, and generous health benefits" – Andrias (2016) *Yale LJ* 19.
[2724] K Moody "Contextualising Organised Labour in Expansion and Crisis: The Case of the US" (2012) 20 *Hist Mater* 3 4.
[2725] J Rosenfeld *What Unions No Longer Do* (2014) 10. Andrias (2016) *Yale LJ* 20 states as follows in this regard: "[T]he 1950s and 60s were marked by complacency among many union leaders and members. Willing to settle for a private, depoliticized system of bargaining, many unions failed to organize new members; some actively resisted membership by non-white workers" [footnotes omitted].
[2726] Pub L 91-452, 84 Stat. 941 (1970), (18 U.S.C. §§ 1961-1968) (2017).

enterprises, including unions, corporations, and other associations".[2727]

Despite the prosperity enjoyed by trade union workers in the preceding decade, it would be inaccurate to state that the USA had entered a period of overall labour peace and stability.[2728] When various international and external economic effects started placing profits under pressure,[2729] employers started fighting back against "shop-floor organisation in the major, highly unionised industries".[2730] As a result, strike action in the USA even surpassed the previous greatest period of industrial action (immediately after WWII) with it "peaking at just over 6,000 strikes in 1974".[2731]

Unions also found themselves at the apex of their "business-unionism" approach (that saw its origins in the early 1900s – but had flourished post-WWII).[2732] Simply put, this approach saw the individual unions focus all of their energy on the self-identified core tasks of the organisation,[2733] namely collective bargaining for those they

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[2727] P Hardin et al (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 2* 4 ed (2001) 2324. For a succinct background to the creation of the Act, see GR Blakey & B Gettings "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies" (1980) 53 *Temp LQ* 1009 1014-1021.

[2728] As stated by Moody (2012) *Hist Mater* 5 – and further evidenced by the discussion of this period over in the UK, in chapter 5 above (at § 5 2 1, § 5 2 6 and § 5 2 7) – "much of the industrial world experienced a major labour-upheaval" during the mid-1960's to 1970's. Says M Schiavone *Unions in Crisis? The Future of Organized Labor in America* (2008) 16 in this regard:

> "All unions were under siege. Beginning in the 1950s, the NLRB, which was meant to protect worker rights, began to continually favor employers over unions in any dispute. Moreover, at the same time that union members' wages were increasing, union membership was declining."

[2729] Andrias (2016) *Yale LJ* 21.

[2730] Moody (2012) *Hist Mater* 5. Rosenfeld *What Unions* 24-25 outlines the changing approach of management during this time, and states as follows:

> "Beginning in the 1960s, employers started to test the law's limits. While business opposition to labor unions was not new, scholars agree that by the late 1960s and into the 1970s and 1980s, organized business had really begun to perfect its antiunion tactics. Instead of playing by a mutually agreed-upon set of rules that had governed what was deemed permissible in collective bargaining disputes, employers began skirting the law, pricing in the resulting penalties as simply one of the costs involved in fighting unions… [T]his recalculation proved fruitful, as companies quickly discovered that 'defying the law was far cheaper than risking any prospect of unionization' [footnotes & references omitted]."

[2731] Moody (2012) *Hist Mater* 6.

[2732] VG Devinatz "The Crisis of US Trade Unionism and What Needs to be Done" (2013) 64 *Lab LJ* 5 8. Devinatz (2013) *Lab LJ* 8 also provides four reasons for the underlying success of the approach, and how it facilitated "successfully raising union members' living standards" during the period of the mid-1940's to 1970's.

[2733] Schiavone *Unions in Crisis?* 15 explains the approach as follows: "Business unionism is concerned only with the narrowly defined bread-and-butter issues, such as union members' wages and working conditions". Schiavone *Unions in Crisis?* 15-16 furthermore quotes Hoxie (at § 7 3 6 above), where is stated that business unionism is "[e]ssentially trade-conscious rather than class-conscious ... it

represent and the continued administration of CBA's reached – in other words, the "bureaucracy of bureaucracy".[2734] And, as explained by Schiavone, "a dominant tendency of business unionism" following WWII, was that of the "servicing model of unionism", which focused on the servicing of existing members as opposed to focusing on recruiting new members.[2735]

Moody reasons that it was the two economic recessions (1973-1975, and 1980-1982) that broke the momentum of organised labour's response to the employer's "fight-back".[2736] Equally significant, however, was the increasing divide between the leadership of the unions and their membership.[2737] This was compounded due to the focus on "business unionism" mentioned above,[2738] which saw the leadership "increasingly [side] with management in the restoration of workplace-authority and company-competitive priorities".[2739] It was against this backdrop that two attempts were made at legislative reform of the NLRA.[2740] The first of these – in March of 1977 – was a "a bill to legalize 'common situs' picketing"[2741] and the second – in June 1978

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expresses the viewpoints and interests of the workers in craft or industry rather than those of the working class as a whole".

[2734] This being my paraphrasing of Devinatz (2013) *Lab LJ* 9, in describing George Meany, the long-standing President of the AFL-CIO. Rosenfeld *What Unions* 10-11 says in this regard:

> "During this period, many unions grew into enormous bureaucracies, overseeing millions of members, millions of dollars, and large staffs charged with handling workplace matters. The organizing arms of these unions, meanwhile, 'tended to enter a state of atrophy'... At the same time, battles over collective bargaining became routinized and scripted, sapping much of the grassroots militancy that had characterized earlier upsurges in unionization. Instead, members began to view their union as a service provider: In exchange for a fee (or dues), the union delivered certain predictable benefits. Lost in the transformation was the sense of rank-and-file ownership of the union – and with it the capacity for collective mobilization that could reenergize labor's organizing muscles, or fend off employer onslaughts on existing unions".

[2735] Schiavone *Unions in Crisis?* 16. Rosenfeld *What Unions* 11 states as follows in this regard:

> "In recent years many labor scholars suggested that organized labor's transformation from a broad-based social movement to a narrow service provider was a primary factor explaining unions' present malaise. This perspective argued that during the decades spent contentedly servicing existing memberships, many unions lost touch with their rank and file, and were caught unawares by brewing economic transformations and growing employer backlash" [footnotes omitted].

[2736] Moody (2012) *Hist Mater* 6 confirms that the "eight largest unions, major sites of the rebellion, lost 2.2 million members".

[2737] 6.

[2738] See § 9 2 1 above.

[2739] Moody (2012) *Hist Mater* 6.

[2740] Rosenfeld *What Unions* 25 makes the point that with the changing tactics of employers, organised labour was effectively left with very little choice – in short, "the labor movement pressed politicians in Washington to update the NLRA to reflect the new challenges labor faced when confronting employers".

[2741] Devinatz (2013) *Lab LJ* 8 explains this as involving "the union having the right to picket other

– was the Labor Law Reform Bill[2742] that attempted "to put more teeth in the NLRA".[2743] The former "lost on a narrow vote in the heavily Democratic 95th Congress".[2744] The latter fell "two votes short" with the result that "'one could hear the death rattle of American working-class political power' in this legislative defeat."[2745]

9 2 2 Post-LMRDA: 1978 to 2003

This legislative defeat was followed by, in the words of Moody, the "collapse of union-resistance" in America.[2746] Other factors contributed to this, including the economic recessions that were wreaking havoc on American businesses.[2747] The drive for increased productivity and efficiency and the reduction in labour costs resulted in "[a]voiding unionization bec[o]me a primary goal for many businesses".[2748] Closely related were the anti-union tactics on the part of employers (or their representatives)[2749] that increasingly became the norm.[2750] Furthermore, Andrias

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contractors and subcontractors at a construction site when its dispute involved only one subcontractor".

[2742] Section 2467, 95th Cong. (1978), as per Brudney (2011) *ABA J L Emp L* 170 n58.

[2743] Devinatz (2013) *Lab LJ* 8. As explained by Brudney (2011) *ABA J L Emp L* 170, the focus was on "speedier union representation elections, greater union access during organizing campaigns, and stronger monetary relief for illegally fired workers".

[2744] Devinatz (2013) *Lab LJ* 8.

[2745] Rosenfeld *What Unions* 25, quoting labor historian Jefferson Cowie [*Stayin' Alive: The 1970s and the Last Days of the Working Class* (2010) 296]. Brudney (2011) *ABA J L Emp L* 171-172, offers some insights into the pro-business/anti-union lobbying that was taking place prior to the vote in 1978 – and states: "A single pro-business organization estimated it had sent out 12 million pieces of mail – and that was more than two weeks before the first Senate cloture vote in mid-June". President Carter is also quoted [Brudney (2011) *ABA J L Emp L* 172] as speaking of the "'grossly distorted' lobbying effort against the bill itself" – in what was to become a forebear of future "corporate political action" [at 171].

[2746] Moody (2012) *Hist Mater* 5.

[2747] Andrias (2016) *Yale LJ* 21-22, speaking in broad terms of the economic impact, states as follows:

> "Over the course of the 1970s, 80s, and 90s, American businesses, faced with increased domestic and international competition, as well as restive capital markets and a push for higher profits, reshaped themselves. Capital moved – both down South and overseas. Manufacturing and industrial sectors of the economy shrank. And corporations 'fissured.' They shed activities deemed peripheral to their core business models and contracted out work to domestic and foreign subcontractors. They also shrunk the portion of their labor force that enjoyed full-time work, vastly increasing their use of 'contingent' workers – part-time and temporary workers and independent contractors – as well as automated technology." [footnotes omitted].

[2748] Andrias (2016) *Yale LJ* 22.

[2749] Devinatz (2013) *Lab LJ* 9 speaks of "newly emerging industries, such as high-tech, virulently battling unionization through enlisting union-busting consultants".

[2750] J Logan "Employer Opposition in the US: Anti-Union Campaigning from the 1950s" in T Dundon & G Gall (eds) *Global Anti-Unionism: Nature, Dynamics, Trajectories and Outcomes* 1 ed (2013) 21 22 describes the "significant expansion of the union avoidance industry" during this time – with it turning

points out that the American judiciary was becoming increasingly permissive in allowing employers to extract whatever advantages they could from the labour relations system.[2751] It was against this background that the newly elected Republican President, Ronald Reagan, drew the proverbial "line in the sand" during the air-traffic controllers' strike of 1981. Rosenfeld states as follows:

> "And political leaders set the tone, no more so than in August of 1981 when President Ronald Reagan issued an ultimatum to striking air traffic control workers demanding they return to their jobs within forty-eight hours or he would fire them all and permanently replace them with nonunion workers. The striking workers, members of the Professional Air Traffic Controllers Organization, did not back down, and Reagan followed through on his promise, decertified the union, and barred the fired employees from working as air traffic controllers in the future. All of this unfolded in a highly fragmented, firm-centered collective bargaining system during a period of rapid deregulation, increasing competition, and major employment shifts in the industries in which Americans worked."[2752]

In industries across America, both before (and after) the air-traffic controllers' debacle, organised labour was in full retreat.[2753] What has been termed as "concession bargaining" saw union leadership embark on "one of organized labor's most idiotic strategies ever".[2754] Commencing in November of 1979[2755] trade unions started to agree to concessions in the terms of the prevailing CBA's, ostensibly due to the tough economic conditions. Once initiated, each subsequent negotiation resulted in further concessions being made, with Moody stating that the "surrender of 1979 led to a dramatic collapse in almost every major form of trade-union activity across the US

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into a "multi-million dollar industry", and "increasingly becoming a standard feature of union organising campaigns". This latter statement is borne out by Logan "Employer Opposition" in *Anti-Unionism* 22 making the point that during the 1980's through 1990's, "over two-thirds of American employers recruit[ed] consultants when faced with an organising campaign" [references omitted]. See Logan "Employer Opposition" in *Anti-Unionism* 22-30, and K Moody "Beating the Union: Union Avoidance in the US*"* in T Dundon & G Gall (eds) *Global Anti-Unionism: Nature, Dynamics, Trajectories and Outcomes* 1 ed (2013) 143 151-156 for a detailed discussion of the American "industry" of anti-union consultants and law firms that have arisen within the broader labour relations system.

[2751] Andrias (2016) *Yale LJ* 22. See further JJ Brudney "Of Labor Law and Dissonance" (1998) 30 *Conn L Rev* 1353 1355.

[2752] Rosenfeld *What Unions* 29.

[2753] Moody (2012) *Hist Mater* 6-7.

[2754] Schiavone *Unions in Crisis?* 17.

[2755] Moody (2012) *Hist Mater* 6 describes the decision by the UAW to "major concessions at the Chrysler Corporation, even before the US Congress passed the Chrysler 'bailout'."

economy".[2756] The restructuring of industries,[2757] changes in the macro-economic policies of the USA[2758] and globalisation[2759] all played a role in the continued decline of organised labour during the remainder of the 1980s.

From a legislative perspective, the next marker was at the start of the 1990s, with the ill-fated "Cesar Chavez Workplace Fairness" bill.[2760] Like the attempts of the late 1970s, it too never garnered enough support under the presidency of Bill Clinton to beat a "filibuster" in June of 1992.[2761] Brudney states that the bill's objective "was to expand the definition of illegal employer conduct by prohibiting the use of permanent replacements for economic strikers".[2762] This was against the background of the 1938 Supreme Court decision in *NLRB v Mackay Radio & Tel. Co*.,[2763] which held that employers did not need to reinstate those workers who had been replaced following their participation in a so-called "economic strike".[2764] Corbett states further: "The bill

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[2756] Moody (2012) *Hist Mater* 6. Moody (2012) *Hist Mater* 7 explains further:

> "Between 1979 and 1983, union-membership in the private sector fell by 26% … Negotiated annual-wage increases in major collective-bargaining agreements in manufacturing dropped from 6.1% in 1981 to 1.5% in 1984, falling far behind inflation even as the annual rate of increase in the Consumer Price Index fell by more than half. Concessions, however, were not only about wages. A third of all concessionary agreements reached in 1982 involved changes in work-rules designed to increase productivity. By 1983 changes in work-organisation had been conceded in automobile-manufacturing, steel, meatpacking, tyres, petroleum-refining, and air and rail-transport" [footnotes omitted].

[2757] See Moody (2012) *Hist Mater* 12-13 for the influence of Japanese car-makers' approaches in respect of the so-called "lean methods" of manufacturing – and the spill over into American "heavy-industries".

[2758] See DJB Mitchell & CL Erickson "De-Unionization and Macro Performance: What Freeman and Medoff Didn't Do" (2005) 26 *J Lab Res* 183 190-193.

[2759] Schiavone *Unions in Crisis?* 1-21.

[2760] H.R. 5 (S. 55), 102nd Cong. (1992), as per Brudney (2011) *ABA J L Emp L* 173 n78.

[2761] Brudney (2011) *ABA J L Emp L* 173.

[2762] 173. The Bill only contains two sections – with s 2 seeking to amend subs 8(a) of the NLRA, and s 3 amending the applicable section of the RLA.

[2763] 304 US 333 (1938).

[2764] Corbett (2011) *Vill L Rev* 228. As per Twomey *Labor & Employment* 247, simply put, an economic strike "is concerned with demands regarding hours of work, wages, and working conditions". RA Gorman & MW Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 2 ed (2004) 456 describe it as follows:

> "The kind of responsive action which an employer may take against its striking employees may depend on the cause of the strike. A distinction has been drawn between the unfair labor practice striker and the economic striker, and to the extent their rights differ the unfair labor practice striker is treated more favorably. Employees who engage in a work stoppage in protest against employer conduct which is found by the NLRB to be in violation of the Labor Act are said to be 'unfair labor practice strikers'. Employees who engage in a work stoppage for other reasons, typically in support of bargaining demands regarding wages and working conditions or requests that the employer

was crucial to organized labor because the right to hire permanent replacements during strikes and, more importantly, the ability legally to threaten to hire such replacements, essentially has rendered the strike, which once was labor's nuclear option, a feckless weapon".[2765]

This situation is worthy of brief examination. Given the fact that strike action is deemed as falling within "concerted activities" under section 7 of the NLRA, it is protected against employer interference (including dismissal).[2766] However, in the words of Pope: "the *Mackay Radio* Court simply asserted the employer right, offering no explanation why strikers – who are admittedly protected against 'discharge' – can nevertheless be replaced permanently at the discretion of the employer."[2767] In other words, in the American labour relations system and since 1938, workers were protected from dismissal for going on strike – but they could nonetheless be

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recognize a union, are said to be 'economic strikers.'"

[2765] Corbett (2011) *Vill L Rev* 228-229, [footnotes omitted]. Says HH Drummonds "Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy" (2009) 70 *La L Rev* 97 150 in this regard:

> "Permanent strike replacement changes this calculus of costs and benefits. Permanent replacement crosses a line, making the consequence of losing for the employees involved not just acceptance of the employer's terms but also de facto loss of their jobs. After President Reagan successfully and permanently replaced more than 10,000 striking air traffic controllers in 1981, the use and threat of permanent replacements in strike situations became more common. This means that even if the employees and union are willing to end their strike, the employer is not obligated to return them to work if no vacancies exist because permanent replacements have been hired or because employees who crossed the picket line have preference over those who honored the strike to the bitter end. One possibility for restoring more of a balance of power in the bargaining impasse situation would be to eliminate permanent replacement."

The latter was to take the form of the attempted Workplace Fairness Act.

[2766] JG Pope "How American Workers Lost the Right to Strike, and Other Tales" (2004) 103 *Mich L Rev* 518 527.

[2767] Pope (2004) *Mich L Rev* 527. Pope (2004) *Mich L Rev* 527 n51 quotes from E Silverstein "If You Can't Beat'em, Learn to Lose, but Never Join Them" (1998) 30 *Conn L Rev* 1371 1373, who states as follows (repeated here in full):

> "As an exercise in statutory interpretation, even the most conservative students have wondered at a result that honors, on the one hand, the prohibition against discharging employees because they strike, but allows, on the other hand, replacement of strikers and retention of strikebreakers once the dispute has ended. How could such a transparent maiming of the statutory right to engage in collective action occur? Perhaps, as Getman suggests, Mackay is a product of hubris, hierarchy, erroneous and/or overvalued theory, willful ignorance, or some combination of these elements."

"Getman", is in reference to J Getman "Of Labor Law and Birdsong" (1998) 30 *Conn L Rev* 1345 1345-1352, which along with Brudney (1998) *Conn L Rev* 1353-1364 and Silverstein (1998) *Conn L Rev* 1371-1376 discuss, and criticise, the finding in *Mackay Radio*, and the judicial approach surrounding broader collective labour issues in America.

"permanently replaced at the discretion of the employer".[2768] The effect of *Mackay Radio* was thus "a bizarre reversal of the strike's traditional function".[2769] Even so, Corbett explains how *Mackay Radio's* doctrine was not really used by management for the better part of 30 years.[2770] This was to change with an "increased willingness to resort to permanent replacements since the late 1970s".[2771] In further confirmation of the changing attitudes to strike action in the USA, 1989 saw "a divided Supreme Court [reaffirm] the doctrine and [extend] it to allow employers to prefer strikers who abandon a strike before their fellow workers".[2772] As such, it is not surprising that the Workplace Fairness bill met its demise at the hands of employer-focused lobbying. Brudney makes the further point that by the early 1990s labour-related matters had "surprisingly low visibility" in the USA.[2773]

1993 saw the formation, under the Clinton Administration, of the Commission on the Future of Worker-Management Relations – known as the Dunlop Commission.[2774] Corbett states that the Commission was tasked with evaluating "what changes should

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[2768] Pope (2004) *Mich L Rev* 527. The author states further [at 527]:

> "The employer need not show any business reason for its exercise (for example, that unless replacements are offered permanent employment the company will be unable to continue operating), and the rule leaves no room for the [NLRB] to argue that the impact of permanent replacement on the section 7 right outweighs the employer's interest".

The aforementioned would not apply were there to be an unfair labour practice involved, on the part of the employer – if, as discussed by Pope (2004) *Mich L Rev* 527, the employer were to replace the strikers purely on the basis of their being union members – but this would need to be proven, which is not a simple threshold to cross.

[2769] Pope (2004) *Mich L Rev* 527. Pope at 528 states further that "it now serves as a source of *employer* bargaining power", with employers now being "more likely to threaten permanent replacement than unions are to threaten a strike" [their emphasis].

[2770] Corbett (2011) *Vill L Rev* 228-229 n7.

[2771] 228-229 n7 (quoting KG Dau-Schmidt & BC Ellis "The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan" (2010) 20 *Ind Int'l & Comp L Rev* 14). See further Pope (2004) *Mich L Rev* 528, who links employers' willingness to use permanent replacements with the sharp decline in industrial action.

[2772] Drummonds (2009) *La L Rev* 125. This being in reference to *Trans World Airlines, Inc. v Independent Federation of Flight Attendants* 489 US 426 (1989), where – as explained by Drummonds (2009) *La L Rev* 125 – "'crossover' flight attendants, who abandoned [their] strike before union and other flight attendants, did not have to be displaced to make place for striking flight attendants with more seniority at [the] end of [the] strike".

[2773] Brudney (2011) *ABA J L Emp L* 174. Put differently, Brudney (2011) *ABA J L Emp L* 175 reasons that what must not be lost sight of, is "the fact that an issue of enormous concern to unionized workers never really grabbed the American public".

[2774] Corbett (2011) *Vill L Rev* 231. Corbett confirms further [at 231] that it was chaired by Professor John Dunlop, the former Secretary of Labor.

be made in the laws governing collective bargaining 'to enhance productivity, employee participation, labor-management cooperation, and resolution of workplace problems by the parties themselves'."[2775] With the findings of the Commission released in December 1994,[2776] a "month after the Republicans swept into power" in Congress,[2777] the "proposals were dead on arrival".[2778]

Writing in the aftermath of the Commission,[2779] Estreicher said the following:

> "The principal cause of labor's decline, however, lies elsewhere: the model of employee organization promoted by the labor laws has failed to keep pace with the unleashing of competitive forces in product markets as a result of deregulation, technological advances, and global competition. Unions can no longer 'take wages out of competition' by imposing like terms on all competitors operating in the same market. But they continue (and are to some extent steered by the system) to see traditional cost-adding wage and job control objectives as their primary 'product' and institutional raison d'etre".[2780]

For the remainder of the 1990s through to the early 2000s there were no further attempts at legislation. Organised labour still faced a significant decline in membership

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[2775] 231, quoting from S Estreicher "The Dunlop Report and the Future of Labor Law Reform" (1996) 12 *Lab Law* 117 120. Estreicher (1996) *Lab Law* 121 states that the "[f]our major areas of reform" that were addressed by the Commission, were "(1) employee involvement, (2) worker representation and collective bargaining, (3) employment litigation and dispute resolution, and (4) contingent workers."

[2776] For a succinct overview of the Commission, see HR Northrup "The Dunlop Commission Report: Philosophy and Overview" (1996) 17 *J Lab Res* 1-8 and P James "US Labour Law Reform: A Note on the Dunlop Debate" (1995) 17 *Emp Rel* 43 43-51. See further Commission on the Future of Worker-Management Relations "Executive Summary of the Fact Finding Report of the Commission on the Future of Worker-Management Relations" (1994) *Cornell University, School of Industrial and Labor Relations* <http://digitalcommons.ilr.cornell.edu/ key_workplace/416/> (accessed 31-10-2018) 1-9 and Commission on the Future of Worker-Management Relations "The Dunlop Commission on the Future of Worker-Management Relations: Final Report" (1994) *Cornell University, School of Industrial and Labor Relations* <http://digitalcommons.ilr.cornell.edu/key_workplace/2> (accessed 31-10-2018) 1-113.

[2777] Corbett (2011) *Vill L Rev* 231. Says Estreicher (1996) *Lab Law* 121 in this regard:

> "The November 1994 elections altered the political calculus. With Republican control of Congress, organized labor's focus shifted from law reform to damage control. The Dunlop panel was urged to avoid clear endorsements of proposals that employers favor and Republicans would readily enact. Politics also precluded Chairman Dunlop's strategy to structure a deal in which management would accede to lower barriers to labor organizing in exchange for the changes it sought. As Jeffrey McGuinness of the Labor Policy Association, a lobbying group for large employers, put it: 'all deals are off, all swaps; whatever deals there might have been are now off.'"

[2778] Corbett (2011) *Vill L Rev* 231.

[2779] BT Hirsch "The Dunlop Commission's Premise: A Tilted Playing Field?" (1996) 17 *J Lab Res* 15 32.

[2780] Estreicher (1996) *Lab Law* 118-119.

numbers, particularly in the private sector. In addition, noticeable changes were afoot within the leadership of America's largest unions – with these unions undergoing significant structural changes as well.

9 2 3 Post-LMRDA: 2003 to present

The changes in the broader American society from the 2000s onwards are aptly described by Gitlow: "We are now experiencing a post-industrial era, dominated by the rise of services, both private and public".[2781] The impact was to be visible in virtually all aspects of the labour relations system and its manifestation within the very core of America's largest unions and federations[2782] was to further compound organised labour's uncertain future. As stated by Moody:

> "The most important developments in organised labour in the first few years of the twenty-first century up to the Great Recession of 2008, however, were: the changing nature of the unions; the increasing centrality of the Service Employees' International Union (SEIU); the split in the AFL-CIO; and the virtual 'civil war' that exploded in 2009 between several important unions."[2783]

By way background,[2784] as the largest union within the AFL-CIO federation, the SEIU was increasingly unhappy with the Federation's lack of focus on organising new members (in efforts to stem the tide of membership decline).[2785] 2005 saw the SEIU

[2781] Gitlow (2012) *Lab LJ* 124. Says K Warner "The Decline of Unionization in the United States: Some Lessons from Canada" (2013) 38 *Lab Stud J* 110 110-111 in this regard:

> "Much emphasis has been placed on the fact that the United States has moved from a manufacturing economy to a 'post-industrial' one, with fewer male, blue-collar, and less-educated workers and more female, white-collar, and more-educated workers. The complementary contention is that this changing workforce has less need for unions and thus less desire to be unionized. Though the changes in the composition of the workforce and the economy – including the detrimental effect upon manufacturing union workers – are undoubtedly real, what is less certain is the explanatory power of these arguments, particularly with respect to the desire for unionization" [footnotes omitted].

[2782] Rosenfeld *What Unions* 1 succinctly captures the effects as follows:

> "The late 1970s and 1980s proved especially brutal for Big Labor, with unionization rates halving during the period. The nation's journalists and intellectuals covered this phenomenon extensively, linking union decline to the transition to a postindustrial economy increasingly open to global trade".

[2783] Moody (2012) *Hist Mater* 16.

[2784] See Moody at 18-20 for further details of the inter-union strife during this time.

[2785] R Milkman "Back to the Future? US Labour in the New Gilded Age" (2013) 51 *BJIR* 645 654 reasons that a further underlying reason, was the AFL-CIO's refusal to restructure towards a "more centralized organization, in part by merging the affiliated unions along industry lines". This centralised-approach, controversial as it was, was favoured by the SEIU as it allowed more direct control over subsidiary unions (and even involved placing unwilling unions under trusteeship) – see Moody (2012) *Hist Mater*

and five other unions leave the AFL-CIO[2786] and "form their own Change-to-Win (CTW) federation".[2787] Moody explains that the "aggressiveness of the SEIU leadership toward other unions went beyond the formation of CTW to spark a virtual civil war in organised labour."[2788] The AFL-CIO therefore saw another split,[2789] which served to "expose a significant fissure within the contemporary US labour movement".[2790]

The American economy (and world, for that matter) experienced the arrival of the 2008 "Great Recession", caused in no small part by the US subprime mortgage crisis.[2791] The effects were catastrophic[2792] with the expected impact on union membership. At the same time, "there was an ample backlog of employment bills

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[2786] Milkman (2013) *BJIR* 654.

[2787] Moody (2012) *Hist Mater* 19. For a useful overview of the new federation, see S Estreicher "Disunity within the House of Labor: Change to Win or to Stay the Course?" (2006) 27 *J Lab Res* 505 505-511. Regarding the management approach within the CTW, that was heavily influenced by the SEIU, Devinatz (2013) *Lab LJ* 14 makes the following interesting observation:

> "In addition to centralizing power and creating bureaucracies in their own unions and their new labor combination, the CTW leaders do not appear to believe that union democracy is either necessary or desirable to US trade unions. Arguing that taking 'bold action' and having a 'military-style' command are required for resuscitating labor, this group of union officials holds the position that 'democracy is a luxury unions can't afford' because as one SEIU staff member stated, '(U)nion democracy doesn't work because workers can't be trusted to make the right decisions.'"

[2788] Moody (2012) *Hist Mater* 19. Moody makes the further point [at 19] that "[m]uch of this centred on the highly controversial efforts of the SEIU to raid a number of unions" for members.

[2789] See in general G Chaison "The AFL-CIO Split: Does it Really Matter?" (2007) 28 *J Lab Res* 301 301-311, regarding the specific issues that gave rise to the split – in particular [at 304] – the personal clashes between the two presidents, Stern of the SEIU, and Sweeney, of the AFL-CIO. RW Hurd & TL Lee "Public Sector Unions Under Siege: Solidarity in the Fight Back" (2014) 39 *Lab Stud J* 9 13 speak to the fundamental divide in approach between AFL-CIO, and CTW, in that the latter "prioritized organizing and restructuring", the former "promoted coherent political action focused on private sector labor law reform". As the authors state [at 13], it was to be the AFL-CIO that pushed for the 2007/2009 amendment bill, following the split.

[2790] Milkman (2013) *BJIR* 654. The point must be made though, that the "split" was to be short-lived – with the CTW all but non-existent by the early-2010's, and with certain of its affiliates returning to the AFL-CIO again – Milkman (2013) *BJIR* 654.

[2791] Moody (2012) *Hist Mater* 20.

[2792] Regarding the impact within the US, Moody (2012) *Hist Mater* 20 states as follows:

> "As employers responded to this decrease in profits, unemployment began to edge upward in the first quarter of 2007, when the unemployment-rate was 4.5%. By March 2008 it was 5.1%, with 7.8 million out of work. By October 2009 official unemployment hit 10% with 15.6 million out of work, a third of them for 27 weeks or more. If we include the 5.6 million considered 'not in the labour- force', but who wanted work, the total is over 21 million. Some 6 million private-sector production-worker jobs were lost between May 2007 and October 2009" [footnotes omitted].

pending in Congress when President Obama took office" in January of 2009.[2793] However, due to the Republican Party retaking control of Congress in November of 2010 only one enactment was to come into effect.[2794] The dire consequences of the recession, together with the issues besetting organised labour, sees Milkman state as follows:

> "By the 2010s, then, the New Deal labour relations system was a dead letter for all practical purposes. Not only had private-sector union density fallen below 10 per cent in the opening years of the twenty-first century ..., but now the one remaining pillar of union strength, public-sector unionism (regulated not by the NLRA but by a variety of other statutes), was under direct attack as well"[2795]

The attack against public-sector unions will be discussed in a moment.[2796] Before this is done, mention must be made of the final opportunity that organised labour had (for the foreseeable future) to successfully push legislation through Congress. 2008 was setting up for a "fire-storm bordering on Armageddon"[2797] as American management-lobbyists again prepared to oppose the bill in question, entitled the Employee Free Choice Act ("EFCA").[2798] The bill had as its goal to allow "union

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[2793] Corbett (2011) *Vill L Rev* 232.

[2794] As per Corbett (2011) *Vill L Rev* 232, this was the (Lilly) Ledbetter Fair Pay Act of 2009 [Pub L 111-2, 123 Stat. 5 (2009), (29 U.S.C. §§ 626 et seq. and 42 U.S.C. 2000e-5) (2017)]. Corbett (2011) *Vill L Rev* 232 however lists several employment bills that were *not* promulgated, due to party opposition – namely, *inter alia*, the Arbitration Fairness Act of 2009, the Employment Non-Discrimination Act of 2009, and the Paycheck Fairness Act [see Corbett (2011) *Vill L Rev* 232 n27-29 for their statutory details].

[2795] Milkman (2013) *BJIR* 647 [references omitted]. To underline this point, JN Raudabaugh "Labored Law: Bilateralism or Pluralism, Ossification or Reformation" (2012) 87 *Ind LJ* 105–117 111 says:

> "According to one critic, 'labor laws ... have become nearly irrelevant to the vast majority of private-sector American workers.' Whether by globalization, structural economic change, increased employer resistance given decreased union density and corresponding economic leverage, unions' own complacency, or traditional adversarial unionism, 92% of the private-sector workforce is not part of the legislated structure for industrial peace. Unions cannot survive if their employer 'hosts' fail, yet employers can thrive without unions" [footnotes omitted].

The "critic" being quoted here, is that of Estlund (2002) *Colum L Rev* 1528.

[2796] Hurd & Lee (2014) *Lab Stud J* 16 speak of a "coordinated assault on public sector collective bargaining rights".

[2797] These being the words of the "vice president of the [US] Chamber of Commerce", as per Rosenfeld *What Unions* 26.

[2798] Employee Free Choice Act of 2007, s 1041, 110th Cong. (2007); Employee Free Choice Act of 2009, s 560 111th Cong. (2009) – these being in reference to the various iterations the bill went through, as it was brought to successive Congresses, in attempts to be promulgated – RA Epstein "Labor Unions: Saviors or Scourges" (2013) 41 *Cap U LR* 1 2 n11; N Lichtenstein "Despite EFCA's Limitations, Its Demise Is a Profound Defeat for US Labor" (2010) 7 *Lab: Stud* 29 30. This is not to suggest that employer-lobbying and the party-political opposition alone was responsible for the bill not being passed.

recognition to take place by card check;[2799] imposed mandatory arbitration of initial two-year [CBA] contracts if the parties failed to reach an agreement within 120 days of union recognition; and stiffened penalties for alleged unfair labor practices committed by employers during the course of an organizational campaign."[2800] The EFCA did not muster sufficient support in Senate[2801] and by late-2009 was no longer pursued.[2802] The aftermath – despite the EFCA not being without its critics[2803] – resulted in, as stated by Milkman, a continuation of the "relentless decline of union density and power … . [but] now accompanied by persistently high unemployment and austerity policies that disproportionately affected the working class."[2804]

In returning to the fate of public-sector unions, Moody states:

> "In 2011, the attack on working-class living standards moved on to the public sector in accelerated form as Republican governors in several states, responding to the nervousness of state-bondholders and the continued desire of businesses and the wealthy for tax-cuts, attempted to deprive state and local-government employees of collective-bargaining rights altogether."[2805]

This development is closely related to the so-called "right to work" in the US

As stated by Moody (2012) *Hist Mater* 20:

> "If the worst of labour's 'civil war' was over by 2010, it had arguably been a factor in the unions' loss of the one piece of legislation they most sought from the Obama Administration, the [EFCA] which would have made union-organising somewhat easier."

[2799] Simply put, this would see recognition of a union on the basis of a sufficient majority of workers within a bargaining unit, indicating their support for the recognition on union-recognition 'cards', or forms – as opposed to the current system which sees the NLRB certify such recognition after conducting a recognition election in the workplace (see Warner (2013) *Lab Stud J* 117).

[2800] Epstein (2013) *Cap U LR* 2. For a further overview of the EFCA, see in general DP Twomey "The Employee Free Choice Act: Congress, Where Do We Go From Here?" (2009) 60 *Lab LJ* 71 71-80.

[2801] Rosenfeld *What Unions* 26 thus states: "In the end, there was no firestorm; there was no Armageddon".

[2802] Milkman (2013) *BJIR* 646.

[2803] See for instance RJ Adams "EFCA, Alas, Is Not the Answer" (2010) 7 *Lab: Stud* 9-15 (but compare with S Friedman "Why the Employee Free Choice Act Deserves Support: Response to Adams" (2007) 31 *Lab Stud J* 15); R Adams "The Employee Free Choice Act: A Skeptical View and Alternative" (2007) 31 *Lab Stud J* 1-14 and RA Epstein (2010) "One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail" (Working Paper No. 249) *New York University Law and Economics Working Papers* 10 10-53.

[2804] Milkman (2013) *BJIR* 646.

[2805] Moody (2012) *Hist Mater* 21-22. Moody (2012) *Hist Mater* 22 makes the point however, that the 'attack' on the public-service had already commenced as early as 2004, when the Governor of Indiana "repealed collective-bargaining rights for state-workers".

states.[2806] The "right to work" "refers to statutes that are adopted [by states] for the express purpose of allowing employees the right to choose to join and pay dues to a union *or* choose not to be a union member".[2807] This is of course possible as a result of subsection 14(b) of the LMRA, which permits "any State" to regulate its own approach to requiring union membership as a condition for employment.[2808] While not a new phenomenon,[2809] Harcourt et al (writing in 2018) confirm that the "number of so-called 'right-to-work' states, which prohibit union security (post-entry closed shops, agency shops, fair share) agreements, has grown to include previously pro-union states like Wisconsin and Michigan, and now totals 28 states".[2810] Given that "it has become *de rigueur* for Republican-controlled state governments to enact such laws",[2811] they are most likely to remain part of the American labour relations system for the foreseeable future, despite vocal opposition in many states.[2812] Further mention can be made, while falling outside the immediate scope of this study, of a series of recent decisions, surrounding the overturning of the 1977 Supreme Court judgment in *Abood v Detroit Board of Education*[2813] – the most recent example being *Janus v American Federation of State, County, and Municipal Employees Council*.[2814] *Abood*

[2806] For a useful overview of the "right to work" phenomena, see in general RL Hogler *The End of American Labor Unions: The Right-to-Work Movement and the Erosion of Collective Bargaining* (2015) 1-192 for its historical development, and in particular, 103-182 for the contemporary evolution of the concept.

[2807] A Abrahms "Could Employee Choice End Labor Unions' Influence?" (2017) 43 *ERLJ* 33 34.

[2808] Abrahms (2017) *ERLJ* 34. For a discussion regarding how these laws arguably impact on labour market security (and "insecure or precarious workers"), see in general J Varga "Dispossession is Nine-tenths of the Law: Right-to-work and the Making of the American Precariat" (2014) 39 25 25-45.

[2809] Abrahms (2017) *ERLJ* 35 writes as follows:

> "While the movement is far from new, it has enjoyed resurgence in the recent years. This resurgence did not start in the typical Right-to-Work strongholds of the South, but bubbled up from historically union strongholds in the Rust Bell: possibly getting its genesis with the very public brouhaha over the 2011 Wisconsin public sector reforms instituted following the election of Governor Scott Walker. Shortly thereafter the Right-to-Work movement's renaissance began..., shocking the labor community and allowing private employees in those stales the ability to exempt themselves from forced union membership."

[2810] M Harcourt et al "A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation" (2019) 48 *ILJ* 66 67.

[2811] M Ginsburg "Nothing New under the Sun: 'The New Labor Law' Must Still Grapple with the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations" (2017) 126 *Yale LJF* 488 495, [their emphasis].

[2812] Moody (2012) *Hist Mater* 22.

[2813] 431 US 209 (1977).

[2814] 585 US __ (2018).

had held that "agency fees in the public sector were valid as a constitutional matter",[2815] but *Janus* has now ruled that these agency fees infringe worker's free-speech rights, and no longer need to be paid – thus dealing a significant financial blow (both now, and in future) to all public-sector unions in America.[2816]

As far as the current state of the union movement in the USA is concerned, Harcourt et al suggest that a useful benchmark remains that of union membership:

> "Over the last 30 to 40 years union membership levels, though healthy in some parts of Europe, have fallen across much of the world, especially in the many Anglophone countries … Although membership and density levels are not the *sine qua non* for union power and influence *vis-à-vis* employers, government and political parties, they do represent the fundamentals of key power resources for their construction and exercise"[2817]

In this regard, statistics released by the federal Bureau for Labor Statistics places the 2018 "union membership rate"[2818] figures at 10.5%, "down by 0.2 percentage point from 2017".[2819] The total number of workers who reported as union members for the same period stands at 14.7 million.[2820] By means of comparison, the same release states that "[i]n 1983, the first year for which comparable union data are available, the union membership rate was 20.1 percent and there were 17.7 million union workers."[2821] Of further interest, in light of the discussion above, is that the membership rate for public-sector workers stands at 33.9%, "five times higher" compared to private-sector workers at 6.4%.[2822] In addition, approximately 1.6 million workers "who report no union affiliation but whose jobs are covered by union [CBA] contract", brings the total "wage and salary workers represented by a union" to 16.4 million in 2018.[2823] Lastly, brief mention can be made of industrial action figures, or "work stoppages", as they are reported by the Bureau. The 2018 numbers, released

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[2815] Ginsburg (2017) *Yale LJF* 495.
[2816] Ray et al *Understanding Labor Law* 367-368.
[2817] Harcourt et al (2019) *ILJ* 66-67 [footnotes omitted; their emphasis].
[2818] This being "the percent of wage and salary workers who were members of unions" – Bureau of Labor Statistics "Economic News Release: Union Membership (Annual) News Release" (2019) *United States Department of Labor* <https://www.bls.gov/news.release/union2.htm> (accessed 31-01-2019).
[2819] Bureau of Labor Statistics *Economic News Release: Union Membership (Annual) News Release* 1.
[2820] 1.
[2821] 1.
[2822] 1.
[2823] 1.

in February of 2019, confirm that "20 major work stoppages involving 485,000 workers" took place, this being the highest since 2007 (with 21 stoppages).[2824] The release furthermore states that "[s]ince 1981, there has been a significant reduction in the number of annual work stoppages" – while the "series low … was 5 in 2009", the year immediately following the commencement of the Great Recession.[2825]

While 16.5 million workers are still directly affected by organised labour decisions and CBA's (a significant number by most measures), consideration of the trade union membership density rate of 10.5% all but tells the story of the extent of America's union decline.[2826] It is therefore unsurprising that an increasing number of pages are dedicated to a theory of a "new labor law" about where America's labour (as opposed to employment) law and worker-representation are to be taken next.[2827] Writing in 2004, St. Antoine (recently quoted again by Andrias)[2828] emphasised how the USA in the 1980s through 1990s experienced a continuous "shift of emphasis from labor law to employment law" and an associated "direct governmental regulation of more and

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[2824] Bureau of Labor Statistics "News Release: Major Work Stoppages in 2018" (2019) *United States Department of Labor* <https://www.bls.gov/news.release/pdf/wkstp.pdf> (accessed 24-02-2019) 1.

[2825] 2.

[2826] Rosenfeld *What Unions* 1 states:

> "The country's unionization rate is lower than at any point since the early decades of the twentieth century. And the contemporary American labor movement stands alone in its smallness. As labor activist Richard Yeselson recently recounted, 'There has never been an advanced capitalist country with as weakened and small a union movement as today's United States'" [citing R Yeselson "Not With a Bang, But a Whimper: The Long, Slow Death Spiral of America's Labor Movement" (06-06-2012) The New Republic <https://newrepublic.com/article/103928/rich-yeselson-not-bang-whimper-long-slow-death-spiral-americas-labor-movement> (accessed 20-01-2019) 1].

[2827] As initially espoused by Andrias (2016) *Yale LJ* 2-100. See in general M Crain & K Matheny "The New Labor Regime" (2017) 126 *Yale LJF* 478 478-487, KMS Ocasio & L Gertner "Fighting for the Common Good: How Low-Wage Workers' Identities Are Shaping Labor Law" (2017) 126 *Yale LJF* 503 503-525, Ginsburg (2017) *Yale LJF* 488-502, MM Oswalt & CFR Marzán "Organizing the State: The 'New Labor Law' Seen from the Bottom-Up" (2018) 39 *Berk J Emp Lab L* 415 415-480 and K Andrias "An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act" (2019) 128 *Yale LJ* 616 616-709, for further commentary and discussion around this theme. Whilst the concept is still subject to academic-development, so to speak, Oswalt & Marzán (2018) *Berk J Emp Lab L* 418 delineate it along the lines of "social bargaining" ("where labor, management, and state representatives are providing new rights and enforcement arrangements for workers through co- or tri-party negotiations and relationships") – but that is "premised on developments spurred by so-called 'alt-labor' groups… and worker centers that advocate for employment rights absent a desire or obvious path toward traditional collective bargaining relationships" [footnotes omitted]. In this regard, see Andrias (2016) *Yale LJ* 8-10 for the original, broader framing of the concept.

[2828] Andrias (2016) *Yale LJ* 8, 37.

more aspects of the employer-employee relationship".[2829] Although it falls outside the scope of this study, these remarks raise questions about the future of the union movement in the USA. In this regard, it is fitting to end this part of the discussion with words relating to a "new" concept of labour proposed by Andrias:

> "As Professor Andrias correctly acknowledges, the challenges facing the labor movement in the United States are great. Contrary to her suggestion, however, there are few actors outside of the labor movement itself – in government, among employers, or in philanthropy – who are willing to provide a lifeline to unions, and none, even if willing, who could do so at the scale needed to rebuild the labor movement. The reality is that the task of constructing a new labor law falls to the labor movement itself. That is a difficult fact, but one that must be acknowledged in order to make the best use possible of the labor movement's existing resources to organize for the future".[2830]

9 3 The legislative regulation of trade unions and trade union accountability

The earlier discussion served as a sobering reminder of the challenges facing the American labour relations system in general and organised labour in particular. As far as the federal legislative framework of labour law is concerned, established as it was many years ago, the criticism is harsh:

> "For more than three decades now, the labor movement and leading labor law scholars have been withering in their criticism of the NLRA ... The primary substantive critique of the NLRA is that the federal rules of organizing and bargaining render employees' statutory rights to form and join labor organizations, and to bargain collectively with management, ineffectual. Scholars have repeatedly noted the central problems. When it comes to the rules of organizing, the regime provides employers with too much latitude to interfere with employees' efforts at self-organization, while offering unions too few rights to communicate with employees about the merits of unionization. The NLRB's election machinery is dramatically too slow, enabling employers to defeat organizing drives through delay and attrition. The NLRB's remedial regime is also too weak to protect employees against employer retaliation. And, with respect to the statute's goal of facilitating collective bargaining, the regime's "good faith" bargaining obligation is rendered meaningless by the Board's inability to impose contract terms as a remedy for a party's failure to negotiate in good faith".[2831]

These remarks serve as a reminder that, even though the goal of this part of the discussion is to examine the current legislative regulation of unions, one must always

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[2829] TJ St Antoine "Labor and Employment Law in Two Transitional Decades" (2004) 42 *Brand LJ* 495 526-527.

[2830] Ginsburg (2017) *Yale LJF* 502.

[2831] B Sachs "Revitalizing Labor Law" (2010) 31 *Berk J Emp Lab L* 333 1162-1163, [footnotes omitted].

be alive to the actual influence and effect of that legislation.

Before commencing with the discussion below, focusing as it does on the legislative regulation of labour associations, an important point must be emphasised – with same being touched on in various parts in chapter 8 (and again to be emphasised during this chapter): The NLRA, and the various statutory bodies that apply or regulate it, do *not* apply to all workers within America. First, "employees of the federal, state, and local governments" are excluded from coverage.[2832] Second, section 2(3) of the NLRA itself, excludes certain categories of persons from the definition of "employee" – such as, *inter alia*, agricultural labourers, independent contractors and supervisors.[2833]

9 3 1 Federalism and diversity and question jurisdiction

In order to understand the application of current federal legislation, it is necessary to first consider a number of preliminary concepts and issues – these being the so-called diversity and federal-question jurisdiction, as well as the concept of pre-emption and the interplay between the federal and state legal systems.

Diversity and federal-question jurisdiction are in effect the two primary categories of subject matter jurisdiction of the federal courts in the USA.[2834] As explained by Von Mehren and Murray:

> "Stated in general terms, the federal judicial power comprises a diversity jurisdiction – the parties belong to different legal orders – and a federal-question jurisdiction. However, Congress has never given the federal courts the full jurisdiction that Article III [of the Constitution] would permit.[2835] One who is not a student of American history is surprised that the Judiciary Act of 1789,[2836] which first implemented Article III, did *not* provide for a general federal-question jurisdiction in the lower federal courts.[2837] Instead, Section 25 of that Act foresaw Supreme Court review of state court decisions on

[2832] Cihon & Castagnera *Employment & Labor* 589. See further Cihon & Castagnera *Employment & Labor* 360.

[2833] See further Cihon & Castagnera *Employment & Labor* 361-370, for a discussion of these categories.

[2834] JM Underwood "The Late, Great Diversity Jurisdiction" (2006) 57 *Case W Res L Rev* 179 179-180.

[2835] Article III establishes the judicial branch of the federal government, which sees regulation of the following: "Judicial Power, Courts, Judges" [s 1]; "Judical Power and Jurisdiction" [s 2]; and, "Treason" [s 3]. The first sentence of s 1 reads as follows: "The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

[2836] Ch. 20, 1 Stat. 73 (1789).

[2837] Says AA Levasseur & JS Baker (eds) *An Introduction to the Law of the United States* (1992) 39-40 in this regard, writing of the impact of the Judiciary Act of 1789, and its interplay with federal jurisdiction:

> federal questions. It was not until 1875, nearly a century later, that the lower federal courts acquired a general federal-question jurisdiction. On the other hand, the Act of 1789 did provide for 'diversity jurisdiction' over cases and controversies between citizens of different states. This fact suggests that in the beginning, the only agreement on the proper role of the federal judiciary was that it should provide an impartial tribunal for those situations in which there was a reasonable fear that the state-court system might be prejudiced in favor of one party. However, from the beginning, this jurisdiction has been subjected to a significant amount-in-controversy threshold."[2838]

Federal-question jurisdiction was introduced in 1875 through the Act of March 3[2839] and is now found in §1331 onwards of the US Code (in Chapter 85 ("District Courts; Jurisdiction") of Part IV ("Jurisdiction and venue") and in Title 28 ("Judiciary and Judicial Procedure")).[2840] §1331 (as amended), reads as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." This means that the federal courts have concurrent jurisdiction with state courts in civil matters where the plaintiff has alleged a violation of either the American Constitution or a federal law(s).[2841] Put differently, in the words of Hay:

> "If the claim arises under federal law, federal courts have competence ('federal question jurisdiction') and state courts are also competent ('general subject matter jurisdiction'), except in the few areas

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> "This very important act also reflected a compromise between the two major political trends that divided Congress at that time ... The same Judiciary Act limited the jurisdiction of the federal courts to less than was authorized by the Constitution. *As a result, State courts not only had jurisdiction of purely state matters and concurrent jurisdiction over most matters which could be brought in federal court, but also jurisdiction over federal issues which Congress had not given to federal courts*" [my emphasis].

[2838] AT Von Mehren & PL Murray *Law in the United States* 2 ed (2007) 119-120, [their emphasis].

[2839] Ch. 137, 18 Stat. 470 (1875), (28 U.S.C. §§ 1330 et seq.) (2017) – the preamble of which reads as follows:

> "An act to determine the jurisdiction of circuit courts of the United States, and to regulate the removal of causes from State courts, and for other purposes". Levasseur & Baker, in speaking to the influence of the American Civil War, and the resultant 1875 Act: "[The Act] was an important victory for the supporters of federal power because it greatly expanded federal jurisdiction. It gave district courts general federal question jurisdiction and increased the cases in which actions before state courts could be removed to a federal district court. As a result, every time an issue arose under federal law it could be brought directly before a federal court or be transferred to that court. This act enabled the federal courts to increase considerably their subject matter jurisdiction and their overall influence on the administration of justice."

[2840] N Miller "An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction" (1991) 41 *Am U L Rev* 369 372.

[2841] Hay *Law of the United States* 51.

> of exclusive federal competence.[2842] Federal courts have concurrent jurisdiction with state courts in state law cases, provided that: (a) the subject matter does not fall within the exclusive jurisdiction of state courts and (b) the prerequisites for 'diversity jurisdiction' have been satisfied."[2843]

This quotation also raises the second principle to found jurisdiction of federal courts, the so-called diversity jurisdiction. This allows, in the words of Underwood, "civil litigants having different citizenships to have their disputes adjudicated in federal court so long as the claims are big enough – even in the absence of any federal cause of action".[2844] (The threshold amount – regulated by §1332 of the Code – currently is $75,000).[2845] While the US Constitution authorises diversity jurisdiction, "the actual grant of diversity jurisdiction is statutory".[2846] Miller explains the underlying rationale for diversity jurisdiction as "to reflect a concern for out-of-state commercial litigants' fears of local-court bias, especially in cases that otherwise would have been heard in pro-debtor state courts" and, as such, it "gives substance to the earlier views that diversity jurisdiction is necessary to ensure justice, or the appearance of justice, in disputes between citizens of different states".[2847]

Note that in federal-question jurisdiction cases, the federal courts either apply federal statutory or case law.[2848] However, should the case before the federal court raise questions of *state* law, then in terms of the so-called "Erie Doctrine and in deference to the federal/state jurisdictional divide,[2849] the federal courts "may not apply or create, federal law".[2850] Therefore, in the diversity jurisdiction cases, "a federal court… ordinarily applies the law of the state in which it 'sits'" with the effect that the

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[2842] As indicated by Hay *Law of the United States* 48, the "exclusive federal competence" pertains to, *inter alia*, matters such as maritime and bankrupcy disputes.

[2843] Hay *Law of the United States* 51.

[2844] Underwood (2006) *Case W Res L Rev* 179.

[2845] Hay *Law of the United States* 49.

[2846] DL Bassett "The Hidden Bias in Diversity Jurisdiction" (2003) 81 *Wash U LQ* 119 119.

[2847] Miller (1991) *Am U L Rev* 372.

[2848] Hay *Law of the United States* 49.

[2849] The doctrine takes its name from the leading Supreme Court decision of *Erie Railroad Co. v Tompkins* 304 US 64 (1938). Brogan succinctly explains the doctrine derived from Brandeis J's ruling as follows:

> "Erie emphatically ended the practice of federal courts sitting in diversity creating their own version of the state law they were to apply by holding that the federal diversity courts must apply the law as articulated by the appropriate state court" – DD Brogan "Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases" (2015) 51 *Tulsa L Rev* 39 39.

[2850] Hay *Law of the United States* 49.

"federal courts must apply the state's statutory law and the interpretations given to it, as well as other decisional law pronounced by [that] state's highest court".[2851]

This leads to the more complex question of *labour*-specific jurisdiction. Prior to the enactment of the NLRA in 1935 (discussed in chapter 8), the "regulation of labor-management relations and of union activity in [the USA] was primarily the province of state law".[2852] A key problem, however, was that the American "Congress did not specify in the original NLRA, or its subsequent amendments, the extent to which it intended to displace state law".[2853] In other words, some form of judicial guidance was needed – guidance that came in the form of development of the doctrine of "pre-emption".

9 3 2 Federalism and pre-emption

9 3 2 1 The primary theories of pre-emption

Gorman and Finkin introduce their chapter on "Preemption of State Regulation" as follows: "No area of labor law seems quite so confusing as the scope of federal preemption, not only to students but to practitioners and the courts as well."[2854] They continue by making the point that Congress, at the time of passing the NLRA, "did not express its intent in the text of the Act" where there is a potential overlap or conflict between federal and state laws and, as such, "the law of preemption is entirely judge-made and so is subject to shifts in judicial application over time".[2855] Similarly, Twomey states the following:

> "The creation of federal labor legislation in the form of the NLRA raises the jurisdictional issue of whether employers and employees covered by the Act must look exclusively to the NLRB and the federal court system for redress or if they may seek an alternative state-created remedy in a state court. This issue is deceptively complicated and must be dealt with by reference to a legal concept that is derived from the 'supremacy clause' of the U.S. Constitution and is referred to as the

[2851] 49. As explained further by Hay, "an underlying policy goal (but that is not the only reason for the Erie doctrine…) is to ensure decisional uniformity as between federal and state courts addressing like cases in the exercise of their concurrent jurisdiction within the same state" – Hay *Law of the United States* 49. See further Feldacker & Hayes *Labor Guide to Labor Law* 322.
[2852] Harper et al *Labor Law* 917.
[2853] 917.
[2854] Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 1078.
[2855] 1079.

preemption doctrine."[2856]

The "doctrine establishes that the NLRA has primacy over all competing state efforts to regulate labor relations, in order to ensure the uniformity of labor policy throughout the United States".[2857] Two important theories within this approach of NLRA pre-emption over that of state law[2858] have been developed via the Supreme Court rulings in the *Garmon* and *Machinist* decisions.[2859]

Befort explains that in *Garmon* the Supreme Court "protects the primary jurisdiction of the [NLRB] to decide labor issues" and that the "NLRA preempts states from regulating conduct that is arguably either protected or prohibited by the NLRA".[2860] The effect of this is that "a state generally may not impinge upon [the] areas of protected conduct either by statutory regulation or by permitting the assertion of state court jurisdiction".[2861] These "areas of protected conduct" refer, in turn, to "broadly speaking",[2862] the right of an employee to join a trade union, to "bargain collectively through a representative of the employee's own choosing" and to engage "in concerted activity" in terms of the NLRA, which includes strike action and picketing.[2863]

The effect of the *Machinists'* decision is that the "NLRA preemption prohibits state interference with conduct that Congress intended to be left unregulated".[2864] Thus, "a state may not regulate conduct, even if it is neither protected nor prohibited by the NLRA, that is within the zone of activity that Congress meant to be left to the free play

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[2856] Twomey *Labor & Employment* 86.

[2857] D Charish "Union Neutrality Law or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law Section 211-A" (2006) 14 *J L & Pol* 779 789.

[2858] Charish (2006) *J L & Pol* 789.

[2859] *San Diego Building Trades Council v Garmon* 353 US 26 (1957), as discussed at § 8 3 2 above, and *Machinists, Lodge 76 v Wisconsin Employment Relations Commission* 427 US 132 (1976) – see Twomey *Labor & Employment* 86-87 and SF Befort "Demystifying Federal Labor and Employment Law Preemption" (1998) 13 *Lab Law* 429 430-434.

[2860] Befort (1998) *Lab Law* 431. Importantly, Befort (1998) *Lab Law* 231 states further that since the test "broadly excludes state law and claims without regard to the substance of the state regulation", the effect hereof is that "the NLRA preempts state regulation even where the substantive terms of a state law are wholly consistent with that of the NLRA".

[2861] 431-432. The exception to this general position (as per Befort (1998) *Lab Law* 432) is where there exists "compelling state interests, such as the maintenance of domestic peace" – for example, state regulation of strike activity in efforts to circumscribe union-related violence.

[2862] 431.

[2863] 431. It must again be mentioned that the NLRA also "protects an employee's right to refrain" from participating in any of those activities – Befort (1998) *Lab Law* 431.

[2864] Befort (1998) *Lab Law* 433.

of economic forces."[2865] The judgment demonstrates the link to the "supremacy clause" of the US Constitution.[2866] Twomey states:

> "The preemption doctrine is a natural extension of the supremacy clause and mandates that a state law cannot stand either where it is in direct conflict with a federal law or where there is evidence that Congress intended to foreclose state action in the particular area in question. Congressional preemptive intent can be established by express language in a statute or implied from either the pervasiveness of the federal law or the need for uniformity of regulation in the field."[2867]

As such, the *Machinists* decision makes clear that the underlying intention of Congress (as conveyed through the NLRA) was that the "outcome of the collective bargaining process will be determined by the parties themselves rather than by a state's notion of an ideal method of resolving labor disputes".[2868]

9 3 2 2 The contemporary pre-emption position

Section 301 of the LMRA (also discussed in chapter 8) "makes private sector collective bargaining agreements enforceable in federal court".[2869] As stated by Fortunato, "[p]reemption based on section 301 of the LMRA, the third branch of labor preemption, operates independently of both the [*Garmon*] and *Machinist* preemption principles".[2870] The key question relating to section 301, however, is "whether the availability of an arbitration remedy under a collective agreement operates to extinguish a unionized employee's ability to pursue various state-created employment rights".[2871]

The answer lies in a collection of Supreme Court decisions following on *Lincoln*

[2865] 433.

[2866] The section reads as follows:

"This Constitution and The Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding" – Twomey *Labor & Employment* 86.

[2867] 86.

[2868] Befort (1998) *Lab Law* 433.

[2869] 434. See for instance the discussions surrounding the *Dowd Box* and *Lucas Flour* Supreme Court decisions in chapter 8.

[2870] MJ Fortunato "Lingle v. Norge Division of Magic Chef, Inc.: Revolutionizing the Application of Substantive State Labor Law to Unionized Employees" (1989) 38 *Cath UL Rev* 769 771, [their emphasis].

[2871] Befort (1998) *Lab Law* 434. See further Fortunato (1989) *Cath UL Rev* 771.

Mills (discussed in chapter 8) and culminating with *Lingle v Norge Division of Magic Chef, Inc*.[2872] In the first of these, *Allis-Chalmers Corp. v Lueck*,[2873] the Supreme Court "[negated] state jurisdiction [in] a tort claim that alleged bad faith in the dilatory settlement of an insurance claim"[2874] with the Court "explicitly interpret[ing] section 301 preemption for the first time in the context of a state tort action, as opposed to a contract action based on a violation of the collective bargaining agreement".[2875] The outcome saw the Supreme Court hold that "when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a §301 claim ... or dismissed as pre-empted by federal labor-contract law."[2876]

Allis-Chalmers was followed two years later by the decision in *International Brotherhood of Electrical Workers (IBEW) v Hechler*,[2877] where the Supreme Court applied *Allis-Chalmers*[2878] and "concluded that an employee could not maintain a state tort action against her union for injuries allegedly caused by the union's failure to ensure that her working conditions were safe and that work assigned to her was within her competence to perform safely".[2879] The Supreme Court first considered the

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[2872] 486 US 399 (1988).

[2873] 471 US 202 (1985) – see Hardin et al *Developing Labor Law II* 2224.

[2874] Hardin et al *Developing Labor Law II* 2224. The authors explain further that the delay in processing of the claim pertained to disability insurance that was provided by Allis-Chalmers as employer, subject to a CBA, with Allis-Chalmers allegedly being obstructive in the awarding of the claim – see Hardin et al *Developing Labor Law II* 2224-2225. For a succinct overview of the facts of *Allis-Chalmers*, see Harper et al *Labor Law* 967-972.

[2875] MS Nofer "Preemption of State Law Claims after Lingle v. Norge" (1989) 34 *Vill L Rev* 1035 1049 – as is evidenced by the prior *Lucas Flour* ruling, which saw the Supreme Court confirm the pre-emption of the state courts, in matters requiring the contractual interpretation of CBAs.

[2876] Hardin et al *Developing Labor Law II* 2225-2226 – see *Allis-Chalmers* 220, care of Blackmun J. The latter point again affirms the *Lucas Flour* decision (at § 8 4 1 above) – which was referred to extensively by the Court.

[2877] 481 US 851 (1987). See Hardin et al *Developing Labor Law II* 2226.

[2878] The Supreme Court summarised the *Allis-Chalmers* decision as follows:

> "[T]he Court considered an employee's state-law tort action against his employer for bad-faith handling of disability-benefit payments due under a collective-bargaining agreement, and concluded that the interests supporting the uniform interpretation of collective-bargaining agreements under federal common law apply equally in the context of certain state-law tort claims" [*Hechler* 857].

[2879] Hardin et al *Developing Labor Law II* 2226. Given the topic of this study, and that the facts of this matter involve an action between a member and their union, a brief synopsis of the case is warranted: Hechler maintained that, upon her being injured in her work at the Florida Power & Light Company, the IBEW was under "a duty to ensure … that [she] 'would not be required or allowed to take undue risks in the performance of her duties which were not commensurate with her training and experience'" – this duty being based on the "contracts and agreements entered into by and between" the IBEW and her

common law pertaining to the claims instituted by Hechler, along with the position in Florida law and its applicable legislation and then concluded that ordinarily it is the *employer* that would owe the duties attributed to the trade union.[2880] However, of importance was the following finding of the Court:

> "Another party, such as a labor union, of course, may assume a responsibility towards employees by accepting a duty of care through a contractual arrangement. If a party breaches a contractual duty, the settled rule under Florida law is that the aggrieved party may bring either an action for breach of contract or a tort action for the injuries suffered as a result of the contractual breach".[2881]

This was the important aspect of the decision, since the Court proceeded to find that "in order to determine the Union's tort liability",[2882] two aspects would have to be taken into account in deciding the question of culpability: Firstly, did the CBA "in fact [place] an implied duty of care on the Union" to ensure the safe work environment so claimed; and secondly, "the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged".[2883] Thus, the CBA *had* to be considered in order to address the question of liability.

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employer, and "pursuant to the relationship by and between" herself and her union (the IBEW) – see *Hechler* 851-852. Hechler instituted her claim in a Florida county (state) court some two years after the incident in the substation. The union in response, argued that the alleged duty was solely in terms of the applicable CBA, and as such, was to be determined in terms of s 301 LMRA – thus, had to be heard before a *federal* court, to which the matter was duly removed. In the applicable district (federal) court, the union argued that claim fell within the ambit of a duty of fair representation claim [*Hechler* 863], and as such – was subject to the statutory time-frame of 6 months – which had been exceeded by Hechler. In conceding this point, Hechler was accordingly barred from proceeding further with her claim, but for her further argument that she be permitted to proceed with a state-law based suit in tort, against the IBEW, on the basis of the failure to provide a safe work environment [*Hechler* 853-854]. The District Court disagreed, reasoning that the further duty (for a safe workplace) also flowed from the CBA [*Hechler* 854]. Specifically, the District Court found "that because respondent [Hechler] had failed 'to demonstrate that the [Union's] allegedly negligent activity was unrelated to the collective bargaining agreement or beyond the scope of the employee-union fiduciary relationship,' her claim was pre-empted by federal labor law" [*Hechler* 854]. This decision was in turn reversed by the Court of Appeals for the Eleventh Circuit – who instead reasoned simply that whilst the CBA "may be of use in defining the scope of the duty owed, liability will turn on basic negligence principles as developed by state law" [*Hechler* 855]. It was this decision, and its apparent conflict with a 1985 Sixth Circuit decision, that saw the Supreme Court grant *certiorari*, and allow the appeal before it [*Hechler* 855]. For a detailed discussion of *Hechler*, and the impact on workplace safety, see in general LA Schmall "Workplace Safety and the Union's Duty After Lueck and Hechler" (1990) 38 *Univ Kans L Rev* 561-666.

[2880] *Hechler* 859-860.

[2881] 860.

[2882] 862.

[2883] 862.

Ultimately, the court ruled that Hechler's claim was "not sufficiently independent" of the underlying CBA.[2884] As such, the "interests in interpretive uniformity and predictability … require that labor-contract disputes be resolved by reference to federal common law", irrespective of whether or not the question (for interpretation) "arises in the context of a suit for breach of contract or in a suit alleging liability in tort".[2885] Hechler's tort action, founded as it was in state-law, thereby was held to "necessarily rest" on the underlying interpretation of the CBA and was accordingly pre-empted by section 301 of the LMRA.[2886]

In the words of Hardin et al,[2887] "[a] few days after announcing *Hechler*, the Court handed down its decision in *Caterpillar, Inc. v. Williams*".[2888] This case again required the Supreme Court's interpretation of the section 301 pre-emption question, albeit on the basis of more procedural grounds than the earlier decisions.[2889] In this matter the employees in question instituted their action in the Californian state courts on the basis of their individual employment contracts, rather than relying at all on an overarching CBA.[2890] The employer attempted to have the matter removed to federal court[2891] on the basis of the existence of a CBA (that the employer allegedly "subsumed" the individual employment contracts)[2892] and associated pre-emption. The crux of the Supreme Court's finding was that the employer's argument was defensive[2893] and that it does not follow that "merely by injecting a federal question into an action that asserts what is plainly a state-law claim, transform the action into one arising under federal law, thereby selecting the forum in which the claim shall be litigated".[2894]

In *Lingle* the "Supreme Court faced the issue of whether an employee, covered by a collective bargaining agreement that provided the employee with a contractual remedy for discharge without just cause, could enforce the state law remedy for retaliatory discharge or whether the state law claim was section 301 preempted".[2895]

[2884] 851. See further 859, 862.
[2885] 851-852.
[2886] 852. See further 862.
[2887] Hardin et al *Developing Labor Law II* 2226, [their emphasis].
[2888] 482 US 396 (1987), as per Brennan, J [their emphasis].
[2889] Hardin et al *Developing Labor Law II* 2226.
[2890] *Caterpillar* 394-395.
[2891] 393-394.
[2892] 395-396.
[2893] 390, 398.
[2894] 396.
[2895] Fortunato (1989) *Cath UL Rev* 772. As explained further by Fortunato, Mrs Lingle was injured during

In a unanimous decision, the court confirmed that the standard to be applied for a finding of pre-emption is "whether the elements of the claim can be examined without reliance upon any of the provisions of a collective bargaining agreement between an employee and employer."[2896] As Fortunato remarks: "[T]he [Supreme] Court reaffirmed that collective bargaining agreement interpretation remains firmly in the arbitral realm and that judges may determine state law labor-management relations' questions only if those questions do not involve judges interpreting or construing the agreements".[2897]

9 3 2 3 Pre-emption criticism

The approach adopted in *Lingle* was affirmed by the Supreme Court two years later.[2898] A multitude of decisions continue to be decided requiring federal courts to interpret the question whether "the state law claim was 'not substantially dependent on analysis of a collective bargaining agreement'".[2899] At the centre of the criticism against pre-emption is that it demonstrates an underlying belief that an independent federal body (namely the NLRB) or independent arbitrators would be significantly better placed to administer the necessary harmonisation required in the national labour relations' field, as opposed to the differentiated (and historically anti-union)

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her employment at Magic Chef, and applied for worker's compensation in terms of Illinois state law. Whilst processing the claim with the assistance of her union, she was dismissed – with her then alleging (based on tort) that the "retaliatory" dismissal was in response to the aforementioned claim. See in this regard Fortunato (1989) *Cath UL Rev* 772-773, 786-787.

[2896] Fortunato (1989) *Cath UL Rev* 786, referencing *Lingle* 407. As such, the court found that "the state law remedy in *Lingle* was 'independent' of the collective bargaining agreement in the sense that resolution of the state law claim did not require construing the collective bargaining agreement" – see Fortunato (1989) *Cath UL Rev* 787, [their emphasis]. For a further discussion of the court's reasoning, see Fortunato (1989) *Cath UL Rev* 787-788.

[2897] 789.

[2898] As per *United Steelworkers v Rawson* 495 US 362 (1990) – see Hardin et al *Developing Labor Law II* 2229.

[2899] Hardin et al *Developing Labor Law II* 2237. For a comprehensive list of caselaw (as of the early 2000s) that explore the abovementioned, see Hardin et al *Developing Labor Law II* 2232-2234, where cases are listed in the footnotes to the following statement:

> "[The] lower courts … have held that Section 301 preempts claims for fraud and misrepresentation, invasion of privacy, defamation, intentional infliction of emotional distress, negligence, tortious drug testing, tortious interference with contract, violation of an implied covenant of good faith and fair dealing, fraud, violation of worker compensation law, race and sex discrimination under state law, breach of a trust agreement, breach of contract, and wages due" [footnotes omitted].

judiciary of the state courts.[2900] Related to this are the questions raised about the original intent of Congress and, by implication, the intent the Supreme Court has ascribed to the legislation.[2901]

The *Garmon* doctrine, therefore, is said to have "sprang from the New Dealers' faith in federal administrative agencies"[2902] (this despite "four Justices of that day [refusing] to join his opinion" and "deeming Frankfurter's preemption doctrine far too broad").[2903] But the *Garmon* principles of, firstly, preventing conflict between state and federal regulation and, secondly, of protecting the primacy of the NLRB's jurisdiction[2904] in regards to both sections 7 and 8 of the NLRA survive to this day, despite their "disputed rationale".[2905]

This focus on the merits of federal labour regulation by the NLRB becomes acute when – as will be apparent from the discussion to follow below – the current state of the NLRB is taken into account. Writing ten years ago, Drummonds states that the "primary agency expertise jurisdiction rationale, moreover, lies shredded in the light of the now well-known politicization of the Board, the refusal of federal courts (including

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[2900] Drummonds (2009) *La L Rev* 164.

[2901] See for instance Drummonds (2009) *La L Rev* 164 who states as follows:

> "As many commentators, and indeed several of the Justices, acknowledge, Congress remains silent after fifty years of judicially-created preemption doctrine. Yet preemption in theory rests upon congressional intent. Judges, not Senators and Congressmen, create and continue to extend the doctrines that displace state authority" [footnotes omitted].

[2902] 165. The author states at 165 as follows:

> "When Justice Frankfurter wrote the *Garmon* majority's decision in 1959, his focus was on the rights of unions under the NLRA, then only a quarter of a century old, and on his long-seated distrust of judicial policy making in the labor relations area" [footnotes omitted].

Furthermore, Drummonds (2009) *La L Rev* 171 explains as follows:

> "[T]he New Dealers turned to a host of federal administrative agencies to fill the perceived need for regulation of the Depression-era economy. To the New Dealers, agencies, rather than courts, promised an expertise-based and uniform set of federal policies to implement the new thinking of that time … In [Frankfurter's] vision, the NLRB would fashion and enforce a uniform national labor policy to which the courts would largely defer."

[2903] As explained by Drummonds (2009) *La L Rev* 166:

> "Moreover, Justice Frankfurter freely acknowledged in Garmon that it was he, not the Congress, who was creating the broad preemption doctrine that he narrowly convinced a majority of the Court to join".

As risk of repeating the obvious, this was the very same Frankfurter, who in his previous position as Dean of the Harvard Law School, had co-authored the hugely influential study of labour injunctions that played such a prominent part in the passing of the 1932 LDA (as discussed at § 7 3 5 1 above). See further Drummonds (2009) *La L Rev* 165-166 n308.

[2904] 167.

[2905] 166.

the Supreme Court) to accept and enforce many important policy judgments by the Board, and the proliferation of situations in which both federal and state courts already apply federal labor law".[2906] Related to this, is the observation that the *Garmon* doctrine has not been applied consistently since its inception, with the result that it is frequently used *against* organised labour.[2907] Pre-emption applies even in those instances where contemporary state laws potentially offer increased protection for unions and their members:[2908]

> "The unnecessarily broad doctrine created by Justice Frankfurter [in *Garmon*], not the Congress, today prevents the states from extending the compensatory (including emotional distress) and punitive damages that now exist for other forms of discrimination other than anti-union activity. Neither may the states apply the new tort of wrongful discharge in violation of public policy. The same holds true for state creation of meaningful remedies for bad faith bargaining … Thus, NLRA Section 8 now effectively operates more as a shield against state innovation and experimentation".[2909]

These criticisms are supported by a number of commentators.[2910] It should

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[2906] 167.

[2907] The author at 167 states as follows in this regard:

> "[A] maze of exceptions and limitations announced over the half-century following *Garnon* make it less predictable in its application; many of these exceptions found expression in cases filed against unions. Thus, while Justice Frankfurter's focus in [*Garmon*] may have been on the protection of federal union rights from state encroachment, today the doctrine protects employers far more often than unions and employees" [their emphasis].

[2908] See for instance the range of cases discussed by Drummonds (2009) *La L Rev* 181-183, and in particular, the 2008 Supreme Court decision of *Chamber of Commerce v Brown* 554 US 60 (2008) [also discussed by Drummonds (2009) *La L Rev* 183-184]. Here the Court, courtesy of Stevens J, held that the Californian "Assembly Bill 1889" was preempted under the "controlled by the free play of economic forces doctrine" of *Machinists* – as per *Chamber of Commerce* 65-66. The Californian enactment, in the words of Drummonds (2009) *La L Rev* 183, was "adopted, after lobbying by unions, [as] a statute prohibiting 'employers that receive state funds from using those funds to 'assist, promote, or deter union organizing' [citing *Chamber of Commerce* 62]'". By holding that section 8(c) of the NLRA preempts the applicable state regulations [*Chamber of Commerce* 67-69], a potentially union-friendly statute was defeated by the Supreme Court effectively holding that "an employer's desire to speak against unionization, neither protected nor prohibited in the statute, to an affirmative NLRA right" – Drummonds (2009) *La L Rev* 184.

[2909] Drummonds (2009) *La L Rev* 169-170, [footnotes omitted].

[2910] See for instance BI Sachs "Despite Preemption: Making Labor Law in Cities and States" (2010) 124 *Harv L Rev* 1153 1168-1169, in quoting as follows from Estlund (2002) *Colum L Rev* 1571-1572:

> "In sum, after surveying the labor preemption field, Professor Cynthia Estlund concluded that the Supreme Court's preemption cases 'virtually banish states and localities from the field of labor relations,' and that '[m]odern labor law preemption essentially ousts states and municipalities from tinkering with the machinery of union organizing, collective bargaining, and labor-management

therefore be emphasised that much of what is arguably problematic about the current application of the doctrine of pre-emption stems in no small part from the application of the NLRA by a single statutory body – namely the NLRB (to be discussed at § 9 3 4 1 below).

9 3 3 Current legislation

The discussion hereafter, follows on the introduction in chapter 8 of the primary pieces of federal labour legislation adopted in the USA as part of their readjustment phase. In the discussion, there will be interchangeable references to the individual acts as such (and their own provisions) and also as they are contained in the US Code.[2911] As mentioned, many of the relevant provisions in legislation (especially the provisions of the NLRA, LMRA, and LMRDA) were outlined in chapters 7 and 8. No purpose would be served by simply repeating all of this. Rather, the focus will be on those provisions relating to collective bargaining and union member representation – in particular Titles I to V of the LMRDA – and then only to the extent that they require further analysis and comment.

9 3 3 1 The promotion of collective bargaining

Osborne et al state simply as follows: "In 1935, Congress enacted the [NLRA] … declaring that national labor policy favored collective bargaining".[2912] The primary section regulating collective bargaining in the context of the American labour relations system is § 157 U.S.C. (section 7 of the NLRA).[2913]

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conflict'" [footnotes omitted].

[2911] The following primary statutes – duly touched on or discussed in the preceding sections (or in the remainder of this chapter) – are found at the following sections in the (2017) US Code: (i) Sherman Act (1890) at 15 U.S.C. §§ 1 et seq.; (ii) Clayton Act (1914) at 15 U.S.C. §§ 12 et seq.; (iii) Railway Labor Act/RLA (1926) at 45 U.S.C. §§ 151-164 and 45 U.S.C. §§ 181-188; (iv) Norris-LaGuardia/LDA (1932) at 29 U.S.C. §§ 101 et seq.; (v) Wagner/NLRA (1935) at 29 U.S.C. §§ 151 et seq.; (vi) Taft-Hartley/LMRA (1947) at 29 U.S.C. §§ 141 et seq.; (vii) Landrum-Griffin/LMRDA (1959) at 29 U.S.C. §§ 401 et seq.; and, finally, (viii) RICO (1970) at 18 U.S.C. §§ 1961-1968.

[2912] Osborne et al *Labor Union Law* 424.

[2913] The section (as amended) reads as follows:

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of

In explanation of the above, Macy states as follows:

> "This situation is peculiar to this type of modern congressional legislation. The act announces a policy of eliminating industrial strife by promoting collective bargaining by employees with their employer. In § [157 U.S.C.] it declares in substance the right of employees to confederate for the purpose, and, in general, for their mutual aid and protection. But this section alone gives no ground of action. The protection of the right is supplied by the later sections; and that protection is mainly against opposition by the employer [in terms of § 158 U.S.C. that] declares that his interference with the right, and certain positions by him adverse to it, shall be deemed unfair labor practices. The act empowers the National Labor Relations Board to issue orders against him upon its finding that he has been guilty of some unfair labor practice. The Labor Management Relations (Taft-Hartley) Act of 1947 made some additions to the provisions here referred to… But the act made no change in the general declaration of rights contained in the original § 7 [§ 157 U.S.C.]".[2914]

§ 157 U.S.C. provides for four main collective bargaining rights, namely the right of self-organisation, to join/form/assist a union, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities pertaining hereto. Added to this is the right to *refrain* from these activities. It is in this "inter-sectional functioning" that the promotion of collective bargaining is both introduced and promoted. The section was described by the Supreme Court in *Jones & Laughlin*[2915] as representing a "fundamental right" – one where "[e]mployees have as clear a right to organize and select their representatives for lawful purposes as the respondent has to organize its business and select its own officers and agents."[2916]

§ 158(a)-(b) U.S.C. (section 8 of the NLRA) provides core protections in its promotion of collective bargaining through the ULPs of both employers and unions. Sub-provisions such as § 158(c), which regulate the "expression of views without threat of reprisal or force or promise of benefit", speak directly to the broader freedom of speech requirements that underpin effective collective bargaining. In addition, §

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employment as authorized in section 8(a)(3)" – § 157 U.S.C.
As such, Osborne et al *Labor Union Law* 429 explain that it "protects the rights of employees to engage in union activity and to refrain from engaging in union activity".

[2914] JE Macy "Rights of Collective Action by Employees as Declared in § 7 of National Labor Relations Act (29 USCA § 157)" (2019) 6 *ALR 2d* 416 § 1.

[2915] *National Labor Relations Board v Jones & Laughlin Steel Corp.* 301 US 1 (1937), at § 7 3 11 4 above.

[2916] Macy (2019) *ALR 2d* § 1 citing from *Jones & Laughlin* 33. The court stated further, immediately after the aforesaid passage, as follows: "Discrimination and coercion to prevent the free exercise of the right of employees to self-organization and representation is a proper subject for condemnation by competent legislative authority" – *Jones & Laughlin* 33.

158(d) provides for the obligation to bargain collectively, a concept to be understood as "the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder".[2917]

§ 159 U.S.C. (section 9 of the NLRA) is critical to the promotion of collective bargaining by virtue of its requirements for representatives and elections – requirements that go to the heart of the unique, exclusive representation system in the USA.[2918] Gorman and Finkin explain the interplay between §159(a) and §158(a)(5):

> "Section [§ 159(a)], read in conjunction with section §158(a)(5) … in substance announces both an affirmative and a negative mandate. It directs the employer affirmatively to 'bargain' with the majority representative concerning all matters which can be classified as 'rates of pay, wages, hours of employment, or other conditions of employment.' Equally, it directs the employer not to bargain on such matters with any person (individual or collective) other than the majority representative. In the absence of a majority representative an employer is free to bargain with a union only for those who have chosen to join the union; but it is illegal for the employer to engage in bargaining with a minority union when there is a majority union with which it must bargain on an exclusive basis."[2919]

[2917] § 158(d) U.S.C.. Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 661 explain that the wages, hours, and other terms of employment amounts to the so-called "mandatory subjects" of bargaining (as opposed to a "permissive subject") – which means that the employer and union "must bargain in good faith but about which either party may stubbornly insist on its position (if 'in good faith')". See Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 696-699 for an overview of the "permissive subjects".

[2918] A Cox "The Legal Nature of Collective Bargaining Agreements" (1958) 57 *Mich L Rev* 1 6 states simply that "NLRA section 9(a) [§ 159(a) U.S.C.] provides that the representatives designated by a majority of the employees in a bargaining unit shall be the exclusive representatives of all the employees in the unit". The relevant wording of §159(a) U.S.C. reads as follows:

> "Representatives designated or selected for the purposes of collective bargaining by the *majority of the employees in a unit* appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment."

The above accordingly simultaneously affirms the exclusive, majoritarian nature of bargaining representatives within the American system, and furthermore confirms their centrality within the broader system – to the point where they are even given an opportunity to be present at the point where non-CBA grievances are discussed. See further the discussion around this latter point by Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 519-520.

[2919] Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 503.

Lastly, § 160 U.S.C. (section 10 of the NLRA) confers the power on the NLRB to prevent unfair labour practices (the jurisdiction and functioning of the NLRB are considered in more detail below).

9 3 3 2 The direct regulation of trade unions

9 3 3 2 1 The NLRA/LMRA

Three key provisions contained in the NLRA (as amended by the LMRA) relate to the direct regulation of trade unions, namely the trade union ULP provision (§ 158(b) U.S.C., section 8(1)(b) of the NLRA), the provision regulating suits by and against labor organizations (§ 185 U.S.C., section 301 of the LMRA) and the powers of the NLRB to prevent ULPs (§ 160 U.S.C., section 10 of the NLRA).

Given the discussion of the ULP provisions elsewhere in this chapter and in chapter 8 above (also in the context of both the NLRB and the DFR below) it is unnecessary to unpack these provisions in more detail here.[2920] The same applies to § 185 (section 301 of the LMRA), particularly considering the discussion of the section in chapter 8 and the additional discussion of this section in the context of pre-emption above)[2921] and § 160 (section 10 of the NLRA). This is also so, given the detailed discussion regarding the functions, procedures and powers of the NLRB in the Statutory bodies section below.

For now, it is enough to merely emphasise the presence of three legislative provisions that regulate union conduct in the NLRA and LMRA.

9 3 3 2 2 The LMRDA's Titles I-VI

Titles I-VI of the LMRDA – regulating a trade union member's Bill of Rights (Title I), reporting, trusteeships, elections (Titles II-IV) and fiduciary responsibilities (Title V) and miscellaneous provisions (Title VI) – were introduced in chapter 8. Before the content of these provisions are considered in more detail, the following point made by St. Antoine is important:

"Unlike many other provisions of Landrum-Griffin [the LMRDA], which are subject to suits by the

[2920] See § 8 3 1 4 above and § 9 3 4 1 and § 9 4 below.
[2921] See § 8 3 1 5 and § 9 3 2 respectively above.

> Secretary of Labor or to criminal sanctions, Title I is largely enforceable by a private civil action brought by the aggrieved member in federal district court. That distinction could be rationalized on the ground the 'Bill of Rights' deals with peculiarly personal protections while the titles covering such items as reports, elections, and 'trusteeships' are more concerned with institutional safeguards.[2922] It is likely, however, that more pragmatic factors account for the difference in the enforcement mechanisms. Some legislators wanted the Secretary of Labor to serve as a 'sieve' to protect unions against frivolous charges, while others wanted to ensure direct access by individuals to the courts. Still others were undoubtedly influenced by their view of whether or not it was desirable to provide free government legal assistance to members pursuing claims against their union".[2923]

These remarks already are notable when compared with the earlier discussions of the position in Britain. Firstly, the view that it is undesirable for the government to provide free legal assistance to members pursuing their claims against their own unions, stand in stark contrast to the motivation behind both CROTUM and CPAUIA (as discussed in chapter 5). Secondly, the fact that some of the LMRDA's drafters would see the Secretary of Labor serving as a type "institutional buffer" between organised labour and their membership (as opposed to those who view a member's direct access to the courts as paramount) emphasises the different views of organised labour. It also raises questions about the effectiveness of judicial involvement as opposed to an independent statutory office in the regulation of trade union matters[2924]

[2922] Cox (1960) *Mich L Rev* 839 states on this point:

> "At common law the rights of individual members can be enforced only by individual suits; the initiative and costs necessary for prosecution must come from the member. The LMRDA preserves this condition except that the election and trusteeship titles are enforceable by the Secretary of Labor upon the complaint of a member."

The right of the individual member to enforce their claim by means of an individual suit, is duly guaranteed in terms of § 412 U.S.C. (section 102 of the LMRDA), entitled "Civil action for infringement of rights; jurisdiction", and confirms that the person "may bring a civil action in a district court" of America.

[2923] St. Antoine (1982) *Am J Comp L* 304. *Cf*, however, RA Smith "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 46 *Virg L Rev* 195 210, who states as follows:

> "The principal weakness of the enforcement provisions of these provisions is its failure to provide a 'public' remedy. Herein lies one of the inconsistencies of the act, since the Secretary of Labor is given important administrative and enforcement responsibilities in connection with Titles II, III, and IV, and Title IV, establishing mandatory standards in connection with the conduct of union elections, is obviously related to Title I. The individual member, when his fundamental rights are infringed, will continue to face, as he has under the common law system, the dual obstacles of group pressure and expense if he contemplates legal proceedings to attempt to vindicate his rights. Unless he is a member of a well-organized minority group, or is both financially independent and intransigent, he is likely to succumb to practicalities".

[2924] See for instance the discussion of DB McLaughlin & ALW Schoomaker *The Landrum-Griffin Act and Union Democracy* (1979) 121, where the "pros and cons" of direct involvement by the Department

– an issue that will be explored further in the concluding chapters of this study.

9 3 3 2 2 1 Title I – the Bill of Rights

At the risk of repetition, the Bill of Rights for union members introduced by the LMRDA provide for equal rights,[2925] freedom of speech and assembly,[2926] dues, initiation fees, and assessments,[2927] protection of the right to sue,[2928] and, safeguards against improper disciplinary action.[2929] The equal rights provision affirms that "every member shall have equal rights and privileges" to nominate candidates for union office, vote in any elections or referendums within the union, and attend union meetings (and participate in the affairs/voting of such meetings – subject to the reasonable rules/regulations of the union's constitution and bylaws).[2930] The freedom of speech and assembly provision provides for the actions and rights of members in expressing their opinions and views without fear of reprisal, but is made subject to the right of a union to "adopt and enforce reasonable rules as to the responsibility of every member toward" the union.[2931] The dues and fees subsection regulates the circumstances under which unions are allowed to increase dues, or introduce new levies (including that such changes take place following a vote by all affected members, by means of a secret ballot).[2932] Protection of the right to sue preserves the right of a trade union member to institute an action in any court, or in a proceeding before any administrative agency, subject to exhaustion of internal reasonable hearing procedures.[2933] The improper disciplinary action subsection provides that a member has to be "served with written specific charges", provided with a "reasonable time to prepare" and "afforded a full and fair hearing" *prior* to a member being "fined, suspended, expelled or otherwise disciplined". This is made subject to the proviso that this does *not* apply to disciplinary action for "nonpayment of dues".[2934]

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of Labor in terms of enforcing the provisions of Title 1 (that is, §§ 411-415 U.S.C.) are considered.

[2925] Subsection 101(a)(1) of the LMRDA.

[2926] Subsection 101(a)(2).

[2927] Subsection 101(a)(3).

[2928] Subsection 101(a)(4).

[2929] Subsection 101(a)(5).

[2930] As per subs 101(a)(1).

[2931] As per subs 101(a)(2).

[2932] As per subs 101(a)(3).

[2933] Subsection 101(a)(4), [their emphasis].

[2934] As per subs 101(a)(5).

The equal rights provision in § 411(a)(1) U.S.C. (subsection 101(a)(1) LMRDA) makes the equal rights and privileges for members of trade unions "subject to reasonable rules and regulations" in the union's constitution or bylaws/procedures.[2935] In fact, the majority of claims brought in terms of this provision, sees "overt union discrimination against members, where members are subject to direct or disparate treatment through the denial of specific rights to participate in union affairs as provided for in the union constitution".[2936]

In this regard, one commentator argued as follows in 1981 about the enforcement of this subsection:

> "[D]isciplinary provisions in the constitutions of many of this country's unions pose serious threats to the exercise of rights guaranteed by the LMRDA and that the usual approach taken by the federal courts in LMRDA litigation fails to promote the union democracy and autonomy that the legislation sought to further. The Note maintains that the only way for courts adequately to safeguard the interests of unions and their members is to accept the mandate of the LMRDA and void offending provisions on their face, applying when appropriate familiar constitutional law doctrines of vagueness and overbreadth".[2937]

This argument is supported by § 411(b) U.S.C. (subsection 101(b) LMRDA) where it is provided that "[a]ny provision of the constitution and bylaws of any labor organization which is inconsistent with the provisions of this section shall be of no force or effect." However, the discussion about the position in the USA has demonstrated the continued reluctance (as influenced by traditional common law values) of the American courts to interfere in the internal affairs of unions.[2938]

[2935] See Osborne et al *Labor Union Law* 32, who state as follows regarding what is understood by "equal rights":

> "[The section] was intended to be a 'command that members and classes of members shall not be discriminated against' in their right to participate in their union's political process, and that they be protected 'against the discriminatory application of union rules'".

[2936] 32-33.

[2937] Anonymous "Facial Adjudication of Disciplinary Provisions in Union Constitutions" (1981) 91 *Yale LJ* 144 144-145.

[2938] Says Feldacker & Hayes *Labor Guide to Labor Law* 356 in this regard:

> "The union's constitution and bylaws cannot conflict with the [LMRDAs] requirements. Although the specific protections of the LMRDA prevail over conflicting constitutional or bylaw provisions, it cannot be overemphasized that a union's constitution and bylaws still govern the relationship between a union and its membership as a matter of contract … except in the case of such a conflict. The courts are very reluctant to intervene in a union's right to interpret and apply its own governing documents. Thus, as a general rule, the courts will uphold a union's interpretation of its own constitution and

Furthermore, the argument is also presented that, regarding the four underlying aims of the LMRDA (promotion of union democracy,[2939] protecting individual members,[2940] promoting union autonomy and freedom from government intervention[2941] and accommodating the need on the part of unions to "curtail some categories of speech"),[2942] the second of these (protection of individual members) "envisioned that unions legitimately controlled by their members would be less likely to abuse members' freedoms than would their more oligarchical counterparts".[2943]

However, arguing for greater external protection of member's rights and freedoms by courts voiding or amending union constitutional clauses misses one of the very premises that saw the LMRA introduced in the first place – namely that empowerment of the membership will increase control of their own union. Why rely on a judicial system that is *not* well-versed in the internal processes of unions,[2944] when those seemingly best placed (with the realities of member apathy left aside for a moment) to decide what is necessary for change, can utilise the other statutory controls so provided, to make the democratic changes required? And even if the judiciary were to void a specific clause, what would the implication be where a legitimate, democratic and union constitutional process were to see the majority of the membership vote to have that same clause, or something similar, reinstated in the future?

The "freedom of speech and assembly" provision (§ 411(2) U.S.C., subsection 101(a)(2) LMRDA) is, as pointed out by Osborne et al, an affirmative rights provision, in that its content is "*in addition* to any that may be found in the union constitution".[2945] Given that the provision speaks to the heart of the political freedom of members to express their views on the internal machinations of their union – which could obviously entail criticism of the incumbent leadership – the provision has seen many cases go

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bylaws unless the union has acted arbitrarily or in bad faith or it is clear that a union has intentionally acted to suppress membership rights."

[2939] Anonymous (1981) *Yale LJ* 150.

[2940] 151.

[2941] 152.

[2942] 153.

[2943] 151-152.

[2944] Says Cook (1962) *ILRR* 327 in this regard: "One truism about the American labor movement is that no two unions are alike." See further the reference to Chafee's "dismal swamp" in the Common law section at § 8 5 3 3 above, and how courts are best advised not to make judicial forays into internal association procedures, unless warranted.

[2945] Osborne et al *Labor Union Law* 37.

before courts in the USA.[2946] Without delving into the details of these cases, suffice it to state – as would be expected of a country that professes such deep democratic underpinnings – that the courts have been protective of a member's rights in terms of the provision.[2947]

With regard to the protection of the right to sue provision (§ 411(4) U.S.C., subsection 101(a)(4) LMRDA) St. Antoine remarks, as point of departure: "An ancient tradition in the American labor movement holds that intraunion quarrels should be settled 'within the family'" – with the associated union constitutional provision demanding the exhaustion of internal remedies.[2948] The expectation of union members to exhaust their union's internal procedures was discussed above and is discussed further in the section on Fair representation below.[2949] But suffice it to point out that the provision made an important change to what was, formerly, the common law position,[2950] by introducing a specific time limit of four months on the exhaustion of internal remedies. Furthermore, the final clause of the provision prohibits employer interference in such procedures, by means of either financing, encouraging or participating in such a process.

This means the provision aims to balance the *internal*, *independent* rights of members to take action against their own unions by means of internal processes with possible abuses by means of extended delays. In *Detroy v American Guild of Variety Artists*[2951] the court found that it had a discretion whether or not to impose the requirement of the exhaustion of remedies provision of a trade union constitution: "even if a union satisfactorily showed that it had reasonable internal procedures capable of taking corrective action within four months, it still might be possible for the aggrieved member to obtain immediate judicial relief without any resort to these

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[2946] See for instance the discussion of cases in Osborne et al *Labor Union Law* 37-43.

[2947] See for instance Osborne et al *Labor Union Law* 41, where it is stated: "Courts have also interpreted Section 101(a)(2) [§ 411(a)(2) U.S.C.] as affirmatively proscribing the maintenance of a union constitutional provision that directly infringes upon or 'chills' members' protected freedom of speech."

[2948] St. Antoine (1982) *Am J Comp L* 305.

[2949] See § 8 5 4 3 above and § 9 4 4 below.

[2950] See further Boyle (1964) *Hast LJ* 591-592.

[2951] *Detroy v American Guild of Variety Artists* 286 F.2d 75 (1961). Regarding the facts, Boyle (1964) *Hast LJ* 593 briefly states as follows:

> "Detroy involved an animal trainer suing his union because he had been placed on the organization's 'unfair list.' His appearance on this list had made it impossible for his act to find employment. Without any recourse whatever to the union's appellate procedures, Detroy brought suit under the labor bill of rights. The trial court denied relief for lack of exhaustion."

procedures."[2952] This reasoning was affirmed by the Supreme Court in *NLRB v International Union of Marine Workers*.[2953]

The provision regulating safeguards against improper disciplinary action (§ 411(5) U.S.C., subsection 101(a)(5) LMRDA) provides three fundamental procedural rights to union members – namely that: (i) They have been served with a written notice containing the specific charges they are to face; (ii) They have been given reasonable time to prepare for the procedure; and (iii) They are to be provided with a "full and fair hearing".[2954] Bellace et al make it clear that these are the minimum requirements expected of union internal procedures, while the "the unions themselves remain free to adopt stricter rules".[2955] Notably, regarding what is to be understood by "union discipline", Osborne et al point to the still-authoritative Supreme Court decision of *Breininger v Sheet Metal Workers*,[2956] where the scope of the provision was delineated so as to apply "*only* to those actions taken by or on behalf of the union as a collective entity to enforce its rules…. the statute's structure and legislative history anticipated an established disciplinary structure, with action undertaken by the labor organization itself rather than *ad hoc* retaliation by individual union officers effectuating their personal vendettas".[2957]

§§ 414 and 415 U.S.C. (sections 104 to 105 of the LMRDA) require of trade unions

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[2952] Boyle (1964) *Hast LJ* 594.

[2953] *NLRB v Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO* 391 US 418 (1968), as per Bellace et al *Landrum-Griffin Act* 57. The relevant passage cited by Bellace et al *Landrum-Griffin Act* 57, is from Douglas J's reasoning – in interpreting the wording of the provision where is stated that a member "may be required to exhaust" – where he states:

> "We conclude that 'may be required' is not a grant of authority to unions more firmly to police their members but a statement of policy that the public tribunals whose aid is invoked *may in their discretion* stay their hands for four months, while the aggrieved person seeks relief within the union. We read it, in other words, as installing in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a litigant seeks administrative relief before the appropriate agency" – *Marine & Shipbuilding Workers* 426, [my emphasis].

[2954] This in terms of § 411(5)(A)-(B) U.S.C.

[2955] Bellace et al *Landrum-Griffin Act* 66.

[2956] *Breininger v Sheet Metal Workers International Association Local Union No. 6* 493 US 67 (1989).

[2957] Osborne et al *Labor Union Law* 45, [their emphasis]. This being in reference to the reasoning of the court, courtesy of Brennan J, at *Breininger* 94. Of further interest, is Osborne et al *Labor Union Law* 46 quoting from *Breininger* 91, where was stated:

> "'[D]iscipline is the criminal law of union government' and 'refers only to actions 'undertaken under color of the union's right to control the member's conduct in order to protect the interests of the union or its membership".

to make copies of CBAs that they are party to as a bargaining unit[2958] available to all members and to "inform its members concerning the provisions of this chapter".[2959]

In concluding this section – and in consideration of the effectiveness and impact the trade union member Bill of Rights of the LMRDA (§§ 411 to 415 U.S.C., Title I, LMRDA) – regard may be had to the remarks of McLaughlin and Schoomaker, who wrote as follows in the late 1970s:

> "Despite the general impression given by most union personnel that neither the unions' procedures nor the members' freedom to participate in the affairs of the union has changed qualitatively since the passage of the LMRDA, over half of the union spokesmen – officers at all levels and their counsel – agreed that individual rights are better protected now than they had been prior to passage of the Act. While, before 1959, union officers might have acknowledged that members have the right to speak freely, to challenge leaders' policies, to be accorded due process in internal trials, and even to sue the union, the existence of the Act and the members' growing awareness of it have served to remind officers that those rights can now be enforced."[2960]

9 3 3 2 2 2 Titles II, III, IV and VI – reporting, trusteeships, elections and miscellaneous provisions

The primary provisions contained in Title II of the LMRDA (§§ 431 to 441 U.S.C., sections 201 to 211 of the LMRDA) were discussed in chapter 8 and the further specifics surrounding the reporting requirements expected of unions are also discussed at § 9 3 4 2 below. Briefly, the core reporting requirements are explained as the "listing [of] the financial information that unions and union officials must report and retain, stating how much information is to be disclosed to union members and the public as well as creating [the] civil and criminal causes of action to enforce the reporting, retention and disclosure provisions".[2961] Nelson furthermore identifies § 436 (section 206 LMRDA) as the "accountability provision that regulates the retention of records that support union and union officials' reports to OLMS so that the reports 'may be verified, explained or clarified, and checked for accuracy and completeness'".[2962] Smith in turn describes § 431(c) (section 201(c) LMRDA) as the obligation on unions to "make available the information required to be contained in

[2958] § 414 U.S.C.
[2959] § 415 U.S.C.
[2960] McLaughlin & Schoomaker *The Landrum-Griffin Act and Union Democracy* 126.
[2961] Nelson (2000) *Geo Mason L Rev* 551, [footnotes omitted].
[2962] 552-553, quoting from § 436 U.S.C.

such report to all of its members".[2963] While this aspect is considered in more detail within § 9 3 4 2 below, suffice it to point out that the union is not required to make *the report* available to its members, only the information required *to be contained* in that report.[2964]

At the same time, the concept of "trusteeships" (see subchapter IV, §§ 461-466 U.S.C., sections 301 of 306 of the LMRDA) is significant in the context of the American labour relations system. This is so given the sheer size of the USA, which leads to the formation of international and subsidiary regional/district/branch and local unions. Bellace et al explain the concept of trusteeships[2965] as follows:

> "During its hearings, the McClellan Committee found that the constitutions of many international unions permitted its officers to suspend the normal processes of government of local unions and other subordinate bodies, to supervise their internal activity, and to assume control of their property and funds. Variously referred to, this form of control was most frequently termed 'trusteeship' in the union constitutions. Although international unions normally imposed trusteeships to eliminate corruption or to remedy mismanagement in the subordinate body, this was not always the case. In its hearings, the committee studied a total of twenty trusteeships, each of them involving an abuse of power … Title III of the Landrum-Griffin Act was enacted in order to remedy this situation".[2966]

[2963] Smith (1960) *Virg L Rev* 213 – referring to § 431(c) U.S.C.

[2964] To this can be added, in the words of Smith – the following in terms of an important corollary to the aforementioned (as discussed in more detail below):

> "[The union in terms of § 431] is under a legal duty, enforceable in any state court of competent jurisdiction, or in the appropriate federal district court, to permit a member 'for just cause' to examine the books and records of the union 'to verify such report.' Costs and reasonable attorney's fees may be allowed to a successful plaintiff. This provision did not appear in the NLRA, but is a logical element in the structure of a statute designed to prevent union maladministration" – Smith (1960) *Virg L Rev* 213.

Regarding a succinct discussion of "just cause", see Bellace et al *Landrum-Griffin Act* 94-95 – where is stated:

> "This requirement has been interpreted as posing a barrier only to undue harassment of the union. Although the burden of establishing just cause has been placed on the union member, the burden is met when the member establishes that a 'reasonable man would be put to further inquiry' in light of the facts known by the member. Just cause will typically be shown by discrepancies within union reports and statements made to the membership, by failure of the union to provide sufficient detail in a filed report, or by union expenditures that could be considered excessive" – Bellace et al *Landrum-Griffin Act* 94, [footnotes omitted].

[2965] For a particularly detailed study of trusteeships, as implemented in the intervening years from the time of the LMRDA, see DR Anderson "Landrum-Griffin and the Trusteeship Imbroglio" (1962) 71 *Yale LJ* 1460 1460-1528.

[2966] Bellace et al *Landrum-Griffin Act* 98. Says Osborne et al *Labor Union Law* 547 in this regard:

> "[The McClellan Committee] concluded that within these unions there were five major categories of abuse: (1) baseless imposition [of the trusteeship "vehicle"], (2) undue duration, (3) wishes of rank-and-file members ignored, (4) looting of local union treasuries, and (5) use of votes of the trusteed

Trusteeships are currently administered (as mentioned in § 8 3 3 4 3 above) in terms of §§ 461 to 466 U.S.C. (sections 301 to 306 of the LMRDA).[2967] Of particular interest, is § 464(a), which empowers the Secretary, upon receiving a "written complaint of any member of subordinate body of a labor organization" that alleges a violation with the provisions of the subchapter – shall investigate the complaint, and if found meritorious (that is, there was a violation, and it was not remedied),[2968] to, "without disclosing the identity of the complainant", bring a civil action against the responsible union (for such relief as may be appropriate).[2969] This is again an example of possible direct involvement by the Secretary of Labor in the internal affairs of a trade union at the behest of a union member, which involves an investigation and may lead to civil action thereafter.[2970] Even so, the concept of trusteeships is not that important for purposes of this study – particularly when one recognises that the requirements relating to trusteeships are largely derived (with necessary adjustments) from the other provisions of the LMRDA.

Union representative elections (regulated in Title IV of the LMRDA – subchapter V, §§ 481 to 483 U.S.C., sections 401 to 404 of the LMRDA) are of significant importance in the context of America's exclusive representative system and are regulated in detail (including specific provisions involving the role of the Secretary of Labor's powers of intervention). In addition, two key provisions of Title VI (now found under subchapter VII, § 521 and § 529 U.S.C., sections 601 and 609 LMRDA) are also

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body to maintain international union control."

See further Cox (1960) *Mich L Rev*, who simply states: "Unfortunately trusteeships have also been a virulent source of political autocracy and financial corruption."

[2967] In terms of the LMRDA, "trusteeship" is defined as including the following:

"[A]ny receivership, trusteeship, or other method of supervision or control whereby a labor organization suspends the autonomy otherwise available to a subordinate body under its constitution or bylaws" – Osborne et al *Labor Union Law* 548-549.

[2968] § 464(a) U.S.C.

[2969] Osborne et al *Labor Union Law* 585-586 make the important point that in terms of § 464(c), an 18-month presumption applies that presumes – subject to specific requirements being met – that the trusteeship is operating in good order, and "not subject to attack 'except upon clear and convincing proof that the trusteeship was not established or maintained in good faith for a purpose allowable under section 462 of this title'" – quoting § 462(c) U.S.C.

[2970] An important qualifier to the abovementioned, is Osborne et al affirming that case-law development has seen it become established practice that members can rely on § 462 to institute a private remedy against the offending union *without* the involvement of the Secretary – ostensibly "as a means of saving enforcement money for the federal government" – Osborne et al *Labor Union Law* 594.

of interest. The discussion below will be limited to these key aspects.

With regard to the core union election provisions, Nelson reasons that Title IV– along with the Bill of Rights' provisions – address "union embezzlement by providing union members the political rights to challenge union officials' power".[2971] The importance of elections – both with regard to representation by the union and the election of union officials – is undeniable.[2972] However, for purposes of the discussion, the focus is on internal election of officials, since impropriety with regard to the internal democratic processes relates directly to trade union-member accountability. As Cox remarks: "[t]he election of officers is the heart of union democracy."[2973]

Cox points out that the provisions recognise that applicable elections are to be "conducted in accordance with the constitution and bylaws" of the union (to the extent that they are not contrary to the statute). This, in turn, means that "the federal remedy may [then] be available for violations".[2974] In this regard, "[e]nforcement of the election requirements is vested in the Secretary of Labor"[2975] in terms of § 482 U.S.C. (section 402 LMRDA), which provides for an investigation of the complaint and the possible commencement of civil action by the Secretary of Labor.[2976] The Secretary of Labor,

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[2971] Nelson (2000) *Geo Mason L Rev* 557.

[2972] For an exhaustive examination of union elections, albeit being published a mere thirteen years after the LMRDA, see Hadley et al (1972) *Yale LJ* 409-574.

[2973] Cox (1960) *Mich L Rev* 842. The author states further:

> "The policies of any large organization must be formulated and administered by a small group of officials. Their responsiveness to the members depends upon the frequency of elections, a fair opportunity to nominate and vote for candidates, and an honest count of the ballots" – Cox (1960) *Mich L Rev* 842-843.

Whilst again being mindful of repeating what has already been stated under the appropriate section at § 8 3 3 4 4 above, by way of summation of the core aspects of the various election provisions, Cox (1960) *Mich L Rev* 843-844 explains as follows:

> "The LMRDA establishes comprehensive requirements for the conduct of union elections. Local officers must be elected every three years or oftener by *secret ballot* of the members or by a convention chosen by *secret ballot.* International officers must be elected every five years or oftener by a secret ballot of the members or by a convention of delegates chosen by secret ballot ... The LMRDA also guarantees the right to nominate and support candidates, to run for office, to get written notice of the election, and to vote without 'improper interference or reprisal of any kind.' Every member is guaranteed one vote ... The statute attempts to preserve the integrity of the election by giving each candidate the right to have an observer at the polls and the counting of the ballots" [footnotes omitted, my emphasis].

[2974] Cox (1960) *Mich L Rev* 844.

[2975] 845.

[2976] This in terms of §§ 482(b) U.S.C. (Section 402(b) LMRDA). In terms of the latter provision, the Secretary shall bring a civil action against the labor organization as an entity in the district court ... to set aside the invalid election, if any, and to direct the conduct of an election in hearing and vote upon

subject to specific requirements and in instances where the constitution of the applicable union "do not provide an adequate procedure for the removal of an elected officer guilty of serious misconduct", is also empowered to remove a trade union officer "for cause shown and after notice and hearing" by ensuring that "the members in good standing vot[e] in a secret ballot, conducted by the officers of such labor organization".[2977] These are further examples of direct intervention in the internal affairs of a trade union, in order to promote internal union democracy and accountability.[2978]

In concluding the brief examination of the key provisions of union elections, it remains important to draw attention to one more aspect, "tucked away" (as it were) within § 481 U.S.C. (section 401 LMRDA): "The requirement of a secret ballot, *probably the most significant procedural innovation of the LMRDA*, makes mandatory what has been universally recognized as the '*sine qua non* of a free election'".[2979]

Two of the provisions found under the miscellaneous provisions (contained in subchapter VII (§§ 521 to 531 U.S.C., sections 601 to 611 of the LMRDA) are of interest to this study as examples of the direct regulation of trade unions. § 521 (section 601 LMRDA), gives the Secretary "the power when he believes it necessary in order to determine whether any person has violated or is about to violate any provision of this Act (except [§§ 411 to 415 U.S.C.] Title I..) to make an investigation and in connection therewith he may enter such places and inspect such records and accounts and question such persons as he may deem necessary to enable him to

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the removal of officers under the supervision of the Secretary and in accordance with the provisions of this title and such rules and regulations as the Secretary may prescribe".

[2977] § 481(h) U.S.C. In this regard, mention must be made of the applicable regulations pertaining to § 481. The main Electronic Code of Federal Regulations, available at <https://www.ecfr.gov/cgi-bin/ECFR?page=browse> (accessed 23-01-2019), can be used to access the specific page, in terms of Title 29, Subtitle B ("Regulations Relating to Labor"), Chapter IV ("Office of the Labor-Management Standards, Department of Labor"), Subchapter A ("Labor-Management Standards"), Part 417 ("Procedure for Removal of Local Labor Organization Officers"). As explained – in an extract from "§417.1 Purpose and Scope", the Secretary, in making use of § 482 to initiate the suit, "a Federal court may direct the conduct of a hearing and vote upon the removal of officers under the supervision of the Secretary, and in accordance with such rules and regulations as the Secretary may prescribe".

[2978] With this said, see H Benson "Union Democracy and the Landrum-Griffin Act" (1982) 11 *Rev Law & Soc Ch* 153 160-164 for a series of examples involving unions, demonstrating the problems in the enforcement of Title IV election guarantees.

[2979] RL Berchem "Labor Democracy in America: The Impact of Titles I & IV of the Landrum-Griffin Act" (1967) 13 *Vill L Rev* 1 31-32.

determine the facts relative thereto".[2980] In addition, in terms of § 529 (section 609 LMRDA), "[i]t shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act." This catch-all provision has been interpreted in a very particular manner by the courts. The reason for this lies in the fact that the American "[c]ourts have denied relief under the Bill of Rights where the plaintiff is a member *but at the same time is an officer or employee of the defendant labor organization*".[2981]

9 3 3 2 2 3 Title V – fiduciary responsibilities

The following remarks serve as a fitting means to contextualise the important discussion to follow:

> "The Congress finds that, in the public interest, it continues to be the responsibility of the Federal Government to protect employees' rights to organize, choose their own representatives, bargain collectively, and otherwise engage in concerted activities for their mutual aid or protection; that the relations between employers and labor organizations and the millions of workers they represent have a substantial impact on the commerce of the Nation; and that in order to accomplish the objective of a free flow of commerce *it is essential that labor organizations, employers, and their officials adhere to the highest standards of responsibility and ethical conduct in administering the affairs of their organizations, particularly as they affect labor-management relations*."[2982]

These remarks go to the heart of this study. In a mere four provisions, § 501 to 504

[2980] See further the discussion of CW Summers "American Legislation for Union Democracy" (1962) 25 *MLR* 273 298, who in reference to the investigation powers of the Secretary, also touches on the notable power contained within § 521, with his quoting of the following words from the provision:

> "[T]he Secretary may report to interested persons or officials concerning the facts required to be shown in a report or any other matter which he deems to be appropriate as a result of such an investigation".

As such, the effect is that the investigation is "not merely to aid litigation but to supplement disclosure" – Summers (1962) *MLR* 298. In this regard, the author states further that "[t]his clearly includes informing union members of conditions discovered within the union so that they may take action either within the union or in the courts" themselves – affirmation then, of one of the central underlying principles of the LMRDA, namely promoting internal control by the members.

[2981] B. R. S. (1962) *Virg L Rev* 85. See the further explanation offered by Bellace et al *Landrum-Griffin Act* 17.

[2982] § 401(a), "Congressional declaration of findings, purposes, and policy (a) Standards for labor-management relations", [my emphasis].

U.S.C. (sections 501 to 504 of the LMRDA) – already introduced in chapter 8 – provide for "additional protection for unions and their members against dishonest and unworthy officers or representatives".[2983]

In the first instance, § 501(a) (section 501 of the LMRDA) requires of a trade union official to hold the union's money and property solely for the benefit of the union and its members, to make use thereof in compliance with the union's constitution, to not "deal" with the union "as an adverse party", and not to hold or acquire "any pecuniary or personal interest" as a result of their actions/role as union official which would conflict with the interest of the union.[2984] St. Antoine remarks that this "fiduciary provision is a protean enactment, capable of being infused with almost any meaning a court decides upon."[2985] Bellace et al make the point that the "principal issue of interpretation" of this section pertains to whether or not the duty "extends to all union activities in which [officials] engage", or whether it is limited to only those financial aspects that are "the traditional realm of fiduciary responsibilities".[2986]

In light of this, there is a vast body of case law on the meaning of this section.[2987] Some of the more recent examples include: (i) An action against union officials for breach of the LMRDA on account of not acting against the harassment/intimidation of a member by a union official;[2988] (ii) Affirmation that a breach will arise – despite the

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[2983] Aaron (1964) *Rut L Rev* 299.

[2984] As explained by Bellace et al *Landrum-Griffin Act* 284 regarding the origins of the above:

> "This concept of fiduciary liability for union officials, incorporated into section 501(a) [of the LMRDA] in 1959, actually predates the passage of the Landrum-Griffin Act. The drafters of title V relied upon the Restatement of Agency and the common law principles of fiduciary obligation found therein when designing the statute. Their intent was 'to incorporate the whole body of common law precedents defining the fiduciary obligation of agents and trustees with such adaptations as might be required to take into account 'the special problems and functions of a labor organization'", [footnotes omitted].

[2985] St. Antoine (1982) *Am J Comp L* 309.

[2986] Bellace et al *Landrum-Griffin Act* 284. See further Osborne et al *Labor Union Law* 111, who state as follows:

> "However, it is equally clear from the legislative debate that although Congress devoted considerable effort to the question, it ultimately was unable to define a standard by which the performance of union fiduciaries could be measured that was distinct from the fiduciary responsibilities imposed on corporations and trusts. The responsibility for determining an appropriate fiduciary standard for union officials has, thus, been left to the courts."

[2987] See for instance MM Cleary "Conduct of Union Officer Which Violates § 501(a) of Landrum–Griffin Act (29 USCA. § 501(a))" (1992) 107 *ALR Fed* 448 1, which provides examples of more than 85 (reported) cases across the District courts alone, deemed to be "of interest" in their pertaining to § 501 U.S.C.

[2988] *Kovach v Turner Dairy Farms* 929 F.Supp.2d 477 (2013).

union official's act having been authorised in terms of the constitution – where they were found to have benefited personally or the act was patently unreasonable or taken in bad faith;[2989] (iii) An (unsuccessful) claim against a union president and other officials for improper use of "in-town expenditures" (as disbursements to cover expenses in fulfilling their duties);[2990] (iv) An action against a union official for recording local union meetings.[2991] and, (v) An action against union officials for improperly "thwarting" attempts by the member to investigate improper expenditure by the union on behalf of the members – and associated malicious internal prosecution for defamation and slander in retaliation.[2992]

Osborne et al make the important comparative observation that these claims "have been analogized to shareholder derivative actions in that the objective is to preserve the assets of the organization and to protect the institution from those entrusted with its operation, not to permit a disgruntled shareholder/member to collect personal damages".[2993] Related to this, is the point that "[t]he obligation is imposed upon the *individuals* serving in these [various roles as defined in § 501], not the organization

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[2989] *Services Employees International Union v National Union of Healthcare Workers* 718 F.3d 1036 (2013). A brief account of the facts is provided by Tallman, J in the first two paragraphs of the decision, where is stated:

> "This appeal presents a classic union power struggle. We must resolve whether § 501 of the Labor Management Reporting and Disclosure Act creates a fiduciary duty to the union as an organization, not merely the union's rank-and-file members. We hold that it does. The defendants, who by jury verdict were determined to be rogue local union officials who diverted union resources in an attempt to establish a new competing local union, breached this duty. The international union's executive committee had decided to consolidate all of its California unionized long-term healthcare workers from three different local unions into one. The defendants actively attempted to obstruct this consolidation, breaching the fiduciary duty they owed their own union as an organization. This breach involved a pattern of conduct of engaging in dual unionism that is not protected speech. Because this breach contravened the union's constitution, it could not have been authorized. We affirm the jury's verdict and uphold its award of damages" – *SEIU v NUHW* 1041, [footnotes omitted].

[2990] *Noble v Sombrotto* 84 F.Supp.3d 11 (2015).

[2991] *Hawaii Regional Council of Carpenters v Yoshimura* 237 F.Supp.3d 1029 (2017). The defendant was also accused of recording the union's executive committee meetings [*Hawaii Regional* 1031-1032], and refusing to return union records upon his termination of employment [*Hawaii Regional* 1032]. After deliberation and holding in favour of the fact that a union could bring a suit under § 501 against officials [*Hawaii Regional* 1035-1036], and finding that "union officials have fiduciary duties even when no monetary interest of the union is involved" [*Hawaii Regional* 1037] – the court (Kay, J) ruled in favour of the union, by granting the requested summary judgment (in part).

[2992] *Holmes v Grooms* 391 F.Supp.3d 536 (2019).

[2993] Osborne et al *Labor Union Law* 144-145. Implied herein then, is that the "ulitmate beneficiary of the litigation is the organization itself", by virtue of it (re)securing or protecting its assets/money and gauranteeing the continued affordance of rights for its members – Osborne et al *Labor Union Law* 145.

itself, reflecting that the organization is to be protected from those responsible for managing its well being".[2994] The authors point to a host of judgments confirming this approach[2995] with the most recent that of the events leading up to the Supreme Court decision in *Sabolsky v Budzanoski* [2996] (denying a writ of certiorari).[2997] In this case the 3rd Circuit Court of Appeals sided with 100 coal miners in overruling the district court's narrow interpretation of § 501 as limited to the holding and expenditure of union funds.[2998] Instead, the court ruled that the provision extends to "all of the activities of union officials and other union agents or representatives".[2999] More recently, in *Wiggins v United Foods*,[3000] the District Court of New Jersey confirmed that "[b]y its terms, section 501(a) imposes liability on individual union officers for breach of fiduciary duties, but does not impose that duty on labor organizations themselves".[3001]

In order to fully understand § 501(a), the provisions of § 501(b) are also important: as explained in *Holmes* – "[i]f a covered union official violates the provisions of Section 501(a), then subsection (b) comes into play".[3002] More specifically, as explained by Osborne et al, the provision requires a "demand" to be made.[3003] The member must request that the union recovers the damages suffered by the union as a result of the wrongful action on the part of the person in breach of § 501(a), or "secure(s) an accounting or other appropriate relief". This must then happen within a reasonable time after receipt of the request, failing which "such member [who made the demand] may sue such officer, agent, shop steward, or representative in any district court… to recover damages or secure an accounting or other appropriate relief for the benefit of the labor organization".[3004] Lastly, § 501(c) introduces as a federal crime, "the

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[2994] Osborne et al *Labor Union Law* 145, [my emphasis].
[2995] 145 n153.
[2996] *Sabolsky v Budzanoski* 457 F.2d 1245 (1972).
[2997] *Budzanoski v Sabolsky* 409 US 853 (1972).
[2998] *Sabolsky* 457 F.2d 1245 (1972) 1250.
[2999] 1250.
[3000] *Wiggins v United Food & Commercial Workers Union, Local 56* 420 F.Supp.2d 357 (2006).
[3001] 365.
[3002] *Holmes* 540, care of Payne SDJ.
[3003] Osborne et al *Labor Union Law* 165.
[3004] § 501(b) U.S.C. The remainder of the provision also confirms that the trial judge may make provision (from that which is recovered) for the payment of attorney fees and related expenses associated with the claim to the member who instituted the suit. In regards to *when* a § 501(b) claim can be brought – Osborne et al *Labor Union Law* 173 states as follows:

"The LMRDA does not specify a limitations period within which Section 501(a) suits must be filed. Such suits are equitable in nature and are therefore governed by the doctrine of laches. That doctrine

embezzlement or unlawful and wilful conversion of union assets".[3005]

§ 502 U.S.C. (section 502 LMRDA) and its bonding requirements – also introduced in chapter 8[3006] – provides an interesting approach to ensuring financial protection. A first point to make is that "'[a]ny person' who is not bonded is not permitted to handle funds"[3007] and, in the further interests of impartiality and financial prudence, the "bond may not be placed through an agent or with a company in which 'any' union or 'any' officer, agent, shop steward, or other representative of a union, has a direct or indirect interest."[3008] As pointed out by Osborne et al, while the statute establishes the various minimum requirements, nothing would prevent unions from adopting more stringent requirements for their various officials[3009] and that, "given the consequences of failing to comply with the statutory requirement, providing blanket bonding coverage to any individual who may handle funds during the course of his or her employment is preferable to the more narrow, individual coverage approach".[3010] Further mention can be made of the extensive regulations issued by the OLMS with regard to these bonding requirements.[3011]

Brief mention may also again be made of § 503 (section 503 LMRDA), which prohibits the payment of direct/indirect loans to any officer or employee over the

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requires an evaluation of whether delay is unreasonable and whether it causes undue prejudice to defendants", [footnotes omitted].

[3005] Smith (1960) *Virg L Rev* 227. The finer nuances and technicalities surrounding § 501(c), in terms of it operating within the American federal criminal law system, falls outside the immediate scope of this study. Whilst outdated in terms of case-law, Osborne et al *Labor Union Law* 179-199 nonetheless provides a useful and comprehensive overview of the considerations applicable.

[3006] See § 8 3 3 4 5 above.

[3007] Smith (1960) *Virg L Rev* 229.

[3008] 229, this in terms of § 502(a) U.S.C. To this point can be added, as per Osborne et al, the following: "Unions may not be self-insured; the bonding company must operate under a grant of authority from the Secretary of the Treasury as an acceptable surety on federal bonds. A list of suitable companies is published periodically" – Osborne et al *Labor Union Law* 202.

[3009] Osborne et al *Labor Union Law* 200.

[3010] 201. By way of the example, the authors state as follows:

"Accordingly, the most prudent course is for a union to secure a bond, in the appropriate amount, which is 'schedule in form,' an industry term meaning that the bond covers any person holding a particular position, rather than covering only specifically identified individuals".

[3011] The relevant part, Part 453 ("General Statement Concerning the Bonding Requirements of the [LMRDA]"), is available at <https://www.ecfr.gov/cgi-bin/text-idx?SID=0f9756081ee5d201496c74b7a1a726a5&mc=true&node=pt29.2.453&rgn=div5> (accessed 23-01-2019). Furthermore, for a further general overview of the bonding requirements, see the website of the OLMS, available at <https://www.dol.gov/olms/regs/compliance/tip5.htm> (accessed 23-01-2019).

prescribed amount and completely prohibits the payment of fines, subject to a federal criminal sanction, accruing as a result of violating the provisions of the subchapter.

Lastly, mention must be made of § 504 (section 504 LMRDA). This section prohibits persons from holding office as a "consultant" or "adviser" or "officer, director, trustee, member of any executive board or similar governing body, business agent, manager, organiser, employee, or representative in any capacity of any labor organization" – if they have been found guilty of a host of crimes[3012] within the preceding thirteen years.[3013] This provision is designed to protect unions and their members by prohibiting persons, found to be in violation of the "typical" crimes associated with organised labour abuse, from simply returning to power in the union after complying with the terms of their prior convictions.

9 3 3 2 3 The Racketeer Influenced and Corrupt Organizations Act

RICO is found in Title 18 "Crimes and Criminal Procedure" of the U.S.C., which contains the principal provision of the Act.[3014] Chapter 96 of the U.S.C. is entitled "Racketeer Influenced and Corrupt Organizations" and spans a mere eight sections. After § 1961 outlines the applicable definitions,[3015] § 1962 the prohibited activities[3016]

[3012] As outlined in § 504(a) U.S.C., which include, *inter alia*, embezzlement, grand larceny, assault "or a violation of subchapter III [reporting obligations] or IV [trusteeships] of this chapter".

[3013] § 504(4) U.S.C. – with the latter also including a prohibition against that person serving in "any capacity, other than in his capacity as a member [of the union] … that involves decisionmaking authority… or custody of, or control of the moneys, funds, assets, or property of *any* labor organization" – § 504(5) U.S.C., [my emphasis].

[3014] Harper et al *Labor Law* 1162.

[3015] Included herein, are the definitions for racketeering activity, unlawful debt and pattern of racketeering activity. "Enterprise" is defined as including "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity". Furthermore, a lengthy provision – under the sub-title "Congressional Statement of Findings and Purpose", explains the underlying motivation and reason for the enactment of RICO.

[3016] The relevant wording of the key provision, as per § 1962(a), reads as follows:

> "It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, [U.S.C.], to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce".

§ 1962(b) states in turn:

> "It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce" –

and § 1963 the criminal penalties,[3017] § 1964 regulates the civil remedies that are available in terms of the chapter.[3018] Finally, §§ 1965 to 1968, respectively outline the venue and process,[3019] expedition of actions,[3020] evidence,[3021] and the so-called civil investigative demand, which empowers the Attorney General to, prior to any civil/criminal proceeding that might follow, serve notice (namely the civil investigative demand) on persons/enterprises to produce for examination "any documentary materials relevant to a racketeering investigation".[3022]

Hardin et al state that the enactment of RICO "followed the perceived failure of prior laws and the need for a new approach to patterns of criminal wrongdoing".[3023] The authors offer the following overview:

> "The RICO statute created separate criminal liability for numerous offenses, including various state felonies, specified federal labor statutes, and specified federal criminal statutes involving a diverse

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with § 1962(c), making same of application to "any person employed by or associated with" such enterprises. Lastly, § 1962(d), makes it unlawful for any person "to conspire to violated" any of the § 1962 subsections.

[3017] As is to be expected, the provision (spanning seven detailed subsections) outlines the various penalties that can be issued to persons/enterprises found to be in violation of the Chapter, including, *inter alia*, not more than 20 years' imprisonment or forfeiture of property. See further Twomey *Labor & Employment* 323.

[3018] The two key provisions see § 1964(a) outline the powers of the district courts, whilst § 1964(c) confirms who may utilise the section. In terms of the former, the wording reads as follows:

> "The district courts of the United States shall have jurisdiction to prevent and restrain violations of section 1962 of this chapter by issuing appropriate orders, including, but not limited to: ordering any person to divest himself of any interest, direct or indirect, in any enterprise; imposing reasonable restrictions on the future activities or investments of any person, including, but not limited to, prohibiting any person from engaging in the same type of endeavor as the enterprise engaged in, the activities of which affect interstate or foreign commerce; or ordering dissolution or reorganization of any enterprise, making due provision for the rights of innocent persons" – § 1964(a) of the U.S.C.

The relevant wording of the latter, sees affirmation that:

> "Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and *shall recover threefold the damages* he sustains and the cost of the suit, including a reasonable attorney's fee" – § 1964(c), [my emphasis].

[3019] The provision regulates various jurisdictional matters pertaining to the district courts.

[3020] The provision essentially allows the Attorney General to request that a judge be allocated to the mattter, to immediately "hear and determine action" in terms thereof – § 1966.

[3021] This single provision merely confirms that proceedings in terms of the Chapter may be "open or closed to the public at the discretion of the court after consideration of the rights of affected persons" – § 1967 of the U.S.C.

[3022] § 1968 of the U.S.C. The remainder of the provision is detailed, and spans six subsections, outlining the various procedural aspects pertaining to the request, and compliance (or non-compliance) thereto.

[3023] Hardin et al *Developing Labor Law II* 2324.

> range of wrongdoing such as extortion, mail and wire fraud, bankruptcy fraud, bribery, obstruction of justice, and money laundering. Building upon the antitrust laws, the statute also afforded private parties civil standing for these same offenses. Efforts in Congress to exclude labor disputes from RICO's reach have failed and, to the contrary, Congress generally has expanded the statute over time, adding numerous offenses as additional bases for liability. In addition, although many lower courts, especially those in earlier years, have attempted to limit the statute through a narrow reading of its provisions, the Supreme Court generally has been receptive to a broader reading."[3024]

The approach of the Supreme Court mentioned in the quotation commenced with the 1985 decision in *Sedima, S.P.R.L v Imrex Co.*[3025] The decision resulted in the "statute [being] increasingly … invoked in civil litigation between labor unions and their officers or members (especially in cases seeking restitution of benefit funds)".[3026] As far as the onus of proof in civil claims is concerned, the plaintiff would need to "prove that the defendant committed the racketeering activity by a preponderance of the evidence",[3027] while the defendant to a RICO action, as a "person", is defined to include "any individual or entity capable of holding a legal or beneficial interest in property".[3028]

[3024] 2325. Harper et al *Labor Law* 1163, in explaining the key aspects of racketeering activity, state as follows: "The most important of these in the labor relations context are… prohibited payments and loans to labor organizations (indictable offenses under § 302(d) of the LMRA, 29 [U.S.C.] §186(d)), and embezzlement from union funds (29 [U.S.C.] §501(c)).

[3025] *Sedima, S.P.R.L. v Imrex Co. Inc.* 473 US 479 (1985). As explained by Hardin et al *Developing Labor Law II* 2327, the Supreme Court "stated emphatically that RICO 'makes it unlawful for '*any person*' – not just *mobsters* – to use money derived from a pattern of racketeering activity to invest in an enterprise, to acquire control of an enterprise through a pattern of racketeering activity, or to conduct an enterprise through a pattern of racketeering activity'" – citing from *Sedima* 495, [their emphasis]. See further JJ Brudney "Collateral Conflict: Employer Claims of RICO Extortion against Union Comprehensive Campaign" (2009) 83 *S Cal L Rev* 731 750-752, for a succinct overview of the case.

[3026] Hardin et al *Developing Labor Law II* 2325. Twomey *Labor & Employment* 323 provides an example in citing the *Hunt v Weatherbee* 626 F.Supp 1097 (1986) matter, which saw Young DJ rule in favour of the plaintiff (a carpenter's apprentice):

> "In *Hunt*, a union member brought a civil action under RICO against several of her union's officials and her employers based on alleged acts of coercion and extortion that she alleged were part of a prolonged pattern of sexual harassment, discrimination, and violation of contractual rights. The court ruled that the… acts alleged by Hunt were not isolated acts but were sufficient to support a RICO claim because the incidents of sexual harassment and discrimination established a pattern of racketeering activity", [their emphasis].

Hardin et al *Developing Labor Law II* 2325 add to this by explaining that disputes between unions and management have also seen more frequent utilisation of RICO, in regards to "organizing, decertification, collective bargaining, and corporate campaigns", whilst the "government has used the statute in civil and criminal proceedings against unions and their representatives".

[3027] 2338.

[3028] 2339 – citing § 1961(3).

Still in the context of the primary purpose of the Act, the following point must be made: Much has been written about RICO and its intersection with labour law in the USA.[3029] Furthermore, many states in the USA have enacted so-called "mini-RICOs", which also apply to trade unions.[3030] Despite changes in recent patterns regarding the use of RICO,[3031] which will no doubt see it continue to feature prominently in the realm of trade unionism, the Act is not a focus of this study. It deserves mention as further evidence of a statutory mechanism applicable (or being utilised by and against) trade unions in the USA (potentially by members). Furthermore, it emphasises that trade union corruption remains a very real concern in the USA[3032] and reminds us of the extent to which this concern has informed the regulation of collective labour law in the USA.

[3029] See for instance the list of articles in Hardin et al *Developing Labor Law II* 2325-2326 n5, to which can be added the following: JB Jacobs & E Peters "Labor Racketeering: The Mafia and the Unions" (2003) 30 *Crime & Justice* 229 229-282; FJ Marine "The Effects of Organized Crime on Legitimate Businesses" (2006) 13 *JFC* 214 214-234; JB Jacobs & DD Portnoi "Administrative Criminal Law & Procedure in the Teamsters Union: What Has Been Achieved after (Nearly) Twenty Years" (2007) 28 *Berk J Emp Lab L* 429 429-493; Brudney (2009) *S Cal L Rev* 731 731-796; GA Toner "New Ways of Thinking about Old Crimes: Prosecuting Corruption and Organized Criminal Groups Engaged in Labor-Management Racketeering" (2009) 16 *JFC* 41 41-59; JB Jacobs "Is Labor Union Corruption Special?" (2013) 80 *Soc Res* 1057 1057 1057-1086; and ER Render "The Thin Line between Union Representation and Inadvertent Criminal Activity" (2014) 4 *Am U Lab & Emp LF* 1 1-31.

[3030] Hardin et al *Developing Labor Law II* 2333.

[3031] Brudney (2009) *S Cal L Rev* 732-733 state as follows in this regard:

> "Over the past twenty-five years, unions have turned increasingly to strategies outside the traditional framework of the [NLRA]. Frustrated by an ineffective NLRA legal regime and the demise of the economic strike, organized labor has pursued coordinated approaches in order to generate extended economic pressure on private employers who seek to avoid recognizing unions or to resist bargaining collective agreements. Coordinated campaign tactics include publicity efforts aimed at attracting media attention and consumer interest … Unions relying on these comprehensive campaign or corporate campaign strategies have enjoyed some success which in turn has contributed to a modest rise in private sector union density, the first such increase for decades" [footnotes omitted].

The employer/management response to the above? The use of RICO in "lawsuits alleging a pattern of unlawfully extortionate activities" – a direct form, therefore, of "employer retaliation" – Brudney (2009) *S Cal L Rev* 733.

[3032] See for instance, the fairly recent summary of union corruption and racketeering cases involving unions in America, as provided by Jacobs (2013) *Soc Res* 1066-1071. See further, written at the start of the 2000s, Nelson (2000) *Geo Mason L Rev* 559-560 n239, for a footnote list of articles referencing various American media sources highlighting union embezzlement and corruption, that spans the equivalent of 1 and a half full pages.

9 3 3 3 Trade union representation of members

The third area of the legislative regulation of trade unions and their accountability – in addition to the promotion of collective bargaining and the direct regulation of trade unions – concerns the role of trade unions in representing their members.

Lieberwitz, in his analysis of due process and the LMRDA, quotes as follows from Summers regarding the representative functions of a trade union:

> "The union in bargaining, helps make laws; in processing grievances acts to enforce those laws; and in settling grievances helps interpret and apply those laws. It is the worker's economic legislature, police [officer], and judge. The union, in short, is the worker's industrial government. The union's power is the power to govern the working lives of those for whom it bargains, and like all governing power should be exercised democratically".[3033]

To this may be added the different roles of union officials, business agents[3034] and related representatives of modern unions,[3035] both within their everyday engagement with the members and employers (in the context of collective bargaining and union administration) and in their engagement with the specific grievance procedure

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[3033] Lieberwitz (1987) *Bost Coll L Rev* 40, in quoting Clyde Summers, in his writing for the ACLU [American Civil Liberties Union, "Democracy in Trade Unions" (June 1952), 4].

[3034] Says Cook (1962) *ILRR* 325 in this regard: "Under the law of the collective agreement, union responsibility for its administration lies in the hands of business agents, international representatives or other designated officials" – before stating as follows of the role so fulfilled by them:

> "The officers who carry out these latter functions [of the administration of the CBAs], the full-time business agents, usually devote themselves exclusively to these duties … The business agent is the full-time official. He is dealing with the union's most vital affairs intimately and daily. Members turn to him for settlement of grievances, often for employment, and for leadership in achieving further gains in working conditions" – Cook (1962) *ILRR* 331.

[3035] Render (2014) *Am U Lab & Emp LF* 2 explains the essential differences as follows:

> "Union stewards are generally employees of the company who are in the bargaining unit represented by the union and who have been elected or appointed to serve in that capacity. In rank, they are beneath union presidents and other union officers, including union business agents who are usually full-time employees of the union. When an employee has a problem at work, whether being laid off, discharged, or being denied an overtime opportunity, generally the first person the employee will contact is the union steward."

As stated further by the author, in terms of the business agent's involvement in the dispute:

> "[It] usually comes later, hopefully after a period of thought and reflection. An experienced business agent is likely to be more familiar with the interpretation of labor contracts than a steward. Further, as full-time employees of the union, they are probably more experienced and better trained, and hence are better able to anticipate some of the problems described below" – Render (2014) *Am U Lab & Emp LF* 3.

mechanisms – most typically, arbitration.[3036] (Note, however, that the particular requirements of different arbitration panels determine whether or not union officials, or their counsel (attorneys), are permitted to appear in arbitration on behalf of the member(s) in terms of the dispute.)[3037] As far as the NLRB is concerned (where unfair labour practices are at stake) "[a]ny party has the right to be represented by an attorney or *other representative* in any proceeding".[3038] At the same time, it has to be said that the bulk of representation happens outside the confines of the statute – in the workplace, in negotiating or re-negotiating CBAs with employers, or, for example, in managing picket lines. Render states as follows:

> "The National Labor Relations Act imposes on employers the duty to bargain with a union, which the National Labor Relations Board has certified as the exclusive representative of the employees in an appropriate bargaining unit. After bargaining, the company and union often enter into a contract setting forth the terms and conditions of employment, sometimes including certain rights of the union officials. Typically, labor contracts provide that management runs the plant, determines the products to be produced and the like. Labor contracts also generally deal with the matter of employee conduct, wages and discipline, either in the contract itself or in work rules. When company management makes a decision, whether it is to discipline an employee or to assign overtime work, in the typical labor contract there is a grievance procedure through which management decisions can be challenged for being in violation of the contract. Labor contracts generally provide for union representation of employees by union stewards at the initial stage of the grievance procedure. At the later stages of the grievance procedure, a union business agent generally becomes involved. The final step in the grievance procedure is usually arbitration."[3039]

As was discussed under the "promotion of collective bargaining" section at § 9 3 3 1 above, legislation ensures the majority representation of the duly elected trade union of a bargaining unit. Furthermore, legislation also outlines the required elections in order to elect the majority, exclusive representative trade union, who will – for the duration of the CBA – duly represent all the workers within that particular bargaining

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[3036] See in general Render (2014) *Am U Lab & Emp LF* 1-31, for a discussion (from the perspective of an arbitrator), of some of the types of challenges facing union officialdom, in terms of their representation of grievances (and prior conduct during collective bargaining disputes), before arbitration panels.

[3037] Osborne et al *Labor Union Law* 340-342, which furthermore affirms that a grievant does not have a right to be being represented by an attorney, as opposed to a union official.

[3038] DE Ray et al *Understanding Labor Law* 5 ed (2019) 29 n68, citing from a NLRB Notice regarding ULP procedures.

[3039] Render (2014) *Am U Lab & Emp LF* 2, [footnotes omitted].

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9 3 4 Statutory bodies

The preceding sections outlined the various provisions of the USA's federal legislation regulating trade unions and trade union accountability. What remains to be examined (as was also done in relation to Britain in chapter 6 above) are the various statutory bodies that are empowered to give effect to that legislation. Again, the motivation for this is simply to be found in the fact that the effect of legislation is also determined by how it is applied and this, in turn, depends on the effectiveness of institutions tasked with its application. In addition, the American federal court system is examined to the extent that they too serve as adjudicators of labour disputes involving unions or their members.

This in mind, this section will consider the following: (i) the NLRB; (ii) the OLMS; (iii) the FMCS; and finally, (iv) the federal courts.

9 3 4 1 The National Labor Relations Board

9 3 4 1 1 The origins, composition and structure of the NLRB

The NLRB owes its formation to the NLRA, promulgated in 1935.[3040] Its original structure resulted in criticism and its increased use necessitated functional changes brought about by the amendments introduced by the LMRA in 1947.

During the formation and initial development of the NLRB, two independent offices came into existence, namely the Board and the Office of General Counsel.[3041] The

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[3040] With this being said, for a discussion of the historical predecessors of the NLRB – whilst acknowledging their brief existence – namely the National Labor Board [NLB] (established on 5 August 1933) and the National Labor Relations Board [the so-called Old/First NLRB] (established on 29 June 1934), see HA Millis & EC Brown *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* (1950) 22-25.

[3041] Twomey *Labor & Employment* 62. This being in terms of subss 3(a) and 3(d) of the NLRA, respectively. Regarding the background to this, PJ Cihon & JO Castagnera *Employment & Labor Law* 7 ed (2011) 351 explain that in its original guise, following the promulgation of the NLRA/Wagner Act, "the NLRB adopted an administrative organization that made it prosecutor, judge, and jury with regard to complaints under the act". Put differently, the "Board investigate charges of unfair labor practices, prosecuted complaints, conducted hearings, and rendered decisions", and even after instituting the office of a general counsel, such was (initially) still subordinate to the Board – Cihon & Castagnera *Employment & Labor* 351. As is to be expected, given the particular adversarial nature of the American labour relations system during the 1930s and 1940s, this resulted in not-insignificant criticism – and was accordingly remedied with the amendments introduced by the LMRA [Cihon & Castagnera

Board is a five-member body appointed by the US president (subject to Senate approval)[3042] for a five-year term, but with the important proviso that each year sees a term of one member expiring.[3043] A further significant characteristic of the Board is the "tradition" that sees the president's political party (in other words, Republican or Democrat) holding "a 3:2 majority of appointments [to the board] and the chair position".[3044] The General Counsel of the Board[3045] is appointed for a period of four years by the US president (also subject to Senate approval).[3046] The General Counsel, apart from his key function with regard to section 10 (NLRA) – discussed in more detail below – also bears responsibility, as per subsection 3(d) (NLRA), to "exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices".[3047] The impact of the Senate's involvement in the appointment process of both Board and General Counsel, as well as the partisan selection of the majority-holding and chair of the Board on the increased politicisation of the NLRB is discussed at § 9 3 4 1 6 below.

Twomey explains that the promulgation of the LMRA in 1947 saw the introduction of a "separation of powers" approach to the Office of the General Counsel in that the office became independent in the sense that he or she is "responsible to the president

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Employment & Labor 351]. The amendment, was essentially the introduction by the LMRA of subs 3(d) into the NLRA, thereby formalising the Office of the General Counsel, and setting out its specific duties and powers – as discussed below.

[3042] Technically, in terms of subs 3(a) of the NLRA, the president appoints the Board members "by and with the advice and consent of the Senate". Regarding the impact hereof, see the further discussion below.

[3043] Twomey *Labor & Employment* 62, this being in terms of subs 3(a) of the NLRA.

[3044] 63. In terms of subs 3(a) of the NLRA, "[t]he President shall designate one member to serve as Chairman of the Board".

[3045] As per subs 3(d) of the NLRA.

[3046] In similar wording to that which is applicable to the appointment of Board members, in terms of subs 3(d) of the NLRA, the General Counsel is appointed by the president "by and with the advice and consent of the Senate".

[3047] Subsection 3(d) of the NLRA. As explained by Cihon & Castagnera *Employment & Labor* 353-354, the "Office of the General Counsel is the prosecutorial branch of the NLRB and is also in charge of the day-to-day administration of the NLRB regional offices" – as such, the "structure of this branch of the NLRB is more complex than that of the Board". The authors continue by outlining the four divisions with the General Counsel office, namely: (i) Division of Operations Management; (ii) Division of Advice (which, *inter alia*, "[o]versees the function of legal advice to the regional offices"; (iii) Division of Enforcement Litigation (which is "[r]esponsible for the conduct of agency litigation enforcing or defending Board orders in the federal courts of appeal or the Supreme Court"); and, finally, (iv) Division of Administration – Cihon & Castagnera *Employment & Labor* 353-354.

and the Senate and not" to the NLRB.[3048] Put differently, "Congress placed the functions of investigation and prosecution with the Office of the General Counsel and placed the quasi-judicial functions of deciding the merits of a controversy with the five-member Board".[3049] Therefore, "[t]he newly organized NLRB represented a unique type of administrative agency structure in that it was bifurcated into two independent authorities within the single agency: the five-member Board and the general counsel".[3050]

The NLRB consists of 32 regional offices, three sub-regional offices, and seventeen resident offices positioned across the states and territories of the US,[3051] and is headquartered in Washington, D.C.[3052] With regard to the functioning of these different offices, [3053] Twomey explains that a "regional director is in charge of every region, assisted by a staff of attorneys, field examiners, Board agents, and clerical personnel" – and that "[a]ll matters subject to the NLRA … must initially be filed with the regional director for the region in which the situation arose".[3054]

Lastly, regarding the actual functioning of the NLRB, its most recent "Strategic Plan" document shows that during 2018 the NLRB dealt with 18,870 ULP cases and 2,090 representation cases with 51,613 "[p]ublic enquiries" and 25,171 "[t]oll free phone enquiries".[3055] The NLRB staff number is listed as "[a]pproximately 1,327".[3056] By way of comparison, in 2013 the NLRB attended to 21,394 ULP cases and 2,652 representation cases, with 86,215 public enquiries and 37,970 telephonic enquiries.

[3048] Twomey *Labor & Employment* 63.

[3049] 63.

[3050] Cihon & Castagnera *Employment & Labor* 351.

[3051] Twomey *Labor & Employment* 63.

[3052] See further Twomey *Labor & Employment* 64 fig. 4.1, for a visual overview of the offices and their boundaries, including those in the non-contiguous states/territories of Hawaii, Alaska and Puerto Rico. With this being said, certain offices have been consolidated into different regions – thus, for the most recent overview of the various regions and their offices (the 26 current versions), see the NLRB website, and the "Who We Are" webpage, available at <https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices> (accessed 26-06-2019).

[3053] Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 10 states: "Despite the centralization of certain functions in Washington D.C., it is in the regional offices that the vast bulk of Board business is done and disputes resolved."

[3054] Twomey *Labor & Employment* 63.

[3055] National Labor Relations Board "Strategic Plan FY 2019 – FY 2022" (2018) *National Labor Relations Board* <https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1709/strategicplanfy19-22final-2018-12-12.pdf> (accessed 26-06-2019) 3.

[3056] National Labor Relations Board *Strategic Plan FY 2019 – FY 2022* 3.

The staff contingent was placed at "[a]pproximately 1,620".[3057]

9 3 4 1 2 The jurisdiction of the NLRB

Twomey explains that the NLRB "enforces" the NLRA[3058] – and has as its "two principal functions" the "conducting [of] secret ballot elections to determine whether a majority of employees want to be represented by a union (representation cases) and ... preventing and remedying unfair labor practices that employers and unions commit."[3059] The jurisdiction of the NLRB is founded on – primarily – the NLRA, in particular, section 3.

Subsection 3(b) outlines the first of the key duties of the Board, by describing how the Board is authorised to delegate to its regional directors[3060] "its power under section 9 to determine the unit appropriate for the purpose of collective bargaining, to investigate and provide for hearings, and determine whether a question of representation exists, and to direct an election or take a secret ballot under subsection (c) or (e) of section 9 and certify the results thereof".[3061] Section 9, as discussed earlier in this chapter and in chapter 7, regulates the exclusive "representatives designated for the purposes of collective bargaining by the majority of employees in" an appropriate bargaining unit[3062] and the election (by secret ballot) associated therewith.[3063] Sections 3 and 9 are the genesis of the NLRB's competency to preside

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[3057] National Labor Relations Board "Strategic Plan FY 2014 – FY 2018" (2014) *National Labor Relations Board* <https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1709/NLRB%20Strategic%20Plan%20FY2014-18.pdf> (accessed 26-06-2019) 4. For the sake of completeness, the "Strategic Plans" of 2007-2012, and 2000-2006, are not cited here, in that they only provide approximate figures for the periods involved, as opposed to the tabled figures presented in the 2014 and 2018 reports. See in general the NLRB's Strategic Plans' webpage at available at <https://www.nlrb.gov/reports-guidance/reports/government-performance-and-results> (accessed 26-10-2019).

[3058] Twomey *Labor & Employment* 62.

[3059] 62.

[3060] Hardin et al *Developing Labor Law II* 2443 explain that this was necessitated simply given the high volumes of work increasingly required of the Board. Cihon & Castagnera *Employment & Labor* 358 state further:

> "For nearly twenty-five years, the Board had primary responsibility for the conduct of all representation elections. Then, in 1959, Congress decided that election procedures were sufficiently settled that the Board could delegate its duties in this area to the regional directors."

[3061] Subsection 3(b) of the NLRA.

[3062] Subsection 9(a).

[3063] This in terms of subs 9(c)(1)(B). This would also include, by implication and by virtue of subs 9(c) of the NLRA, any "desertification proceedings", which apply in instances where the question surrounds

over representation cases.[3064]

With regard to preventing and remedying unfair labor practices,[3065] subsection 3(d) – in regulating the General Counsel – states that the General Counsel "shall have final authority,[3066] on behalf of the Board, in respect to the investigation of charges and issuance of complaints under section 10 and in respect of the prosecution of such complaints before the Board".[3067] Section 10, of course, is the section in the NLRA that regulates the prevention of ULPs (as discussed in chapter 8). These sections are therefore the genesis of the NLRB's competency to preside over employer and/or union unfair labour practices.

9 3 4 1 3 Qualification of the jurisdiction of the NLRB

Two key points need to be made regarding the overall jurisdiction of the NLRB. Firstly, the NLRB is *not* concerned, nor does it have jurisdiction over, "[p]urely local activities"[3068] – in other words, matters not covered by the wording of subsections 2(6) and 2(7) of the NLRA[3069] detailing the *inter-state commerce* requirement of the Board's jurisdiction.[3070]

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whether or not "a certified or recognized union continues to represent the majority of employees in a bargaining unit" – Twomey *Labor & Employment* 102.

[3064] 62.

[3065] 62.

[3066] The ancillary powers of the General Counsel are discussed in the section to follow below.

[3067] Subsection 3(d) of the NLRA.

[3068] Twomey *Labor & Employment* 68.

[3069] Subsection 2(6) reads in full as follows:

> "The term 'commerce' means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country".

Subsection 2(7) in turn states:

> "The term 'affecting commerce' means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a *labor dispute* burdening or obstructing commerce or the free flow of commerce" [my emphasis]. The phrase 'labor dispute' in the aforementioned subsection, is subsequently defined in subs 2(9), as including: "[A]ny controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee."

[3070] As per subs 2(6) of the NLRA. Put differently, Cihon & Castagnera *Employment & Labor* 358 state: "Consistent with the federal courts' traditional view of the scope of federal commerce clause powers,

Further mention must be made of subsection 2(3) of the NLRA (as discussed above)[3071] which defines the term "employee" – and provides a list of certain employee-categories that do not fall under the ambit of the NLRA, and accordingly, the jurisdiction of the NLRB.[3072] In addition, subsection 2(5) of the NLRA defines what is to be understood by "labor organizations".[3073] With regard to the NLRB's jurisdiction over unions, Cihon and Castagnera state as follows:

> "NLRB and Supreme Court decisions have held that the words 'dealing with' are broad enough to encompass relationships that fall short of collective bargaining. For example, in *NLRB v Cabot Carbon*,[3074] the Supreme Court held that the act encompassed employee committees that functioned merely to discuss with management, but not bargain over, such matters of mutual interest as

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> the Supreme Court has held that the NLRB can regulate labor disputes in virtually any company, unless the firm's contact with interstate commerce is de minimus (minuscule and merely incidental)."

Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 24 explain it is follows:

> "The Board is thus free to exercise jurisdiction to hear representation and unfair labor practice cases involving parties having a 'substantial' impact on the flow of goods or services across state lines, regardless of an isolated examination of the quantity of commerce in the case before the Board, the nature of the business (i.e., services or production as opposed to transportation), the size of the operations, or the location of the business. As the Court put it, '[I]n passing the National Labor Relations Act, Congress intended to and did vest in the [National Labor Relations] Board the fullest jurisdictional breadth constitutionally permissible under the Commerce Clause'".

As will be seen below, however, in spite of this broad jurisdictional reach, a further threshold of jurisdiction is imposed by the NLRB itself.

[3071] See § 9 3 4 1 3 above.

[3072] See Cihon & Castagnera *Employment & Labor* 361, which lists the following:

> "individuals employed as agricultural laborers; individuals employed as domestics within a person's home; individuals employed by a parent or spouse; independent contractors; supervisors; and individuals employed by employers subject to the Railway Labor Act."

As is to be expected, what is to be understood by the term "independent contractor" or "supervisor", as but two examples, has seen numerous decisions being handed down, both before the NLRB and the courts, over the course of the decades since the promulgation of the NLRA and its amendments. For the purposes of this study, the details of these decisions, and their outcomes, are not relevant – beyond the acknowledgement that, in certain instances, certain "types" of employees do not fall under the NLRA and NLRB jurisdiction. See further the analysis of Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 32-52, as example of the complexities and caselaw associated with the aforementioned interpretation.

[3073] The complete wording of the subsection reads as follows:

> "The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

[3074] *National Labor Relations Board v Cabot Carbon Company* 360 US 203 (1959), as per Whittaker, J, [their emphasis].

grievances, seniority, and working conditions."[3075]

As such, the "traditional" concept and manifestation of a trade union, in its most general terms, falls under the NLRA, and accordingly, the NLRB. The wording of sections 2 and 3 (in particular) and the interplay of section 3 with sections 9 and 10 outline the jurisdiction of the NLRB. Since the NLRA is limited in *its* ambit, so too is the NLRB limited as the agency delegated to implement the NLRA (as amended).

The second key point to consider, is that over and above the NLRA's empowering provisions (and associated limitations), a further series of *self*-imposed criteria is applied in establishing Board jurisdiction.[3076] As explained by Twomey:

> "Although the interpretation of the jurisdictional provisions of the statute has given the NLRB broad authority, the Board has for reasons of administrative convenience and policy exercised its authority only in situations falling within certain standards. First adopted and published in 1950,[3077] the standards have been revised from time to time. In every Board proceeding, the first question investigated is the question of the Board's jurisdiction. *Once the existence of general authority over the subject matter is established, the Board then determines whether to proceed by ascertaining if the employer's operations satisfy the following standards.* In applying these standards, the Board considers the total operations of the employer, even though the particular labor dispute may involve only a portion of those operations."[3078]

Thus, as explained by Gorman and Finkin, the NLRB "has chosen not to exert its power to the fullest constitutional and statutory limit" since the "volume of cases would otherwise be unmanageable and its attention would be diverted from the more significant interstate cases by many truly of only local significance."[3079] In describing its own jurisdiction, the NLRB itself refers to these standards:

> "The Board has statutory jurisdiction over private sector employers whose activity in interstate

[3075] Cihon & Castagnera *Employment & Labor* 370.

[3076] The statutory basis for this, is provided for by subs 14(c)(1) of the NLRA (duly inserted by subs 701(a) LMRDA), which reads as follows:

> "The Board, in its discretion, may, by rule of decision or by published rules adopted pursuant to the Administrative Procedure Act, decline to assert jurisdiction over any labor dispute involving any class or category of employers, where, in the opinion of the Board, the effect of such labor dispute on commerce is not sufficiently substantial to warrant the exercise of its jurisdiction".

[3077] See further Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 28 for details surrounding this.

[3078] Twomey *Labor & Employment* 68 [my emphasis].

[3079] Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 27.

> commerce exceeds a minimal level. Over the years, it has established standards for asserting jurisdiction... As a practical matter, the Board's jurisdiction is very broad and covers the great majority of non-government employers with a workplace in the United States, including non-profits, employee-owned businesses, labor organizations, non-union businesses, and businesses in states with 'Right to Work' laws."[3080]

For purposes of these additionally imposed standards, the NLRB makes use of a distinction between three broad categories of business, namely: (i) Retailers; (ii) Non-retailers; and (iii) Special categories.[3081]

"Retailers" only fall "under the Board's jurisdiction if they have a gross annual volume of business of $500,000 or more".[3082] In case of non-retailers the focus is on "the amount of goods sold or services provided by the employer out of state ("outflow") or purchased by the employer from out of state ("inflow")", with the proviso that the outflow or inflow "can be direct or 'indirect', passing through a third company such as a supplier".[3083] The annual amount of product flow required in case of non-retailers is at least $50,000."[3084] The "special categories" group refers to jurisdictional arrangements in respect of a series sub-categories, including "channels of interstate

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[3080] NLRB "Jurisdictional Standards" webpage, available at <https://www.nlrb.gov/rights-we-protect/law/jurisdictional-standards> (accessed 26-06-2019). Furthermore, the "Standards" document ends with affirmation of which employers are *excluded* from the NLRB's jurisdiction – and sees the following being listed:

> "Federal, state and local governments, including public schools, libraries, and parks, Federal Reserve banks, and wholly-owned government corporations; Employers who employ only agricultural laborers, those engaged in farming operations that cultivate or harvest agricultural commodities or prepare commodities for delivery; Employers subject to the Railway Labor Act, such as interstate railroads and airlines."

[3081] For a more detailed description of the jurisdictional standards, see Twomey *Labor & Employment* 68-69; Cihon & Castagnera *Employment & Labor* 359-360; Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 29-32.

[3082] NLRB "Jurisdictional Standards" (undated) *NLRB* <https://www.nlrb.gov/rights-we-protect/law/jurisdictional-standards> (accessed 26-06-2019). The remaining wording of the category description reads as follows:

> "This includes employers in the amusement industry, apartment houses and condominiums, cemeteries, casinos, home construction, hotels and motels, restaurants and private clubs, and taxi services. Shopping centers and office buildings have a lower threshold of $100,000 per year."

[3083] NLRB "Jurisdictional Standards" (undated) *NLRB*.

[3084] NLRB "Jurisdictional Standards" (undated) *NLRB*.

commerce";[3085] "law firms and legal service organizations";[3086] "federal contractors"[3087] and "cultural and educational centers".[3088]

In commenting on these rules, Twomey states that "[o]rdinarily, if an enterprise does the total annual volume of business listed in the standard, it will necessarily be engaged in activities that 'affect' commerce".[3089] It is significant that in those instances where the potential employer "refuses to supply the Board with information concerning total annual business, the Board may dispense with this requirement and exercise jurisdiction".[3090] Lastly, Harper et al point out that in spite of questions surrounding the dollar amounts of the NLRB jurisdictional standard – and an unsuccessful attempt in 1996 to have the amounts adjusted to "account for inflation"[3091] – concerns over the number of smaller businesses that would effectively have been excluded from NLRB jurisdiction saw the amounts remain unchanged.[3092]

As such, representation cases or ULPs involving employers that meet these jurisdictional standards fall within the jurisdiction of the NLRB.

[3085] NLRB "Jurisdictional Standards" (undated) *NLRB*. The remaining wording of the category description reads as follows:

> "For businesses providing essential links in the transportation of goods or passengers, including trucking and shipping companies, private bus companies, warehouses and packing houses, the minimum is $50,000 in gross annual volume."

[3086] NLRB "Jurisdictional Standards" (undated) *NLRB*. The remaining wording of the category description reads as follows: "The minimum is $250,000 in gross annual volume."

[3087] NLRB "Jurisdictional Standards" (undated) *NLRB*. The remaining wording of the category description reads as follows:

> "Private contractors who work for the federal government are under NLRB jurisdiction. In addition, all federal contractors are required by the Department of Labor to post a Notice of Employee Rights under the NLRA."

[3088] NLRB "Jurisdictional Standards" (undated) *NLRB*. The remaining wording of the category description reads as follows:

> "For private and non-profit colleges, universities, and other schools, art museums and symphony orchestras, the annual minimum is $1 million."

[3089] Twomey *Labor & Employment* 70.

[3090] 70.

[3091] Harper et al *Labor Law* 111.

[3092] See Harper et al *Labor Law* 111, where is stated as follows:

> "In 1996, the House attempted to index the Board's jurisdictional standards to account for inflation, which would have raised the $500,000 gross revenue standard for retail businesses to over $2.5 million, and the $50,000 inflow/outflow standard for nonretail enterprises to over $250,000. However, this effort, which would have effectively removed the Board's jurisdiction over many small businesses, was not successful, and the $500,000 and $50,000 standards remain in place."

9 3 4 1 4 The procedures and powers of the NLRB

The regional directors are authorised to "decide whether a question concerning representation exists; determine the appropriate collective bargaining unit; order and conduct an election; certify the election's results and; resolve challenges to ballots by making findings of fact and issuing rulings."[3093] However, as explained by Cihon and Castagnera, the Board retains the power to review a representation election already held on four grounds, namely if: (i) There is a departure from established Board precedent, or the absence of precedent and, as a result, "a significant issue of law or policy is raised";[3094] (ii) If a "clear error regarding some factual issue" was made by the regional director *and* that error "is prejudicial to the rights of one of the parties";[3095] (iii) If there was a procedural error at any point of the process, that similarly prejudiced one of the parties; and finally, (iv) If "the Board believes that one of its rules or policies is due for a reconsideration."[3096]

The Board also "acts as a quasi-judicial body, deciding appeals from the decisions of administrative law judges"[3097] in ULP hearings.[3098] As mentioned above, the General Counsel is afforded his powers in relation to unfair labour practice disputes by subsection 3(d) of the NLRA and, in particular, is the "final authority to act in the name of, but independently of any direction, control, or review by, the Board in respect

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[3093] Cihon & Castagnera *Employment & Labor* 358.

[3094] 358.

[3095] 358.

[3096] 358.

[3097] Twomey *Labor & Employment* 63. Cihon & Castagnera *Employment & Labor* 351 describe the Board as being "the judicial branch of the agency".

[3098] Says Twomey *Labor & Employment* 65 further in this regard:

> "In unfair labor practice hearings, the administrative law judge functions very much like a trial court judge: hearing witnesses, ruling on admissibility of evidence, making findings of fact, and drawing conclusions of law. The administrative law judge's decision may be appealed to the Board in Washington, D.C., by any party involved in the case. Administrative law judges are free from supervision by the Board. The Board appoints them based on merit from a civil service roster."

Cihon & Castagnera *Employment & Labor* 351, in turn, state as follows in regard to the ALJ's:

> "The NLRB also has a branch called the Division of Judges. These administrative law judges (ALJs), formerly called trial examiners, are independent of both the Board and the general counsel. Appointed for life, they are subject to the federal Civil Service Commission rules governing appointment and tenure. This organizational independence is necessary because the ALJs conduct hearings and issue initial decisions on unfair labor practice complaints issued by regional offices throughout the United States, under the authority delegated to these offices by the general counsel … The ALJ's function is that of a specialized trial court judge: to decide unfair labor practice complaints."

of the investigation of charges (under section 10) and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the board."[3099] With this being said, Cihon and Castagnera make the important point that "[a]lthough [sub]section 3(d) of the act gives the general counsel 'final authority'… the Office of General Counsel has exercised its statutory right to delegate this power to the regional directors, who make most of the day-to-day decisions affecting enforcement of the act".[3100]

Section 11 regulates the "[i]nvestigatory powers" of the NLRB, as "necessary and proper for the exercise of the powers vested in it by section 9 and section 10".[3101] In this regard, subsection 11(1) allows the Board (or its representatives) access to the necessary evidence/documentation or persons relevant to the matter in question, including the right to subpoena persons,[3102] while subsection 11(2) regulates the powers of the Board in instances where there is non-compliance with subsection 11(1).[3103] Furthermore, section 12 contains the offenses/penalty clause, with the possibility of a fine or imprisonment for resisting, preventing, impeding or interfering with the performance of NLRB duties and functions.[3104]

The referral process is dependent on the underlying complaint. The representation cases (involving the NLRB's responsibilities relating to secret elections)[3105] are initiated when a "petition" is filed with the applicable regional director.[3106] In contrast, a "charge" is filed with the regional director in instances where an ULP is being alleged.[3107] This means, in effect and in the words of Twomey, that "the Board has

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[3099] See Twomey *Labor & Employment* 63, paraphrasing from subs 3(d) of the NLRA.

[3100] Cihon & Castagnera *Employment & Labor*

[3101] Section 11 of the NLRA.

[3102] Subsection 11(1).

[3103] Subsection 11(2) reads as follows:

> "In case of contumacy or refusal to obey a subpoena issued to any person, any district court of the United States … within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board … there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof."

[3104] This being a paraphrasing of s 12 of the NLRA, as quoted in full at § 8 3 1 6 above.

[3105] In terms of subs 9(c)(1)(B) of the NLRA.

[3106] Twomey *Labor & Employment* 64-65; Hardin et al *Developing Labor Law II* 2447-2448.

[3107] Twomey *Labor & Employment* 65. Says Cihon & Castagnera *Employment & Labor* 354 in this regard:

appellate jurisdiction over election decisions emanating from the regional offices, and the General Counsel has appellate authority over regional directors' rulings on charges of unfair labor practices."[3108]

Upon the petition or charge (as the case may be) being filed[3109] at the appropriate regional office of the NLRB[3110] the following steps are taken (as outlined by Twomey in respect of unfair labour practices – ULPs):[3111] (i) The complaint is initially investigated and allowance is made for any necessary "adjustment" to the claim,[3112] or, alternatively, for the withdrawal, dismissal or closing of the complaint (in the absence of suitable grounds/merit);[3113] (ii) If sufficient grounds exist and there is no settlement in light of a preceding adjustment,[3114] a formal complaint is issued by the regional director[3115] in terms of subsection 10(b);[3116] (iii) The matter is then heard in

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"In either type of case, the NLRB does not initiate the proceeding; rather, it responds to a complaint of unfair practice or a petition for an election filed by a party to the case".

[3108] Twomey *Labor & Employment* 65.

[3109] By an employee, union or employer. Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 10 state as follows in this regard: "[T]he charge need not be filed by the person actually aggrieved or adversely affected by the alleged misconduct. The statute uses the passive voice – '[w]henever it is charged that' – and is silent on who the charging party must be. The Supreme Court, relying on the legislative history, made plain that any person, even a stranger to the dispute, is authorized to file a charge. As such, the American system does not cater for frivolous, vexatious or misconceived applications, as is the case in Britain (involving applications to CO, for instance – as discussed above at § 6 3 2 7 5), at least not in the case of ULPs.

[3110] In case of an ULP, this has to be done within six months. Subsection 10(b) of the NLRA states: "[T]he Board may not issue a complaint based on conduct that occurred more than six months before the filing and service of the charge". It can be mentioned that the Supreme Court was to "borrow" this timeframe for the purposes of s 301/DFR claims, as per the discussion at § 9 4 below.

[3111] Twomey *Labor & Employment* 65-67.

[3112] As per subs 10(b) of the NLRA.

[3113] As per subs 10(c). Writing in 2011, Cihon & Castagnera *Employment & Labor* 354-356 state as follows in this regard:

"In recent years, approximately one-third of all charges filed were voluntarily withdrawn, another one-third were dismissed as having no merit, and approximately one-third were found to have merit. Of the charges having merit, approximately 60 percent were settled with no formal complaint being issued. Thus, approximately 86 percent of all charges filed were disposed of before reaching the hearing stage in the procedure."

[3114] This being in terms of subs 10(k) of the NLRA. For analysis of the settlement procedure and implications, see Hardin et al *Developing Labor Law II* 2468-2471, who provide a useful overview.

[3115] As explained by Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 10-11, the complaint must be factually related to the allegations of the underlying charge; when a charge reiterates mere "boilerplate" or general allegations of an unfair labor practice, it has been held that no complaint may properly be issued.

[3116] Twomey *Labor & Employment* 65. Twomey *Labor & Employment* 67 explains that in instances where, following the initial investigation, the regional director opts not to issue a complaint, "the charging

the form of a public hearing before an administrative law judge ("ALJ"),[3117] with the matter "prosecuted by an attorney from the regional [NLRB] staff, acting on behalf of the General Counsel";[3118] (iv) The finding and recommendations of the ALJ is hereafter served on the involved parties and then forwarded to the Board.[3119] (v) The respective parties have 28 days within which to file "a statement of exceptions" against the finding of the ALJ[3120] failing which "the judge's recommended order takes the full effect of an order by the Board";[3121] and, finally, (vi) Upon review of the transferred case, the Board duly issues a decision and an order".[3122]

With regard to the nature of the orders that can be issued by the NLRB under section 10 (ULPs), Hardin et al explain that "two basic types of remedies" are envisioned that "the Board may itself grant or obtain in the courts", namely provisional

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party may appeal to the General Counsel's Office of Appeals in Washington, D.C., where recommendations are made to the General Counsel, who has final authority over the issuance of complaints." As such, Twomey *Labor & Employment* 67 affirms that should the General Counsel approve of the general director's decision in *not* issuing a complaint, no further appeal is possible – with the alternative seeing the original decision being reversed, and the complaint being issued. Importantly, regarding the aforementioned General Counsel's authority, the effect thereof sees it providing "a legal basis, from time to time, for an activist role in presenting novel legal theories to the Board for adjudication" – Twomey *Labor & Employment* 67.

[3117] This being in terms of subs 10(b) of the NLRA.

[3118] Twomey *Labor & Employment* 65. Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 11 describes this stage of the process as follows:

> "It is at this stage that the function of the General Counsel and regional offices ceases being investigatory and becomes prosecutory. The charging party need not enter an appearance, but it may do so and is entitled to call, examine and cross-examine witnesses as well as to introduce documentary evidence. The administrative law judge presides at the hearing, and makes rulings on motions and questions of evidence."

[3119] As per subs 10(c) of the NLRA – Twomey *Labor & Employment* 65.

[3120] As per subs 10(c) of the NLRA. Says Cihon & Castagnera *Employment & Labor* 356 regarding this, in effect, "appeal" to the Board: "Normally, a three-member panel of the Board handles any single case at this stage. (In 40 percent of all the "appeals," the Board approves the ALJ's report in its entirety.)". See further Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 12, who state that the Board "is free to disagree completely with the inferences drawn and the decision rendered by the administrative law judge, but will commonly adopt the judge's findings, particularly on matters turning upon the credibility of the witnesses."

[3121] Twomey *Labor & Employment* 65 – still as per subs 10(c) of the NLRA. As stated further by Twomey *Labor & Employment* 65-66, what amounts to an appeal against the aforementioned findings by the ALJ – if applicable – is initiated through the filing by the respective party of "a brief to support their exceptions and request oral argument before the Board".

[3122] Twomey *Labor & Employment* 66 – again, as per subs 10(c) of the NLRA.

remedies[3123] and final remedies.[3124] The provisional remedies provide for injunctions (typically against employers)[3125] and are designed to "fill the considerable time gap between the filing of a complaint by the Board and issuance of its final decision – in those cases where considerable harm may occur in the interim".[3126] Temporary restraining orders are also available – also in terms of subsection 10(j)[3127] – until such time as the final order is issued by the Board.[3128]

Final orders, in turn, stem from the provisions of subsection 10(c) of the NLRA, which sees the Board empowered to "issue an order requiring a person who has committed an unfair labor practice 'to *cease and desist* from such unfair labor practice, and to take such *affirmative action* including reinstatement of employees with or without back pay, as will effectuate the policies of this Act'".[3129] While final orders would in most instances be directed against employers, unions in violation of subsection 8(b) (the union ULPs) could also see orders issued against them which could include "both cease-and-desist orders and orders for affirmative remedial action".[3130] Hardin et al provide a useful overview of the various orders made by the

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[3123] These being in terms of subss 10(e), (f), (j) and (l) – Hardin et al *Developing Labor Law II* 2497-2498.

[3124] These being in terms of subss 10(a), (c) and (d) – Hardin et al *Developing Labor Law II* 2498.

[3125] Says Hardin et al *Developing Labor Law II* 2505 in this regard: "Most, but not all, Section 10(j) proceedings have been filed against employers. Most situations involving injunctions against unions are handled under Section 10(l)". Regarding the latter, Hardin et al *Developing Labor Law II* 2508 explain that "injunctive relief against unions is normally sought" in terms of subs 10(l), since the 10(l) commences with reference back to specific subsections under subs 8(b), which relates to UFLs by unions or their agents. The subsections in question are subss 8(b)(4)(A), (B) or (C), or subs 8(b)(7)(8)(e). In providing examples, Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 2508-2509 state:

> "[U]nions have been enjoined from threatening nonstrikers, threatening and engaging in picket line violence, blocking plant ingress and egress, and engaging in surveillance of nonstrikers; using threats or a concerted refusal to work to attain preferential hiring of union members; striking for contract modification without giving proper notice under Section 8(d) of the Act; striking over nonmandatory subjects of bargaining, and refusing to bargain in a multi-employer association unit" [footnotes omitted].

[3126] Hardin et al *Developing Labor Law II* 2500 – this being in terms of subs 10(j) of the NLRA. See further Hardin et al *Developing Labor Law II* 2500-2504 for an overview of the procedures surrounding the injunctions so used.

[3127] 2504.

[3128] 2509.

[3129] 2516, quoting from subs 10(c) of the NLRA, [their emphasis]. The authors affirm further that the Board's enforcement powers is "thus two-pronged: both *prohibitory* (cease-and-desist orders) and *mandatory* (remedial action orders)" – Hardin et al *Developing Labor Law II* 2516 [their emphasis].

[3130] 2552-2553.

NLRB in response to subsection 8(b) violations,[3131] which focuses on violations of subsections 8(b)(1)(A) and (B),[3132] 8(b)(2),[3133] 8(b)(3),[3134] 8(b)(4),[3135] 8(b)(5),[3136]

[3131] 2553-2567

[3132] This pertains to the union either restraining or coercing a employee in the exercising their s 7 NLRA rights – and usually sees the NLRB issue either cease-and-desist orders (in instances involving, for instance, physical force or violence for the purposes of intimidation), or affirmative relief (where a union is, for instance, ordered to repay a improperly imposed fine on a union member, or restore union membership for an improperly expelled member). See Hardin et al *Developing Labor Law II* 2553-2554. Of interest, is that the remedy of the aforementioned cease-and-desist, includes the requirement that the union "posts a notice" of its having been ordered to desist its actions, in the affected workplace [Hardin et al *Developing Labor Law II* 2553].

[3133] This pertains to a union either causing, or attempting to cause, an employer to discriminate against an employee in subsequent violation of subs 8(a)(3), or against an employee on the basis of the latter having their membership of a union improperly denied or terminated. As is to be expected, this too sees a cease-and-desist order (in instances of the attempted causing of discrimination), but can include, "where both the union and employer are charged, the usual remedy [of] an order holding the union and employer jointly and severally liable for back pay, requiring reinstatement, and directing the respondents to cease and desist from their misconduct" – in instances where actual discrimination pertaining to the employee was present, as per Hardin et al *Developing Labor Law II* 2555-2556. Alternatively, the union can (where appropriate) again see an affirmative order against them, to the extent of, *inter alia*, "mak[ing] the employee whole for all losses of wages and benefits until the employee is reinstated or obtains substantially equivalent employment" [as per Hardin et al *Developing Labor Law II* 2557]. Furthermore, as in the earlier cease-and-desist example, here too, sees the union being required to "post a notice of compliance" [Hardin et al *Developing Labor Law II* 2555-2556].

[3134] This pertains to a union, which is the duly assigned representative of the employees within the applicable bargaining unit, that refuses to bargain collectively (in good faith) with an employer. In such cases, the NLRB will typically order the union to "cease and desist from such unlawful conduct and affirmately to bargain", and, furthermore, "[w]here a union unlawfully refuses to execute an agreed-upon [collective bargaining] contract, the Board will order it to do so" – Hardin et al *Developing Labor Law II* 2562.

[3135] This pertains to secondary boycott activities, where the union in question is seeking to compel the employees of employer X (or employer X directly), to, *inter alia*, refuse to use, manufacture, process, transport or otherwise handle or work on any goods and the like, of employer Y – in order to so bring pressure to bear on the latter, for the purposes of achieving the envisaged bargaining (or related) outcomes. In such instances, violations "usually are first remedied temporarily by use of the mandatory injunction procedures of Section 10(l)", whilst the "Board's final determination in such cases normally includes a cease-and-desist order and a requirement to post notices" – Hardin et al *Developing Labor Law II* 2563. The authors state further that "[a] proclivity to violate the secondary boycott provisions of the Act may result in an order not only to post the standard Board notice but also to publish, at the union's expense, such notice in a newspaper of general circulation in the geographical area where the union is located" [Hardin et al *Developing Labor Law II* 2564]. Of significance is the fact that whilst any damages suffered by an employer as a result of secondary boycott actions is *not* recoverable in a subs 8(b)(4)(B) ULP, same would be in a s 303 proceedings – Hardin et al *Developing Labor Law II* 2564.

[3136] This pertains to the charging of excessive union membership fees to prospective members – and would see the union being ordered to return such to the member(s) concerned [Hardin et al *Developing Labor Law II* 2565].

8(b)(6),[3137] 8(b)(7),[3138] and finally, subsection 8(e) of the NLRA.[3139]

Hardin et al also list the so-called "fair representation cases" in their discussion of the different examples of orders implemented by the NLRB.[3140] The authors state as follows:

> "In addition to the judicial reliefs available to aggrieved employees through a civil action when a union breaches its duty of fair representation, relief is also available through the Board's processes. The cases involving such breaches arise from myriad fact patterns. Because the Board's orders are designed to remedy the particular wrong calling for redress, the orders in these cases are necessarily varied."[3141]

The DFR, and its complexities involving the concurrent jurisdiction of the federal and state courts, as well as the NLRB, are discussed in more detail at § 9 4 3 below. The final issue of interest in relation to nature of the orders made by NLRB is that of "special remedial problems involving unions", which sees Hardin et al discuss "flagrant violations" by unions.[3142] The example used by the authors (detailed in the *Teamsters Local 705* decision)[3143] is where "a union engaged in the widespread practice of coercing employers to sign contracts covering their employees and without any bargaining with the employers", which, once done, saw the "union then coerc[e] the employers to pay initiation fees and dues on behalf of their employees".[3144] Hardin et

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[3137] This pertains to causing or attempting to cause the payment by an employer, to the union, "in the nature of an exaction for services which are not performed or not to be performed" – with the expected recourse being the union reimbursing the employer [Hardin et al *Developing Labor Law II* 2565].

[3138] This pertains to picketing in order to "forc[e] or requir[e] an employer to recognize or bargain" with a union. Hereto, according to Hardin et al *Developing Labor Law II* 2565, sees same being managed in terms of the "mandatory injunction provisions of section 10(l), pending final determination by the Board". In terms hereof, "if a Section 8(b)(7)(A), (B), or (C) complaint is substantiated, the Board's order is to cease and desist and post an appropriate notice" [Hardin et al *Developing Labor Law II* 2565-2566].

[3139] This pertains to the so-called "hot-cargo" provisions, where an employer and union agree to refrain from "handling, using, selling, transporting or otherwise dealing in any products of any other employer" – where the latter has been identified as being anti-union, or (typically) is engaged in industrial action involving an associated union. As explained by Hardin et al *Developing Labor Law II* 2566, the union will be "enjoined from giving effect to such clause in an agreement", or will see a cease-and-desist order "restraining both parties from maintaining or enforcing the offensive clause and from entering into future hot-cargo agreements".

[3140] Hardin et al *Developing Labor Law II* 2560-2562.

[3141] 2560, [footnotes omitted].

[3142] 2567.

[3143] *Teamsters Local 705 (Gasoline Retailers Ass'n)* 210 NLRB 210, 86 LRRM 1011 (1974).

[3144] Hardin et al *Developing Labor Law II* 2567-2568.

al point out that "where the union's misconduct is particularly widespread and egregious, the Board will fashion extraordinary remedies to redress the [extraordinary] violations".[3145]

Once issued, subsequent enforcement of the order can only be done through a judgment being handed down by the appropriate Federal Court of Appeals.[3146] A ruling by the NLRB – in and of itself – is not enforceable through any mechanism that falls in the powers of the NLRB[3147] and remains dependent on the Appeals Court.[3148] In the event that a party to the order is aggrieved by the outcome, their right of recourse (by means of review – discussed below) lies to the same Court of Appeals.[3149] Finally, any appeal from the decision of the Court of Appeals (also by review) by either the Board itself, or the party to the original complaint, lies to the Supreme Court.[3150] Any non-compliance with these court orders may result in a civil or criminal contempt of court finding (or both).[3151]

[3145] 2567. The redress implemented by the NLRB, involved "revoking the collective bargaining relationships, voided the contracts, and required that any new relationship with the named employer be based on Board certification" – coupled with reimbursing the employer – *and* ordering the union to cover any costs (for a period of 30 days) that might accrue towards to the employees (in terms of health and welfare coverage) as a result of the underlying contracts being terminated [Hardin et al *Developing Labor Law II* 2568].

[3146] This in terms of subs 10(e) of the NLRA, which also empowers the courts of appeals to issue an "appropriate temporary relief or restraining order".

[3147] Cihon & Castagnera *Employment & Labor* 356 simply state that "[o]rders of the Board are not self-enforcing". Hardin et al *Developing Labor Law II* 2569-2570 in turn affirm that "an order by the [NLRB] does not have the force of law" – and that if "the party or parties against whom a Board order has been issued refuses to obey, the Board has no authority to compel compliance or punish noncompliance."

[3148] Twomey *Labor & Employment* 67. This is per subs 10(e)-(f) of the NLRA – with the former also making provision, in the event that the courts of appeals are "in vacation", for the NLRB to approach the relevant district (federal) courts instead. Says Hardin et al *Developing Labor Law II* 2570 in this regard, significantly, that until such time that order is subsequently enforced by the applicable appeals court, "the respondent does not incur any penalty for continued disobedience" of the original NLRB order.

[3149] Twomey *Labor & Employment* 67 – as per subss 10(e)-(f) of the NLRA.

[3150] Twomey *Labor & Employment* 67 – "upon writ of certiorari or certification", as per subs 10(e) of the NLRA. Regarding the likelihood of cases reaching the Supreme Court in this manner, Cihon & Castagnera *Employment & Labor* 356 state: "Any party to the case decided by the federal circuit court of appeals may petition the US Supreme Court to grant certiorari to review the appellate court's decision. The Supreme Court generally restricts its review to cases in which a novel legal issue is raised or in which there is a conflict among the courts of appeal. (Only a minuscule percentage of labor cases reach this final step of the procedure.)"

[3151] Twomey *Labor & Employment* 67.

9 3 4 1 5 The review of NLRB decisions

At first instance, as explained by Gorman and Finkin:

> "Judicial review may also be sought by 'any person aggrieved by a final order of the Board,' as provided in section 10 (f), and this will usually be the charged party or respondent which is the object of a Board order; not infrequently, the charging party, which has been denied some requested relief before the Board, will seek review in order to have the court modify and expand the Board's order. This is the only manner in which the statute explicitly contemplates judicial review of a Board order – through an action to enforce or set aside a 'final order' of the Board in an unfair labor practice case".[3152]

Note that in contrast, in almost all instances of a decision made by the Board in respect of representation cases (involving as they often do, election results) are not, strictly speaking, "final orders".[3153] As such, unlike orders in unfair labour practice cases, "they cannot be directly reviewed by a court".[3154]

Once the review process is initiated,[3155] a distinction must be made between a

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[3152] Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 14.

[3153] 14. Therefore, by way of summary, Hardin et al *Developing Labor Law II* 2570-2571 state as follows: "Final orders are entered only in unfair practice cases under Section 10(c) after the issuance of a complaint, a hearing before an ALJ, and a decision by the Board. Decisions and directions of elections in representation cases under Section 9(c) are not final orders under Sections 10(e) and (f), and review of issues in representation proceedings may only be obtained incident to review of an order entered in an unfair labor practice proceedings. As a general rule, US district courts are without jurisdiction to entertain suits to review Board action in representation or unfair labor practice cases" [footnotes omitted].

[3154] Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 14; Hardin et al *Developing Labor Law II* 2496. However, there is an important qualification to this point. Gorman & Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 14 continue by explaining as follows:

> "These representation decisions may be reviewed only after they have been 'engrossed' as part of the record in an unfair labor practice case. Section 9(d) of the [NLRA] explicitly provides that when the unfair labor practice case is reviewed by the court of appeals, the record of the pertinent representation case becomes part of the record before the court. The object of this circuitous machinery is to deter dilatory challenges in the midst of representation cases which will delay the conduct of an election and the prompt recording of employee preferences on collective bargaining. Moreover, the outcome of the election will in many instances render moot the challenges to the Board representation findings."

[3155] It is worth mentioning, as per Hardin et al *Developing Labor Law II* 2579, that "[t]he [NLRA] does not provide any time limit within which the Board must apply for enforcement of its orders". As such, it is perhaps not surprising that the authors state further that "[t]he law is also silent as to when petitions for review must be filed" [Hardin et al *Developing Labor Law II* 2579].

review of the facts presented to the NLRB[3156] and a review of NLRB "determinations on law and policy".[3157] Hardin et al state that "[t]he judicial role in reviewing questions of law differs from that in reviewing questions of fact".[3158] In case of the review of questions of law, the Supreme Court in *Chevron v Natural Resources Defense Council*[3159] "set forth a rule of deference to administrative agencies in matters of statutory interpretation when U.S. courts of appeals are reviewing final orders of administrative agencies".[3160] Harper et al describe this as a principle that "direct[s] the courts to defer as much to an agency's interpretation of what Congress intended, at least where that intent is not clear, as to an agency's exercise of Congressionally delegated discretion or policymaking authority".[3161] Related to this is the observation of Hardin et al that "[w]hen reviewing remedies imposed by the Board [issued in terms of law and policy decisions], the courts of appeals give considerable weight to determinations of the Board".[3162]

[3156] Hardin et al at 2582 explain that "[i]n the vast majority of appellate challenges to Board orders, the point of attack is not the Board's interpretation of the statute, but, rather, the Board's findings of fact on which its conclusions of law are based".

[3157] Twomey *Labor & Employment* 67.

[3158] Hardin et al *Developing Labor Law II* 2588.

[3159] *Chevron, USA, Inc. v Natural Resources Defense Council, Inc.* 467 US 837 (1984), by the ruling of Stevens, J – see Twomey *Labor & Employment* 67.

[3160] Twomey *Labor & Employment* 67. A petition was filed to the Supreme Court to review the decision of the Environmental Protection Agency ("EPA"), in interpreting the 1977 amendments to the Clean Air Act of 1963 [Pub L 88-206, 77 Stat. 392 (1963), (42 U.S.C. § 7401 et seq.) (2017)]. Says Stevens, J in analysing the decision reached by the EPA, and its role (afforded by Congress) in making such decisions:

> "In these cases, the Administrator's interpretation represents a reasonable accommodation of manifestly competing interests and is entitled to deference: the regulatory scheme is technical and complex, the [EPA] considered the matter in a detailed and reasoned fashion, and the decision involves reconciling conflicting policies. Congress intended to accommodate both interests, but did not do so itself on the level of specificity presented by these cases. Perhaps [Congress] consciously desired the Administrator to strike the balance at this level, thinking that those with great expertise and charged with responsibility for administering the provision would be in a better position to do so … For judicial purposes, it matters not which of these things occurred. Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policy-making responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments" [footnotes omitted] – *Chevron* 865.

[3161] Harper et al *Labor Law* 110. The qualification to the aforementioned, would be that the agency's (that is, the NLRB's) interpretation of the underlying intent, "is based on a *permissible construction* of the statute" – Harper et al *Labor Law* 109, [my emphasis].

[3162] Hardin et al *Developing Labor Law II* 2591.

In the case of a review on the facts, however, the Supreme Court concluded in *Universal Camera Corp. v NLRB*[3163] that subsection 10(e) of the NLRA[3164] permits a reviewing court to set aside a NLRB decision in specific circumstances: "Congress has merely made it clear that a reviewing court is not barred from setting aside a Board decision when it cannot conscientiously find that the evidence supporting that decision is substantial, when viewed in the light that the record in its entirety furnishes, including the body of evidence opposed to the Board's view".[3165] As such, since 1951, where questions about the evidence considered by the NLRB are properly raised on review there is a duty to intervene, albeit through measured consideration of the *entirety* of the record presented in the matter.[3166] However, in the words of Hardin et al, "a reviewing court cannot set aside a Board decision based on a choice between two

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[3163] *Universal Camera Corp. v NLRB* 340 US 474 (1951) – Twomey *Labor & Employment* 67. The focus of the application stemmed from the NLRB ruling (a cease and desist against the discharge of any employee) that was subsequently ignored by Universal Camera. The Court of Appeals for the 2nd Circuit, duly issued an enforcement order, which then saw Universal Camera bring certiorari, the Supreme Court granting.

[3164] The applicable wording of subs 10(e) of the NLRA, as amended by the LMRA/LMRDA, reads as follows: "The findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive". Its original form (as per the NLRA), simply stated that "[t]he findings of the Board as to the facts, if supported by evidence, shall be conclusive" – *Camera Corp* 459.

[3165] *Camera Corp* 465. See further Hardin et al *Developing Labor Law II* 2583, who affirms that the aforementioned saw the Supreme Court lay down a "guidelin[e] for determining whether the Board's findings of fact were supported by substantial evidence".

[3166] Whilst this latter point might appear to be an obvious one (contrasted by the question of "why *wouldn't* a court consider the entirety of the record on review") – as evidenced within Frankfurter's reasoning, this is precisely what the subs 10(e) amendment sought to bring about, specifically because the practice had developed where reviewing courts did *not* consider the full record. As explained at *Camera Corp* 459:

> "But the inevitably variant applications of the standard to conflicting evidence soon brought contrariety of views and in due course bred criticism. Even though the whole record may have been canvassed in order to determine whether the evidentiary foundation of a determination by the Board was 'substantial', the phrasing of this Court's process of review readily lent itself to the notion that it was enough that the evidence supporting the Board's result was 'substantial' when considered by itself. If is fair to say that by imperceptible steps regard for the fact-finding function of the Board led to the assumption that the requirements of the Wagner Act were met when the reviewing court could find in the record evidence which, when viewed in isolation, substantiated the Board's findings".

The aforementioned was further compounded, given that the "(d)issatisfaction with the existing standards as to the scope of judicial review derives largely from dissatisfaction with the fact-finding procedures now employed by the administrative bodies" – a reference primarily to the NLRB, as opined in the Report [86 Cong. Rec. 13942–13943, reprinted as H.R.Doc. No. 986, 76th Cong., 3d Sess.] by the Attorney General's Committee of 1941, tasked with investigating the administrative review process that gave rise (eventually) to the subs 10(e) amendments – see *Camera Corp* 460 n9.

fairly conflicting views, even though the court would justifiably have made a different choice had the matter been before it de novo".[3167] Also related hereto is the basic point of departure on review that "the Board's experience in the specialized field of labor-management relations" means that the courts cannot simply discount the weight of the NLRB's initial findings.[3168]

A final point to make regarding the review process, as explained by Hardin et al, is that the NLRB "may recover its expenses, in addition to assessable costs, where a party's court challenge to the Board's order is deemed frivolous" and that "[r]emedies for frivolous claims to the Board must be for the determination of that agency in the first instance".[3169]

9 3 4 1 6 Politicisation and effect of the NLRB

The final aspects of the NLRB to consider are the continued politicisation of the Board and its impact and effect on labour policy and overall labour relations in the USA. A first point that must be made relates to the background of the various individuals that were elected to serve on the Board. Initially, the focus was on "nonpartisan, neutral adjudicators", in line with the expectations Congress that enacted the NLRA and LMRA.[3170] However, starting with President Eisenhower (1953-1961) and by 1970 onwards, "a majority of appointments to the Board have come from management and union law practices rather than nonpartisan and neutral backgrounds".[3171]

Secondly, the underlying procedures regarding the appointment of NLRB Board

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[3167] Hardin et al *Developing Labor Law II* 2583-2584, quoting from *Camera Corp* 488.

[3168] 2584.

[3169] 2598-2599. See Hardin et al *Developing Labor Law II* 2599 n176 for a list of numerous decisions, pertaining to what constitutes a "frivolous claim".

[3170] Twomey *Labor & Employment* 62.

[3171] 62. For a detailed discussion regarding the underlying background to this period, and the manner in which the appointment process was to gradually move away from the nonpartisan approach, see the comprehensive study of Flynn, in particular J Flynn "A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935-2000" (2000) 61 *Oh St LJ* 1361 1367-1398. In this regard, Flynn identifies four distinct phases of the NLRB's development, namely: (i) The "[e]ra of nonpartisanship" between 1935 to 1952 – this being the presidencies of Roosevelt and Truman [Flynn (2000) *Oh St LJ* 1367]; (ii) The proverbial "turning of the tide" following President Eisenhower's election (as the first Republican president post the promulgation of the NLRA) [Flynn (2000) *Oh St LJ* 1368]; (iii) The "[t]urning point" in 1970, which coincided with the appointment of Edward Miller as chair of the Board, by President Nixon [Flynn (2000) *Oh St LJ* 1378-1379]; and, finally, (iv) The 'Reagan Board', and its approach of the "[o]ld rules are off".

members were also to undergo changes, and by the time of President Reagan's (1981-1989) second term through President George H.W. Bush's administration (1989-1993) and onwards, the American Senate was increasingly vocal about the approval of members.[3172] Harper et al remarks in this regard:

> "Up through the late 1970s, with rare exceptions, the Senate routinely confirmed the President's nominees to the Board. Since that time, however, the Senate has quite frequently refused to act on particular nominations, and in recent years it has often refused to vote on any Board nominations until the President and Senate leaders from both parties reach agreement on a 'package' of appointments."[3173]

Not surprisingly, this subjected the NLRB to "political" criticism.[3174] Furthermore, writing in 1986, Raskin states that "[t]he only change has been in the nature of the Board's critics – sometimes management, sometimes labor, sometimes both – depending on which group felt at any given moment that its ox had been gored by the conflicting interpretations given to various sections of the law by the shifting majorities in control of the NLRB in Democratic and Republican administrations."[3175]

[3172] Twomey *Labor & Employment* 62. Twomey *Labor & Employment* 62 says further in this regard, that the intended appointments "tended to come in 'package deals,' whereby Senate power brokers, in consultation with industry and labor interest groups, insisted that the president acquiesce to some of its specific choices as the price of the Senate confirming his Board nominee(s)".

[3173] Harper et al *Labor Law* 101.

[3174] In this regard, Twomey *Labor & Employment* 62 describes the perceived "leanings" of the various Boards under US presidents in recent times, and the issues associated with appointments:

> "The Clinton Board was perceived by employer groups as providing greater protections for workers than intended by the NLRA, and the Bush II Board was perceived by union leaders and many [academics] as regularly denying or impairing the statutory rights it was charged with protecting. With the adjournment of Congress in January 2008, the Bush II Board consisted of just two members … Due to senatorial tactics, no appointments were made to the Board until March 27, 2010, when two recess appointments were made by President Barack Obama. On January 3, 2012, the Board again consisted of two members ... The nomination and appointment process continues to be dysfunctional, with too many long-term vacancies and short-term recess appointments."

[3175] AH Raskin "Elysium Lost: The Wagner Act at Fifty" (1986) 38 *Stan L Rev* 945–955 948. See further CL Fisk & DC Malamud "The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform" in ZJ Eigen (ed) *Labor and Employment Law Initiatives and Proposals Under the Obama Administration: Proceedings of the New York University 62nd Annual Conference on Labor* (2011) 37 38, who state as follows:

> "Within its range of discretionary policymaking, the Board has oscillated between the extremes with every change of controlling political party, bringing its legitimacy as expert policymaker sharply into question".

9 3 4 2 The Office of Labor-Management Standards

The earlier discussion of the "legislative regulation of unions" highlighted a host of provisions of the LMRDA where unions must file different reports with the Secretary of Labor. Related are those instances of possible direct involvement by the Secretary of Labor – also in terms of the LMRDA – in internal trade union functioning.[3176] The actual implementation of these duties have long since been delegated to specific federal bodies, the most important for the purposes of this study being the OLMS.

9 3 4 2 1 The scope and function of the OLMS

There is (relatively speaking) a dearth of academic research on the OLMS as a whole. In short, it is the "federal agency that regulates internal union affairs."[3177] More specifically, the office provides for "worker protection by administering the [LMRDA] and related laws requiring disclosure and financial reporting for labor unions and employers".[3178] To this Lund adds (over and above the annual financial reporting), "potential conflict of interest disclosure by trade union officers and employees, as well as regulating the conduct of union elections".[3179] As such, the OLMS is also responsible for monitoring the Title I-V requirements as outlined in the LMRDA[3180] and

[3176] A key example hereof, is the rights of the Secretary in terms of s 210 of the LMRDA (§ 440 U.S.C.) – as discussed above at § 8 3 3 4 2 – to bring a civil action to either act against a violation in terms of the reporting requirements, or prevent a violation of same.

[3177] MJ Hayes "It's Now Persuasion, Not Coercion: Why Current Law on Labor Protest Violates Twenty-First Century First Amendment Law" (2018) 47 *Hof L Rev* 563 564. Regarding the operational size of the OLMS staff, J Logan "Union Financial Reporting and Disclosure under the LMRDA: A Comparison of the Bush and Obama Administrations*"* in D Lewin (ed) *Advances in Industrial & Labor Relations* (2015) 29 31 confirms recent numbers as follows: Under the Bush administration, 2006 saw 327 staff, or "full time equivalent employees (FTEE)". This fell to 225 by 2013, with between 212-218 FTEE's in the "first five months of 2014", this being under the Obama administration.

[3178] DH Bradley "Major Functions of the US Department of Labor (CRS In Focus IFI0975)" (2018) *Congressional Research Service* <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=3103&context=key_workplace> (accessed 20-02-2019) 1.

[3179] J Lund "Financial Reporting and Disclosure Requirements for Trade Unions: A Comparison of UK and US Public Policy" (2009) 40 *IRJ* 122 131.

[3180] The "OLMS summary" page, on the Department of Labor's OLMS website states as follows:

> "The Office of Labor-Management Standards (OLMS) of the US Department of Labor administers and enforces most provisions of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA). The LMRDA primarily promotes union democracy and financial integrity in private sector labor unions through standards for union officer elections and union trusteeships and safeguards for union assets. Additionally, the LMRDA promotes labor union and labor-management transparency

is placed within the Department of Labor.[3181]

The Department of Labor's OLMS website itself lists the following key activities of the OLMS: (i) Public disclosure of reports;[3182] (ii) Compliance audits;[3183] (iii) Investigations;[3184] and, finally (iv) Education and compliance assistance.[3185] Regarding the powers of enforcement held by the OLMS, Lund states as follows:

> "[The] OLMS does not have any quasi-judicial authority; it is part of the Executive Branch of the US government and is responsive to direction from the Secretary of Labor as well as the President. If it seeks any criminal action against union officials, it must do so through Federal prosecutors. In short, it is neither judge nor jury, but rather only detective."[3186]

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through reporting and disclosure requirements for labor unions and their officials, employers, labor relations consultants, and surety companies" – Anonymous "OLMS Summary" (2017) Office of Labor-Management Standards (OLMS) <https://www.dol.gov/olms/about/mission_and_purpose.htm> (accessed 20-06-2018) 1.

[3181] Nelson (2000) *Geo Mason L Rev* 552; LM Kahn "Introduction to the US Department of Labor Centennial Symposium" (2014) 67 *ILRR* 563 563. For a succinct history of the Office, and the various changes it has gone through (commencing as the Bureau of Labor-Management Reports), its scope, and the various federal authorities it was placed under, see Anonymous "History of OLMS" (2011) *Office of Labor-Management Standards (OLMS)* <https://www.dol.gov/olms/history/index.htm> (accessed 20-06-2018) 1.

[3182] This being in reference to the original intention of the LMRDA, in introducing greater transparency and accountability into the area of internal union affairs. Lund (2009) *IRJ* 123 states in this regard:

> "A second policy object is that union financial reporting and disclosure requirements may serve to prevent financial mismanagement and abuses by union officials by effectively placing them in a 'goldfish bowl' by making the annual reports a public record."

Nelson (2000) *Geo Mason L Rev* 551 speaks of how the entire Title II of the LMRDA was centred around providing union members with more financial information, so as to "make informed decisions about the handling of their union's affairs" – and that officials would be less like to behave improperly "if instances of misuse were documented in reports open to the public". As such, the records and reports submitted to the OLMS are deemed to be "public information", which are accordingly "available for disclosure" at the OLMS (and its various branches) – Anonymous *OLMS Summary* 1.

[3183] This being in reference to the audits conducted by the OLMS in terms of determining union compliance with the LMRDA – Anonymous *OLMS Summary* 1.

[3184] In this regard, Anonymous *OLMS Summary* 1 states as follows:

> "OLMS staff conduct investigations to determine if violations of the LMRDA provisions have occurred. Investigations are initiated based on various sources such as complaints from union members; information developed by OLMS as a result of reviewing reports filed; information developed during an OLMS audit of a union's books and records; and information obtained from other government agencies. Investigations may involve civil matters (such as an election of union officers) or criminal matters (such as embezzlement of union funds)."

Importantly, the aforementioned also includes referrals by the OLMS to the US Attorney – in those cases where "union embezzlement violations" have been detected, for possible criminal prosecution – Anonymous *OLMS Summary* 1.

[3185] Anonymous *OLMS Summary* 1.

[3186] Lund (2009) *IRJ* 131.

The scope and function of the OLMS in mind, it is necessary to discuss the impact of the reporting obligation (and changes thereto) on trade unions in the USA.

9 3 4 2 2 The impact of the reporting obligation on organised labour

As indicated above, one of the key responsibilities of the OLMS is its collecting, overseeing and examining of the various LMRDA reports that are required from trade unions.[3187] It is this OLMS activity, in light of the public disclosure of these reports, that is of direct interest to this study.

Apart from an "initial information report",[3188] unions are expected to file their annual financial reports with the OLMS. A key document is the so-called "LM-2 form".[3189] As evidence of the impact that these reporting requirements have on organised labour in the USA, it may be mentioned that the procedural changes to the format of the LM-2 that were introduced by the Bush Administration[3190] saw widespread opposition from unions. In this regard, Logan states as follows:

> "Over the past few decades, the [OLMS] has become one of the most controversial and politicized divisions of the Department of Labor (DOL). Republic and Democratic Administrations have adopted starkly different practices concerning both the allocation of resources and the focus of regulatory

[3187] At the outset therefore, Lund (2009) *IRJ* 131 confirms that in terms of the submission of the annual financial reports, they "are signed by both the chief executive and chief financial officer of the trade union, who must certify that the information contained in this form is true and accurate; criminal penalties for false filings, misrepresentation, destruction of records and similar violations can result in a $10,000 fine or one year of imprisonment".

[3188] Anonymous *OLMS Summary* 1 – this is the so-called "LM-1 form", and in filing for the first time – the union would also be required (in terms of subs 201(a) LMRDA) to file copies of their constitution/bylaws. AL Bowker "Trust Violators in the Labor Movement: A Study of Union Embezzlements" (1998) 19 *J Lab Res* 571 572 states that "labor organizations are required to file copies of their constitutions or bylaws with the United States Department of Labor, Office of Labor Management Standards (OLMS) within 90 days after becoming subject to the LMRDA".

[3189] Anonymous *OLMS Summary* 1. Nelson (2000) *Geo Mason L Rev* 552 explains that the form is properly entitled the "Labor Organization Annual Report" form – a digital copy of which can be found here: Department of Labor: Office of Labor-Management Standards "Form LM-2 Labor Organization Annual Report" (2021) *DOL: OLMS* <https://www.dol.gov/olms/regs/compliance/GPEA_Forms/forms/Form_LM2_2021.pdf> (accessed 22-04-2018).

[3190] See the Final Rule as published by the OLMS in the Federal Register, outlining the proposed changes: Department of Labor: Office of Labor-Management Standards "29 CFR Parts 403 and 408 Labor Organization Annual Financial Reports" (09-10-2003) *68 FR 58374* <https://www.govinfo.gov/content/pkg/FR-2003-10-09/pdf/03-25487.pdf> (accessed 20-04-2018).

activities at the agency… These differences have been brought into sharp focus during the Bush II and Obama Administrations. Under the Bush Administration, funding for OLMS increased significantly, and the DOL revised union financial reporting requirements, imposing a more onerous burden on unions in the name of promoting transparency and accountability. Under the Obama Administration, in contrast, OLMS has seen its budget cut – whereas other divisions, such as the Wage and Hour Division, have seen a large increase in funding – and the DOL has reversed most of the Bush era reporting reforms".[3191]

Below, these developments are examined more closely.

9 3 4 2 3 The Bush II and Obama Administrations – differences in approach to the OLMS

9 3 4 2 3 1 The OLMS under the Bush II Administrations

Logan commences his assessment of the "significant reforms in the area of union financial reporting" by the Bush II Administration[3192] by stating as follows: "These reforms not only failed to promote greater transparency and accountability, but most likely hurt the union members they were purporting to protect".[3193] What did the reforms entail? Logan outlines the changes by chronologically considering the various revisions to the different forms – the so-called LM-2,[3194] LM-3,[3195] LM-30[3196] and T-1 forms.[3197] While all the forms were to see significant actual (or intended) real-world changes on the part of union-reporting administration, of particular consequence were the revisions to the LM-2 form. Lund and Roovers – quoting the OLMS in explanation of the intended reforms – highlight the following:

"These reforms will provide *union members*, *the public*, and the *government* the information they need to properly ensure union democracy, fiscal integrity and transparency in a manner consistent with the intent of Congress in enacting the LMRDA. The revised form LM-2 will provide detailed information about financial transactions of labor organizations in an *easily understood format*. The new reports will be *usefully organized* according to the *services and functions provided to union members* and the *members will be able to identify major receipts and disbursements for a variety of*

[3191] Logan "Union Financial Reporting" in *Advances* 30 [references omitted].
[3192] 42.
[3193] 42. Logan reasons further that "if anyone benefited from these revisions it was not union members, the public, or government, but external organizations hostile to unions on ideological grounds".
[3194] 43.
[3195] 43.
[3196] 44-45.
[3197] 44.

activities".[3198]

The new requirement accordingly compelled unions that annually were holders of union, union officials' or union employees' expenditure receipts in excess of $250,000 to file the LM-2 – with the key change made being as follows: "To identify 'major' receipts and disbursements, and to allocate disbursements among several categories provided on the form'".[3199] While there was "essentially no difference between the old [prior to the revision] and new forms",[3200] what did change was that each entry that met the requirements needed to be allocated within these new "functional activity categories".[3201] For the purposes of this study, the technical details of *what* had to be included and *how* these needed to be included in the new form are far less important than their *effect*.[3202] However, it may be mentioned that, whereas the old form LM-2 saw the "biggest single source of paper" being the "list of officer and employee payments… which required the salary, allowances, and reimbursed expenses of all officers and employees to be itemized",[3203] the new form LM-2 saw the biggest single

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[3198] J Lund & BJ Roovers "Through the Looking Glass – Does the Labor Department's New Form LM-2 Really Deliver Greater Transparency?" (2008) 33 *Lab Stud J* 309 309, [their emphasis]. A further quote by the authors from the OLMS, speaks to how "[t]oday's union members, *more than ever before*, need relevant information provided in a usual format in order to make the decisions necessary to exercise their rights as members of democratic institutions" – Lund & Roovers (2008) *Lab Stud J* 309, [their emphasis]. PB Wilson "Conquering the Enemy Within: The Case for Reform of the Landrum-Griffin Act" (2005) 26 *J Lab Res* 135 137, in turn, identifies three key problems underlying the reporting system (as it was then) that warranted the proposed changes, namely: (i) That the DOL does "not aggressively enforce compliance"; (ii) That the information collected "is not distributed to the members, is difficult to obtain independently, and is rarely audited"; and, (iii) That the data that *is* collected, is "reported in such broad categories that union members and researchers have difficulty evaluating whether a union is meeting its fiduciary requirements".

[3199] Lund & Roovers (2008) *Lab Stud J* 310, duly quoting from the Federal Register entry, announcing the proposed changes – see Department of Labor: Office of Labor-Management Standards "29 CFR Parts 403 and 408: Labor Organization Annual Financial Reports" (27-12-2002) *67 FR 79280* <https://www.govinfo.gov/content/pkg/FR-2002-12-27/pdf/02-32445.pdf> (accessed 21-02-2018) 79280.

[3200] Lund & Roovers (2008) *Lab Stud J* 312.

[3201] 315. The five categories are as follows: "representation activities; political action and lobbying; contributions, gifts, and grants; general overhead; and union administration" – Lund & Roovers (2008) *Lab Stud J* 314. See Lund & Roovers (2008) *Lab Stud J* 314 for a more detailed description of what is to be understood within each of these categories. Furthermore, Lund & Roovers (2008) *Lab Stud J* 312-315 provide a succinct overview, including a tabular comparison, of the changes introduced by the Bush Administrations' OLMS.

[3202] Wilson (2005) *J Lab Res* 138 states similarly as follows: "It is beyond the scope of this article to examine the 75 itemized questions in the LM- 2 form and its 15 attached schedules."

[3203] Lund & Roovers (2008) *Lab Stud J* 322.

component of each union report fall in the itemised description of time and receipts allocated to the functional categories.[3204]

The major change, therefore, resulted in a union "now [having to] decide how each expense that would have fallen into these old categories must now be allocated into functional activity categories",[3205] ostensibly so that union members (and other interested parties, given the public disclosure element) would not only be able to see how much of their membership dues was being spent where, but also so that they could now see *how much time* was being allocated to what activity by their union and its officials.

While the LM-2 changes were significant, brief mention must also be made of the changes made by the Bush Administration to the LM-30 form, officially entitled the "Labor Organization Officer and Employee Report".[3206] The original intention behind the form, as explained by Nelson, was guided by subsection 202(a) of the LMRDA, which "requires officers and union employees to annually disclose financial interests that he or his family has that may be construed as a conflict of interest".[3207] The

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[3204] By way of example, in terms of the old form, Schedule 9 "required listing *all* new, past, and continuing offices who held office at any time during the reporting period, gross salaries, allowances, and reimbursed expenses" – Lund & Roovers (2008) *Lab Stud J* 313, [their emphasis]. The old Schedule 10, required same of union employees (earning more than $10,000 per year). In turn, the new form – care of Schedule 11 and 12, respectively expected the listing of same, but with the added requirement that the "percentage of time spent by each officer in all five functional activity categories" now having to be categorised as well – Lund & Roovers (2008) *Lab Stud J* 313.

[3205] DA Lyons "Recent Regulation: Dept. of Labor Increases Union Financial Reporting Requirements" (2004) 117 *Harv L Rev* 1734 1736 explains the changes as follows:

> "First, unions now must itemize within each category all 'major' disbursements, defined as all expenditures greater than $5000. Second, to reflect in-kind contributions, the form eliminates the separate categories for disbursements to union officers and employees; now, unions must estimate how each officer or employee divides his time among various activities and allocate that employee's salary pro rata across those categories … Smaller unions with less than $250,000 in annual receipts are exempt from most of these changes" [footnotes omitted].

[3206] Nelson (2000) *Geo Mason L Rev* 552. A digital copy of the LM-30 form can be found here: Department of Labor: Office of Labor-Management Standards "Form LM-30 Labor Organization Officer and Employee Report" (2021) *DOL: OLMS* <https://www.dol.gov/olms/regs/compliance/GPEA_Forms/forms/Form_LM30_2021.pdf> (accessed 22-04-2018).

[3207] Nelson (2000) *Geo Mason L Rev* 522. The author cites further from *US v McCarthy* 422 F.2d 160 (2d Cir. 1970) 163 (as per Judd DJ), where the court states as follows:

> "The breadth of the reporting requirements [of s 202] reflects a Congressional intention to require disclosure both of acts which were illegal and of those which were only questionable. By requiring the reporting of all facts which might bear on a union official's loyalty, and by making the reports available to the public ([s 205]), Congress intended to provide union members with information to

changes instituted by the Bush OLMS significantly expanded on the above, to include a reporting obligation on the part of union shop stewards and safety committee members, "thereby greatly expanding the number of rank-and-file union members required to report personal financial information".[3208] The form was also significantly more complex, spanning nine pages – with a further "83 FAQs to explain the new form".[3209]

In short therefore, the OLMS under Bush II saw a dramatic increase in both the complexity and scope of reporting requirements on the part of trade unions. This raises the question as to the effect of this increased obligation.

9 3 4 2 3 2 The effect of the increased reporting obligations on transparency

A useful point of departure in examining the changes brought about by the Bush II OLMS is the reaction of organised labour in the USA. Lund and Roovers point to responses from prominent unions and their officialdom, where one example saw the AFL-CIO report their completed (new) 2005 LM-2 form to be "850 pages compared with the 100 pages using the old form".[3210] Related were reactions pointing to the predicted increase in "outside accounting fees", given how the onerous reporting had become and that it necessitated many unions to use external expertise, leading to "much higher internal costs, largely associated with administrative time breaking expenses into functional activity categories".[3211] Apart from the above, one of the key areas of complaint was that the additional resources required to administer their

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help them in intelligent election procedures" – Nelson (2000) *Geo Mason L Rev* 552.

[3208] Logan "Union Financial Reporting" in *Advances* 44.

[3209] 45. For an example of the form, and the related explanatory notes/instructions – see respectively Department of Labor: Office of Labor-Management Standards "29 CFR Part 404 Labor Organization Officer and Employee Report, Form LM-30; Final Rule" (02-07-2007) *72 FR 36106* <https://www.govinfo.gov/content/pkg/FR-2007-07-02/pdf/07-3155.pdf> (accessed 23-03-2018) 36160-36168 and Department of Labor: Office of Labor-Management Standards *LM-30 Final* 36169-36186. In providing an example of the information that was to be required, Logan "Union Financial Reporting" in *Advances* 44-45 states as follows:

> "[U]nion members [were] to report on personal financial information, such as loans at commercial rates from a union-affiliated credit union or mortgages and other personal loans at commercial rates from any bank that conducted business with the union or a union benefit fund or substantial business with any unionized employer. The potential filer had to inquire of any lender how much business it did with unionized employers and keep records in order to avoid criminal prosecution for willful failure to file".

[3210] Lund & Roovers (2008) *Lab Stud J* 325.

[3211] 325.

reporting, meant that less time could be focused on the core duties of the union.[3212] Brief mention should also be made of organised labour's attempts to challenge the revisions through the courts.[3213]

The Bush II OLMS therefore saw a far greater focus on the scope, detail and complexity of union reporting obligations. It would not be inappropriate to state that never before was as much data generated by American organised labour itself as during the 2000s.[3214] The question, however, was whether this brought about increased transparency, and by association, increased union accountability?

The simple answer is "no". By all measures, despite the wealth of detailed information the system generated, there was very little (if any) noticeable difference in transparency. Lund and Roovers state as follows:

> "[T]he only reporting labor organizations to file more than an average of one itemization sheet are those larger unions, and here, the number of itemization sheets might be measured in pounds of paper rather than number of sheets. Is it reasonable to expect the average union member will download and print or even peruse the hundreds or thousands of pages of itemization sheets? Construed in the most favorable light, the gains in transparency have been only for the larger unions with very little change for smaller unions, particularly the unions with less than $2.5 million in annual receipts, which constitute 80 percent of the filers in this year.[3215] Transparency is not just about the

[3212] In referencing the then AFL-CIO president, Lund & Roovers affirm this point in his stating that the new revision "will burden over 5,000 union organizations – only 70 of which are large, international unions – with extensive new reporting requirements requiring filling out huge numbers of forms, thus leaving less time for contract negotiations, grievance handling, organizing, and other core union activities" – Lund & Roovers (2008) *Lab Stud J* 326.

[3213] This pertains to the "legal challenge filed by the AFL-CIO… which resulted in a temporary stay, [before] the US Court of Appeals later upheld almost all of the DOL's proposed changes in the LM-2 form" – as such, it became effective on 1 July 2004 – as per Lund (2009) *IRJ* 126. The legal challenge being referenced here, is that of *American Federation of Labor & Congress of Industrial Organizations v Chao* 409 F.3d 377 (D.C. Cir. 2005), where Elaine Chao's (the then Secretary of Labor) decision to change the LM-2 requirements was held (by Rogers CJ) to be "a reasonable application of her authority" under the LMRDA (specifically in terms of subs 201(b) – read with s 208) – *AFL-CIO v Chao* 378, 386. With this being said, the Court of Appeals did, however, side with the AFL-CIO in terms of the DOL's attempts at introducing a new form, that of T-1, which would impose a "general trust reporting requirement" on the part of unions – see *AFL-CIO v Chao* 378, 387. For more details on the proposed T-1 changes, see Logan "Union Financial Reporting" in *Advances* 44.

[3214] For a detailed analysis of the reporting done in 2005, being the first year that the new forms following the revision were submitted, see Lund & Roovers (2008) *Lab Stud J* 315-324, which breaks down the analysis of the various Schedules, and the associated information (and format of such) provided by America unions.

[3215] Lyons (2004) *Harv L Rev* 1736 makes the point that "the more expansive requirements affect only the largest twenty percent of American unions; nonetheless, this largest twenty percent includes almost ninety-three percent of total dollars received annually by organized labor".

availability of information; it is about usability as well."[3216]

Logan convincingly argues that even if one of the core motivations underlying the revisions was to allow the OLMS to better detect financial impropriety on the part of unions, "it is highly improbable that significant cases of embezzlement would be exposed because of more detailed, complex, and sometimes trivial information on the revised LM-2s".[3217] Lund, in turn, reasons that compelling public disclosure of all this information in an effort to prevent corrupt financial activities requires "three sequential steps [to] occur":[3218] Firstly, the member must request the information. Secondly, the member must review the information – which assumes that they can properly understand it – and if they then find something untoward, they must formulate some plan to do something about it. Finally, they must then either lodge a complaint with the OLMS, or "go to the union meeting and raise the issue, run for office or support candidates who support their view".[3219] Lund adds that all of this is implicit on the notion that "somehow the reporting form itself will actually disclose financial wrongdoing."[3220]

Furthermore, the particular nature of trade union structure in the USA sees the so-called international/national or parent-union with far more to lose in terms of being labelled corrupt than does the local branch union. At the same time, it increasingly is

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[3216] Lund & Roovers (2008) *Lab Stud J* 327. The authors state further, given the open-ended manner that the some of the functional activity categories are described, that different unions would report the same type of time/money expenditure under different categories. Thus, the "resulting information is highly subjective and very questionable in terms of utility" – Lund & Roovers (2008) *Lab Stud J* 327.

[3217] Logan "Union Financial Reporting" in *Advances* 45-46. The author states further in this regard:

"Union officials guilty of criminal misconduct are unlikely to self-report their own embezzlement, and while some union members may believe that they could uncover cases of corruption with more detailed and complex disclosure, this seems unlikely. Significant cases of embezzlement are likely to be highly complex cases that would not be uncovered by these kinds of reporting revisions" – Logan "Union Financial Reporting" in *Advances* 46.

[3218] Lund (2009) *IRJ* 136.

[3219] 136.

[3220] 136. The author offers a further example to this, as follows:

"Horowitz argued that convicted International Union President Jake West was counselled by his lawyer how to 'hide' questionable personal credit-card expenses on the 'old' LM-2 ... Yet, under the 'new' LM-2, if West used a personal (not a union) credit card and had the expenses reimbursed to him, those expenses would have been lumped together in Schedule 11 and been literally invisible to any outsider, no matter how skilled" – Lund (2009) *IRJ* 136, citing Horowitz – CF Horowitz "Cooking the Crooks: Unions Must Disclose Financial Deals Beginning Next Month" (August 2005) <https://www.heartland.org/_template-assets/documents/publications/19930.pdf> (accessed 20-03-2018) 2.

in the domain of local branches (as opposed to the parent-union) where matters go awry in terms of embezzlement/corruption.[3221] As explained by Logan – it is frequently information provided by the parent-union that results in the OLMS being able to institute action (or refer criminal conduct) against the local branch and its officials.[3222]

This is however not to suggest that the changes made were universally regarded as unwelcome. Writing shortly after their introduction, Lyons argues that the LM-2 form had effectively remained unchanged since the promulgation of the LMRDA – this despite unions in America having "changed dramatically"[3223] – and that the LM-2 form "had failed to adapt to this increased complexity".[3224] As a result, the argument is made that "[u]nions took advantage of the laxity of these reporting requirements to hide corruption, as accountants simply shifted disbursements from line items that required supporting schedules to those that did not".[3225] Wilson adds to this that some cases of union corruption might well have been picked up sooner had the changed reporting requirements under the Bush II OLMS been active at an earlier stage.[3226]

[3221] Logan "Union Financial Reporting" in *Advances* 46.

[3222] 46. Logan makes the further point at 46:

> "Many national unions now have detailed codes of ethics that cover not only the conduct of union officials but also financial misdeeds, and extensive internal controls to prevent and detect embezzlement. These kinds of controls, not more detailed and complex LM-2 forms, are most likely to deter and expose cases of fraud and theft".

[3223] Lyons (2004) *Harv L Rev* 1735. The author states further, as evidence of the change in labour associations, that "[m]odern unions often manage member benefit plans, operate revenue-producing subsidiaries, and participate in political campaigning".

[3224] 1735. Lyons adds to this that the "form remained largely unchanged since the 1950s, consisting primarily of a statement of the union's assets and liabilities and a one-page summary of its receipts and disbursements", whilst "[d]isbursements were broken into a handful of broad categories, such as 'Professional Fees' and 'Contributions, Gifts, and Grants'".

[3225] 1735.

[3226] Wilson (2005) *J Lab Res* 137 states in this regard:

> "[O]n August 22, 2002, a partner at Thomas Havey LLP, an accounting firm 'proud of its long and rewarding association with the organized labor movement,' entered a guilty plea admitting to helping Iron Workers union officials in a $1.5 million fraud. Most recently, in October of 2002 several officials from the Washington (D.C.) Teachers' Union (WTU) resigned amid allegations that they embezzled millions in dues for personal use. The FBI alleges that three former officers (president Barbara Bullock, her assistant Gwendolyn M. Hemphill, and treasurer James O. Baxter II), spent more than $2 million in union money on luxury items such as furs, art, jewelry, silver, and custom-made clothes. A subsequent audit by the American Federation of Teachers ("AFT") found that the amount misappropriated is at least $5 million, and likely to be much more" [footnotes omitted].

Regarding the latter WTU incident, Wilson (2005) *J Lab Res* 149 states further:

> "Under the proposed regulations unions are also required to specifically list disbursements over a certain dollar threshold. If the new reporting regime had covered the WTU it is likely that many questionable transactions would have been caught years earlier. For example, many of the

Furthermore, the lack of disclosure with regard to "union-controlled trusts" provided a loophole "that allowed unions to hide questionable or risky investments by using Enron-like 'off the books' accounting procedures."[3227] Regarding the reference to Enron, Lyons commences his discussion of the proposed changes as follows:

> "If the 1980s marked a period of excess and greed, the present decade is rapidly becoming an era of accountability. The Enron scandal and those that followed shook the public's confidence in corporate management, driving Washington to enhance disclosure requirements and expand regulation of independent auditors through the Sarbanes-Oxley Act of 2002. The Department of Labor has seized on this momentum to bring a similarly strict level of accountability to labor unions, whose members historically have had little information about how management spends their dues. Since 1998, the Department's [OLMS] has averaged nearly eleven convictions each month for union corruption,[3228] reflecting an exceptionally high level of mismanagement due in part to lax financial reporting requirements that allow union officials to shield questionable expenses from public scrutiny … This change commendably improves transparency in union reporting, benefiting dues payers and the public alike"[3229]

However, the (justifiable, it is submitted) point remains that "[p]roviding rank-and-file members with more detailed information in a more complex form is not the same as promoting greater transparency and accountability".[3230] Simply having access to more detailed financial reports does not mean that anything meaningful can be done

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> questionable transactions occurred at local retailers (including a furrier, Nordstrom's, Gucci, Tiffany, and local art dealers). Under the new regulations these vendors would have shown up on the WTU's LM-2 form. WTU members would surely have questioned big expenditures on the union credit cards at up-scale retail clothing and art stores, if only they knew."

One of the several cases involving Bullock and the WTU, is that of *American Federation of Teachers, AFL-CIO v Bullock* 539 F.Supp.2d 161 (2008) – see 164-165 for a list of the other criminal cases brought against the various role-players. The instant case also saw the Independence Federal Savings Bank being cited as a party, for its failure to pick-up the fraudulent activities (later matters considered the bank's liability separately).

[3227] Lyons (2004) *Harv L Rev* 1736.

[3228] Reference must however be made to the caution issued by Lund, who states as follows in regards to the enforcement data issued by the OLMS:

> "This enforcement data must be viewed cautiously for a number of reasons. [It has been] noted that OLMS 'double counts' indictments and convictions of the same individual union officials (in other words, an official may be indicted by a grand jury and then convicted, often by plea agreement, and this will be 'counted' as both an indictment and conviction). Next, a number of the indictments and convictions shown are not only for union officials, but also for accountants, lawyers, employers, investment advisers and spouses (who forge their union official spouse's signature on a union cheque)" – Lund (2009) *IRJ* 130-131, [references omitted].

[3229] Lyons (2004) *Harv L Rev* 1734, [footnotes omitted].

[3230] Logan "Union Financial Reporting" in *Advances* 46.

with them.[3231]

But these remarks are connected to a further notable point regarding the financial reporting obligations on trade unions in the USA (as discussed at § 9 3 3 2 above in the "direct regulation of trade unions" section) – there is no statutory requirement for a trade union's reports to be externally, and independently, audited.[3232] There is also no obligation in terms of the LMRDA on trade unions to "provide an annual financial report to its members, audited or otherwise, nor does it require that this report be presented to an annual meeting of members".[3233] As referred to earlier, the relevant wording of subsection 201(c) of the LMRDA reads as follows:

> "Every labor organization required to submit a report under this title shall *make available the information required to be contained in such report* to all of its members, and every such labor organization and its officers shall be under a duty … to permit such member for *just cause to examine any books, records, and accounts necessary to verify such report*."[3234]

What is provided for by the Act, is the making available of the information underlying the report, or, alternatively, the examination of whatever information is

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[3231] In this regard, Logan "Union Financial Reporting" in *Advances* 46-47 states as follows:

"Few union members would have had time to read these lengthy reports and make sense of them. Fewer still would understand what is important, or know how to act upon on this detailed information."

[3232] Lyons (2004) *Harv L Rev* 1736, 1739 – with due reference to the Final Rule published by the OLMS, in explanation of the revisions to the LM-2 form: Department of Labor: Office of Labor-Management Standards *29 CFR Parts 403 and 408 Labor Organization Annual Financial Reports* 58379. With this being said, subs 201(a)(5)(E) of the LMRDA, does state as follows regarding what must be provided within the "detailed statements" that is to be provided by a union to the Secretary of Labor/OLMS upon its initial reporting: "audit of financial transactions of the labor organization". At risk of stating the obvious, this applies to the provision of documentation at the first instance of a new association issuing its reports – and the wording of the provision would does not explicitly require an *external* audit. Added to this, in terms of subs 201(b), no mention is made of an audit or auditors, anywhere within the provision that regulates the annual financial reporting to be done by a union.

[3233] Lund (2009) *IRJ* 132. The author does make the point that "[m]any individual union constitutions do require this, but it is not a matter of law" – Lund (2009) *IRJ* 132. It must be pointed out that, as explained by Wilson (2005) *J Lab Res* 145-146, part of the negotiations that saw the promulgation of the LMRDA, resulted in the repeal of subs 9(f) of the NLRA, as amended by the LMRA in 1947. The subsection "required unions to file (and distribute to members) copies of their constitution, bylaws, and most recent financial statement before they were permitted to litigate their grievances before the NLRB" – Wilson (2005) *J Lab Res* 145. Wilson, in arguing for various changes to be made to the reporting requirements of the LMRDA (as it was then), makes the interesting point that – were the subsection to be restored, an additional element of compliance would be introduced by employers – since it would be in the latter's interest to verify whether or not there was compliance on the part of the union, who would otherwise lose recourse before the NLRB [Wilson (2005) *J Lab Res* 146].

[3234] Subsection 201(c) of the LMRDA, [my emphasis].

necessary in order to verify the report. In short, the report *itself* need not be made available in terms of the LMRDA.

Of course, section 205 of the LMRDA does regulate how the reports are to be made public information, which means union members can therefore obtain access to the report via the OLMS. Regardless, in consideration of the objectives of improved transparency as a by-product of increased reporting obligations, a glaring omission remains that of the involvement of external auditors in what is, essentially, a system based on "self-reporting".[3235]

What has been demonstrated so far is that increasing the detail and complexity of reporting obligations do not *in and of itself* allow for increased transparency and accountability – at least not in instances where it would solely be dependent on a union member to do something about it.[3236] It can be justifiably argued that increasing reporting detail might assist a centralised regulatory body, such as the OLMS, to better detect and act upon financial impropriety. But then legislation should arguably be framed in that manner, rather than couching it in terms of an ostensible attempt to empower union members to act against their own corrupt officials.

Having said this, and as so frequently demonstrated in the historical discussion of both Britain and the USA earlier in this dissertation, changes in government more often than not see significant changes in labour policy. The election of President Barack Obama saw the return of a Democrat Administration between 2009 and 2017 resulting in a complete revision of the approach and policy of the OLMS. The extent of this change will be considered next.

[3235] Says Lyons (2004) *Harv L Rev* 1738 in this regard:

"The case for independent auditing is only stronger in the union sphere, where fewer safeguards exist to ensure the truthfulness of management's financial disclosures. For public corporations, the market demands financial accuracy, because the prospect of inaccuracy dramatically increases the risk of investment. Investors are willing to accept the cost of audits and a lower return on their investments in order to secure more reliable information. But union dues payers have no comparable ability to negotiate for safeguards, because dues or fees are often compulsory conditions of employment".

[3236] Lund & Roovers (2008) *Lab Stud J* 328 state further in this regard:

"This rather creates a feast-or-famine situation; if a member wants to research his or her own local union's LM-2, he or she is not going to find very many itemization sheets. But if he or she wants to research the international union, there might be quite a task ahead, sorting through the myriad of sheets. While itemization sheets may provide grist for the self-styled watchdog organizations and the press, they really do little to improve transparency for the bulk of the unions this law is supposed to be regulating and the millions of American union members it is supposed to protect."

9 3 4 2 3 3 The OLMS under the Obama Administration

The Obama Administration rescinded many of the Bush II Administration revisions[3237] discussed above. Logan states as follows in this regard:

> "The past several years has seen significant changes at OLMS. Since the Obama Administration took office in January 2009, the emphasis of the OLMS has no longer been on imposing onerous and expensive financial reporting regulations on unions. Rather, the agency has focused on improving efficiency in reporting and enforcement, increasing outreach and compliance assistance to the parties regulated by the [LMRDA] and reducing nonfiling, significant omissions in filing, and tardy filing of financial reports through VCAs [voluntary compliance agreements] with national and international unions."[3238]

The shift in focus is most crisply demonstrated by the fact that the Obama-era OLMS had approximately 100 less staff members than at the height of the Bush II-era, and yet, its conviction rate for "criminal wrongdoing" at least remained constant relative to the previous administration.[3239] The focus in the area of financial reporting was "to convict 'truly bad actors' – that is, those union officials (and others) who are

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[3237] See M Kisicki "Federal Regulations Update" (2012) 39 *Empl Rel Today* 55 58 for a brief discussion of one of these rescissions – and the following Federal Register notices, either confirming the rescissions (or notifying of the intended rescissions): Department of Labor: Office of Labor-Management Standards "29 CFR Parts 403 and 408 Labor Organization Annual Financial Reports Labor Organization Annual Financial Reports" (13-10-2009) *74 FR 52401* <https://www.govinfo.gov/content/pkg/FR-2009-10-13/pdf/E9-24571.pdf> (accessed 20-05-2018); Department of Labor: Office of Labor-Management Standards "29 CFR Part 404 Labor Organization Officer and Employee Reports" (10-08-2010) *75 FR 48416* <https://www.govinfo.gov/content/pkg/FR-2010-08-10/pdf/2010-19250.pdf> (accessed 24-04-2018); Department of Labor: Office of Labor-Management Standards "29 CFR Part 403 Rescission of Form T–1, Trust Annual Report; Requiring Subsidiary Organization Reporting on the Form LM–2, Labor Organization Annual Report; Modifying Subsidiary Organization Reporting on the Form LM–3, Labor Organization Annual Report; LMRDA Coverage of Intermediate Labor Organizations; Final Rule" (01-12-2010) *75 FR 74936* <https://www.govinfo.gov/content/pkg/FR-2010-12-01/pdf/2010-29226.pdf> (accessed 23-04-2018) and Department of Labor: Office of Labor-Management Standards "29 CFR Part 404 Labor Organization Officer and Employee Reports" (26-10-2011) *76 FR 66442* <https://www.govinfo.gov/content/pkg/FR-2011-10-26/pdf/2011-26816.pdf> (accessed 24-04-2018).

[3238] Logan "Union Financial Reporting" in *Advances* 31. Regarding these "VCAs", Logan at 40 explains them as follows:

> "Under these VCAs, the national union agrees to undertake specific steps designed to both get its locals into compliance with the financial reporting requirements of the LMRDA and to increase electronic reporting by local unions. In return, OLMS conducts detailed audits into those locals that have the most common reporting errors".

[3239] 32.

responsible for serious criminal misconduct".[3240] A further major goal of the Obama OLMS, as identified by Logan, was to make the annual financial auditing process "much more efficient".[3241] This saw more focused investigations by the OLMS in those cases "that are most likely to reveal evidence of serious criminal misconduct", which, in turn, saw a significant increase in the so-called "fall-out rate – the percentage of audits that lead to a finding of criminal activity".[3242] The issue of audits and the capacity of the OLMS to do them has long been identified as a challenge. Wilson, writing in 2005, states as follows in this regard:

> "[The] OLMS periodically uncovers union corruption, but it has left many stones unturned. That's because compliance audits are rare and becoming more so. In 1984 OLMS conducted 1,583 audits – roughly 5 percent of the auditable report universe – while in 2001 it conducted only 238 audits – about 0.8 percent of the auditable report universe, or roughly one out of every 128 filing organizations. As of April of 2002, ten of the largest U.S. unions had never been audited in the 43 years since LMRDA's passage. Is embezzlement or financial mismanagement in unions rare or frequent? We may never know because most union financial reports are not audited".[3243]

A further focus area was to increase the "percentage of unions filing financial reports electronically" with the establishment (in October of 2010) of an online filing system portal.[3244] This was intended to bring about a reduction in errors, but also to speed up the reports becoming available to union members and the public.[3245] The result of this change has fed into the OLMS's so-called "online public disclosure room",[3246] which allows for the instantaneous searching of a myriad of information (in

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[3240] 31.

[3241] 32.

[3242] 33.

[3243] Wilson (2005) *J Lab Res* 138, [footnotes omitted]. Lyons (2004) *Harv L Rev* 1739 provides further (albeit similar) information regarding the capacity of the OLMS in conducting compliance audits:

> "In the union context, significant oversight theoretically might come from the Department of Labor, which has the authority to audit a union's financial statements. But the Department's Office of Labor-Management Standards lacks the resources to perform this duty consistently: the Department itself frankly acknowledges that '[in contrast to the reviews the [US Securities and Exchange Commission] performs on public companies not less than once every three years, labor unions currently can expect, on average, to be audited by the Department of Labor approximately *once every 150 years*. Indeed, despite controlling vast sums of money, ten of the twenty-five largest labor unions *have never faced* a Labor Department audit", [footnotes omitted; my emphasis].

[3244] Lyons (2004) *Harv L Rev* 34-35.

[3245] 35.

[3246] Department of Labor: Office of Labor-Management Standards "Online Public Disclosure Room" (22-07-2019) *DOL: OLMS* <https://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm> (accessed 20-08-

some instances, dating back to 2000),[3247] including the LM-2, LM-3, LM-4 and LM-30 forms of specific unions, their constitutions and bylaws,[3248] "simplified Labor Organization Annual Financial Reports", individual reports for union officers and employees, as well as CBAs.

This brings to an end the comparison between the approaches of the OLMS of two different administrations, specifically in relation to the reporting obligations of unions.[3249] While the increased use of electronic filing of reports (and the access thereto) is of particular interest to this study,[3250] a broader feature of the OLMS must still be examined. As is apparent from the discussion thus far, there is an understandable similarity between the financial reporting requirements of trade unions in the USA and what was and is done under the auspices of, formerly, the Registrar of Friendly Societies, then CROTUM and currently, the CO, in Britain. A comparison of these institutions is important for this study and it is to this topic that the attention now turns.

9 3 4 2 4 The British and American financial reporting requirements – differences and similarities in approach

One of the key sources for the discussion to follow is Lund who, writing in 2009,[3251]

2019).

[3247] Nelson (2000) *Geo Mason L Rev* 553.

[3248] See for instance the OLMS "Union Reports, and Constitutions and Bylaws (OLPDR)" page, available at <https://olms.dol-esa.gov/olpdr/#Union%20Reports/Union%20Search/> (accessed 02-12-2018).

[3249] In this regard, what was for instance not addressed, were the changes brought in by the Obama Administration – which are being systematically rescinded by the Trump Administration [see for instance Department of Labor: Office of Labor-Management Standards "29 CFR Parts 405 and 406 Rescission of Rule Interpreting 'Advice' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" (18-07-2018) *83 FR 33826* <https://www.govinfo.gov/content/pkg/FR-2018-07-18/pdf/2018-14948.pdf> (accessed 22-10-2018)], pertaining to the so-called "persuader-activities" [see Logan "Union Financial Reporting" in *Advances* 41], which required increased reporting on the part of employers and labour consultants, in terms of money (essentially) spent in organising *against* unions. A further aspect not touched on, is the commentary surrounding the use of the available data – as reported by unions – by various anti-union/anti-labour bodies. In the latter regard, see Logan "Union Financial Reporting" in *Advances* 40, 47-48.

[3250] See the section below at § 9 3 4 2 4, for a discussion of the what is available in the context of Britain.

[3251] Lund (2009) *IRJ* 1. Further mention can also be made of J Lund & J McLuckie "Labor Organization Financial Transparency and Accountability: A Comparative Analysis" (2007) 58 *Lab LJ* 251 1, which sees a comparative analysis – against the backdrop of agency theory and financial reporting regulation – between, *inter alia*, Chile, Canada, Singapore, New Zealand, the UK and the USA. With this being

analysed and compared the policy approaches of Britain and the USA (as such, prior to the most recent changes that affected the CO, as discussed above).[3252]

Lund identifies four policy objectives[3253] of the OLMS, namely: (i) An objective centred on a "corporate reporting and disclosure standard";[3254] (ii) An objective to prevent "financial mismanagement and abuses" by union officialdom by means of the public disclosure element;[3255] (iii) An objective to promote union member activism;[3256] and, finally, (iv) An objective – from the Bush II Administration perspective – aimed at "undermin[ing] the reputation of the labor union movement through a classical political misinformation campaign".[3257] In overlaying these policy objectives on the history of the OLMS, Lund places the first (corporate standard) phase as falling between 1947 and 1959, from the promulgation of the LMRA through to the introduction of the LMRDA. This phase consisted of the simple reporting requirement of a union "furnish[ing] a copy of its annual financial report to all members (e.g. shareholders) [while] no specific form was required".[3258] The second phase (displaying the objective of public disclosure) ran from 1959 to 1992 and was marked by the "salaries and financial transactions of union officials and their organisations [being] visible to the entire public [while] a standard form actually [became] required".[3259] The fourth objective (with an emphasis on a political motivation underpinning OLMS policy) relates to both the Bush I (1988-1992) and Bush II Administrations, while the third objective (of increasing member participation/activism) is stated to be present under Bush II. This is so since, despite suggestions of political motivation underlying the increased reporting obligations of the Bush II era, the publicly-visible motivation remains that of "increas[ing] union member involvement in the governance of their

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said, the latter article does not differ significantly, in respects of the US and UK comparison, from Lund's 2009 findings.

[3252] See § 6 3 2 7 6 and § 6 3 2 7 7 above.

[3253] Lund's point of departure in this regard is expressed as follows:

> "Although not mutually exclusive, we can track the trajectory of these policy objectives over time in order to better inform how well current regulations serve those objectives in different countries" – Lund (2009) *IRJ* 123.

[3254] 122.

[3255] 123.

[3256] Lund at 123 speaks of "empower[ing] union members to take a more active role in the financial and overall governance of the unions".

[3257] 123.

[3258] 126.

[3259] 126.

union".[3260]

Lund analyses these developments by raising four central issues, three of which are particularly relevant to this study. Firstly, the efficacy of the current reporting regulations in terms of creating "more meaningful information" to allow for improved participation by members.[3261] Secondly, whether the reporting system has "prevented or limited financial mismanagement" on the part of unions?[3262] Finally, is there alignment between unions and corporations in terms of what is expected of each in regards to their respective reporting obligations?[3263] The first two of these questions were addressed in the earlier discussion.

These issues in mind, and turning to the comparison between the British and American systems,[3264] it remains notable that in Britain (unlike the USA), TULCRA requires a statement to be issued to the union members outlining, *inter alia*, the total income/expenditure by the union, salaries and benefits paid to specific senior officialdom, the details pertaining to the external auditor and the auditor's report regarding the union's annual return.[3265] Furthermore, the very fact that British unions are audited externally and independently means that there is a far greater likelihood that possible financial mismanagement would be brought to light as it would not be solely dependent on an actively involved/informed membership, or the auditing capacity of the CO. Again, while this point needs to be viewed against the arguments that the ease of hiding financial impropriety is heavily dependent on the nature of the information to be reported, an external audit nonetheless adds an additional layer of

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[3260] 127. By way of example, in the consideration of the broader focus of the LMRDA, and the use of financial records in order to make unions more accountable to their members (at the commencement of the Bush II Administration), Wilson (2005) *J Lab Res* 135 states as follows:

> "These financial reports are intended to allow rank-and-file union members to hold union officials accountable by letting members know how the union leadership spends their dues – and thus act as a safeguard against waste, graft, and unlawful funding of political candidates and causes".

[3261] Lund (2009) *IRJ* 123.

[3262] 123.

[3263] 123. The question not being focused on, was Lund's second – regarding whether or not the "reporting and disclosure regime" serves to "embarrass unions and give aid and comfort to their political opponents" – Lund (2009) *IRJ* 123. Whilst of obvious interest in the context of Britain and the US, given the particular nature of the adversarial approach between, respectively, the State (subject to whom is in power) and employers, on the one hand, and organised labour/members, on the other – this consideration enjoys less merit in South Africa, as will become evident from the remaining chapters to follow.

[3264] Examined in detail, as by Lund (2009) *IRJ* 131-134.

[3265] Lund (2009) *IRJ* 133 – this referring to TULRCA ss 32-32A.

protection.[3266]

A further important point to be made is that the regulatory bodies in both countries are increasingly subject to political influence. While Lund focused on the Bush II Administration, this study has the benefit of additional information to draw from. As the discussion of the office of the CO in Britain in chapter 6 showed – particularly in light of the recent promulgation of the 2016 TUA – commentators speak of the CO as a neutral independent officer discharging largely administrative functions being transformed into a coercive and interventionist instrument of the State.[3267] While the discussion of the American situation earlier in the chapter primarily addressed the transition from the Bush II to Obama Administration, the pattern of politicisation of the OLMS is now being repeated by the Trump Administration.[3268] Quite what the future effects will be, were the external regulators within Britain and America to become increasingly viewed as a "mere instrument" of the State, remains to be seen. The independence of an external regulator of trade unions – as will be seen in the concluding chapters below – remains of critical importance.

At the same time, comparison of the British and American attempts at reporting requirements and oversight, provides largely the same answers to the three issues raised by Lund. One of these relates to whether or not there is alignment between unions and corporates in terms of reporting obligations. Lund argues (justifiably, it is submitted) that a "comparison between unions and corporations is not an apt one".[3269] Yes, there is an element of overlap, particularly in instances of a publicly traded corporation, but that is where the similarities end. In the words of Lund:

> "[C]orporations do not share anything approaching the level of details that unions do, nor do they allow individual shareholders access to corporate ledgers … The current Form LM-2 provides itemised salaries and expenses of all officers and employees, and lists all accounts payable and receivable of $5,000 or more… There is no such itemisation in a balance sheet in any publicly available corporate report. US unions must use functional activity reporting for most expenses; there

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[3266] Lyons (2004) *Harv L Rev* 1740 states in this regard:

> "But without watchdogs to verify the accuracy of the forms, the Labor Department may be simply generating more paperwork without reducing corruption. An independent audit requirement is the most inexpensive and effective way to ensure that the numbers union managers release are not simply smoke and mirrors."

[3267] This in paraphrasing A Bogg "Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State" (2016) 45 *ILJ* 299 320, as at § 6 3 2 7 7 above.

[3268] Key of which, is the rescission of the "persuader-activities", as discussed at § 9 3 4 2 3 3 above.

[3269] Lund (2009) *IRJ* 135-136.

> is no such corporate requirement in the US. Finally, US unions must itemise all expenses and 'other receipts' of $5,000 or more, identifying the names and addresses of vendors. Even in the UK, employer associations do not have to report to the CO the details of officer salaries and benefits, whereas trade unions do… Virtually every union in the USA or the UK is subject to very detailed financial reporting and its members' access to its books; no corporate shareholders can examine the books. Only US publicly traded corporate reports are available to the public, and provide considerably less detail than US or UK forms."[3270]

As far as the question whether reporting has brought improved participation by members is concerned, Lund makes the point that no data is available regarding the extent to which (if at all) users make use of, and download information, from the various web-repositories.[3271] While not specifically highlighted in § 6 3 2 7 above, Britain too sees the annual returns of all "listed" (and certain un-listed) unions made publicly available on the CO website.[3272] This means, according to Lund, that in the absence of a member acquiring "financial information from the oversight agency websites, the only other source is from their union".[3273] This, in turn, leads to a situation affirmed by research-interviews done with a small number of unions in Britain and USA in 2007, which saw very low (to non-existent) requests from members for access to the returns.[3274] Related is the question about the "the ability of their members, on average, to understand key financial concepts" with the research indicating a varied response given the varied background and sophistication of trade union members.[3275] This offers a very real example of the relationship between a certain percentage of union members (how big a proportion, will remain speculative in the absence of more research) and financial information from their union: they might well not ask for it in the first place and if they did, they might not necessarily understand it.

A further point is that – and this is true of the USA – too much information has a

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[3270] 136.

[3271] 136. Simply stated – neither the CO or OLMS websites have any manner of knowing who accesses and downloads what from the respective websites, since no registration is required (which arguably makes sense, given the public disclosure element).

[3272] As available here: Certification Officer "Official list and schedule of trade unions and their annual returns" (08-07-2019) *GOV.UK* <https://www.gov.uk/government/publications/public-list-of-active-trade-unions-official-list-and-schedule/trade-unions-the-current-list-and-schedule> (accessed 20-07-2019). The forms, named "AR-21", are deemed to be public records – Lund (2009) *IRJ* 131, and in many instances – several years of Annual Returns are available digitally for download.

[3273] Lund (2009) *IRJ* 136.

[3274] 136-137.

[3275] 137.

negative effect on transparency: "The problem may not be the lack of information, but just the opposite… those who request LM-2 for larger international unions will be awash in paper".[3276]

Lund also quotes Aaron,[3277] who stated as follows shortly after the passing of the LMRDA:

> "[The LMRDA] '[i]s bound to fall short of its goals because most of the intended beneficiaries do not fervently believe in or ceaselessly strive to maintain the democratic rights, which the statute purports to secure for them. Many of the worst situations existing in some unions today are largely the result of membership apathy – an unwillingness to participate actively and continuously in the government of their organizations so long as they operate with acceptable efficiency. This indifference is, of course, but a reflection of a similar attitude evinced by the average citizen toward his own local and national government. Law cannot create a desire for democracy; it can only help those who want to get and maintain it'".[3278]

Similarly, Lund states that "while disclosure and reporting can be legislated and regulated, the ability to comprehend what one is reading and act upon it cannot."[3279] It is submitted that these remarks perfectly encapsulate the primary challenges facing the use of legislative imposition of financial reporting on trade union accountability.

In relation to the third and final question – whether or not changes to a reporting system can prevent or limit financial impropriety – Lund queries whether the increased expenditure on the part of unions (to meet the Bush II OLMS reporting requirements) is "indeed worthwhile" when "all available evidence suggests that members are not really taking advantage of the information".[3280] While that might very well be the case – in the absence of specific research on this topic – this will never be known with any absolute certainty. Regardless, it is submitted that the question misses the bigger point: While members might not be best placed in all instances to make use of the information so available – does this not then provide further motivation for an independent, external, regulatory body that has union members' best interests in mind, to be able to evaluate that information (in lieu of the membership), and act accordingly,

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[3276] 137.

[3277] B Aaron "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 73 *Harv L Rev* 851 906.

[3278] Lund (2009) *IRJ* 137, [their emphasis].

[3279] 137.

[3280] 138.

if required? This particular question will see further consideration in the concluding chapters of this study.

This discussion brought to light certain key insights, none the least of which is that increasing the financial reporting obligations on trade unions does not automatically serve as an immediate remedy for internal financial abuse. However, what was also demonstrated is that this statement requires a significant qualifier – namely its link to those instances where it is primarily the duty of the *member* to detect and act on such abuse (given trade union member apathy). Furthermore, the efficacy of any such reporting-based system remains completely dependent on *what* information is sought and *how* it is presented – this has a direct impact on the possible ease with which financial impropriety could be hidden, or not recorded in the first place.

It must also be emphasised that financial mismanagement or corruption, while serious, still is only one component of union accountability. Even so, the discussion also served to highlight the value of public disclosure of union documentation. Given that "sunlight is said to be the best disinfectant",[3281] the online repositories of both the CO and OLMS (and the breadth and depth of information available in them) serve as valuable examples against which similar systems could be measured.

Finally, the discussion also showed the fine line between increasing obligations on the part of unions and the very real effect this may have on the core responsibilities of organised labour (such as collective bargaining, representation of its members). Leaving aside the related question (considering the discussion above) of whether or not this can be utilised by a government (and its constituencies – that is, organised business) that is not necessarily well-disposed towards labour unions, the point remains that the pendulum-swing between over-regulation and under-enforcement is narrow in its scope. Again, the implications of this will be considered in more detail in the concluding chapters below.

[3281] This being a paraphrasing of (former Supreme Court Justice) Louis Brandeis' well-known maxim, the full text of which reads as follows: "Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman" – from his chapter on "What Publicity Can Do", LD Brandeis *Other People's Money and How the Bankers Use It* (1914) 92.

9 3 4 3 The Federal Mediation and Conciliation Service

Brief mention must be made of the creation of the FMCS by the LMRA in 1947.[3282] The FMCS is tasked with the "function of aiding the parties 'to settle … disputes through conciliation and mediation'"[3283] and serves as an "independent agency reporting directly to the Office of the President of the United States".[3284] Befort describes the FMCS as "the federal agency primarily charged with overseeing private sector labor arbitration matters",[3285] while Twomey outlines the primary duties of the FMCS as follows: Firstly, the FMCS may "proffer its services in any labor dispute… whenever in its judgment such dispute threatens to cause a substantial interruption of commerce".[3286] Secondly, in the event that the FMCS is not able to bring about agreement through conciliation "in a reasonable time", the Director (of the FMCS)[3287] shall "seek to induce the parties voluntarily to seek other means of settling the dispute without resort to strike, lock-out or other coercion";[3288]

In 2018 10,537 collective bargaining mediation cases were assigned to the FMCS[3289] with a settlement rate of 86.2%, while the same period saw 1,707 grievance

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[3282] Twomey *Labor & Employment* 280. As explained by Anonymous "U. S. Conciliation Service, 1913-47" (1947) 65 *Mon L Rev* 172 172, the FMCS effectively replaced the United States Conciliation Service, that had (between 1913 and 1947) functioned as a "division of the Department of Labor engaged in the mediation of industrial disputes". For a succinct overview of the FMCS and its structures, see S Dike-Wilhelm "Federal Mediation and Conciliation Service*"* in E Arnesen (ed) *Encyclopedia of US Labor and Working-Class History* (2007) 447 447.

[3283] In this regard, JT Barrett "The FMCS Contribution to Nonlabor Dispute Resolution" (1985) 108 *Mon L Rev* 31 31 offers a succinct overview of the differences between the various approaches:

> "Four formal procedures – litigation, arbitration, negotiation, and mediation – are commonly used for the legitimate resolution of disputes between individuals or groups. In litigation and arbitration, a third party is empowered to decide the issue in question. Negotiation has the advantage of allowing the parties to participate fully in developing a solution with which each can live. Mediation blends the advantages of the other three methods, employing an objective third party, but leaving the decision on the outcome to those who must abide by it."

[3284] Twomey *Labor & Employment* 280 – herein citing from subs 203(a) of the LMRA. The FMCS is duly regulated in terms of 29 U.S.C. §§171-175.

[3285] SF Befort "Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment" (2001) 43 *Bost Coll L Rev* 351 403.

[3286] Twomey *Labor & Employment* 280, quoting from subs 203(b) of the LMRA – which sees the final part of the provision state as follows:

> "Whenever the Service does proffer its services in any dispute, it shall be the duty of the Service promptly to put itself in communication with the parties and to use its best efforts, by mediation and conciliation, to bring them to agreement."

[3287] This in terms of subs 202(a) of the LMRA.

[3288] Twomey *Labor & Employment* 281.

[3289] The FMCS describes collective bargaining mediation as follows:

mediation cases assigned,[3290] with a settlement rate of 70.2%.[3291]

Twomey explains that the FMCS "concerns itself primarily with disputes arising from new agreement negotiations and from conflict as to what shall be the changes in the renegotiation of an existing agreement".[3292] However, the FMCS has also seen its powers extended in order to offer its services to increasingly more federal units and departments within the American Government.[3293] The service offered by the FMCS is completely voluntary, with the FMCS having no powers of enforcement.[3294] Apart from providing a general service to facilitate collective bargaining, the FMCS is also drawn into possible disputes between employers and trade unions on account of statutory requirements. As explained by Cihon and Castagnera, subsection 8(d) of the LMRA requires notification to the FMCS when a disputes arises in negotiation of a new, or existing, collective bargaining agreement[3295] as well as prior to the termination

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"Through collective bargaining mediation, FMCS helps avert or minimize the cost of work stoppages to the US economy. As part of its core work, FMCS mediates collective bargaining negotiations for initial contract negotiations – which take place between an employer and a newly certified or recognized union representing its employees – and for negotiations for successor collective bargaining agreements. FMCS provides mediation services to the private sector, and also to the public sector, including Federal agencies, and state and local governments" – FMCS "2018 FMCS Annual Report" (2019) *Federal Mediation & Conciliation Service* <https://www.fmcs.gov/wp-content/uploads/2019/08/2018-FMCS-Annual-Report.pdf> (accessed 22-10-2018) 11.

[3290] The FMCS describes grievance mediation as follows:

"Grievance mediation involves the use of a neutral party to mediate disputes that may arise over the terms and conditions of a collective bargaining agreement. FMCS mediators provide this service to the private and public sectors with the goal of preventing unresolved contract interpretation issues from becoming contentious issues in future contract negotiations" – FMCS 2018 FMCS Annual Report 11.

[3291] The collective bargaining mediation settlement rates from 2014 to 2017 were, respectively, as follows: 86.5% (2014); 84.6% (2015); 85.5% (2016); and, 87.1% (2017). The similar period saw the settlement rates of the grievance mediation at, respectively: 76.8% (2014); 72.9% (2015); 75.7% (2016); and, 74.2% (2017) – FMCS *2018 FMCS Annual Report* 15.

[3292] Twomey *Labor & Employment* 281.

[3293] In this regard, the FMCS 2018 Report states as follows:

"FMCS provides professional services to a wide range of federal, state, and government agencies on a cost-reimbursable basis. The Administrative Dispute Resolution Acts (ADRAs) of 1990 [Pub L 101-552, 104 Stat. 2736 (1990)] and 1996 [Pub. L 104-320, 110 Stat. 3870 (1996)] authorize FMCS to assist federal agencies in resolving disputes, train persons in skills and procedures employed in alternative means of dispute resolution, design conflict management systems, build capacity for constructive conflict management, and strengthen inter-agency and public-private cooperation" – FMCS *2018 FMCS Annual Report* 9.

See further Barrett (1985) *Mon L Rev* 33 for an overview of some of the prominent federal units that have made use of FMCS services.

[3294] Cihon & Castagnera *Employment & Labor* 512.

[3295] 459. Furthermore, the authors confirm that once the notification has been sent, a block on further

of a collective bargaining agreement.[3296] Finally, as pointed out by Harper et al, "[m]ost collective agreements provide for ad hoc selection of a single arbitrator", but should the parties to the agreement be unable to reach consensus on who the arbitrator should be, then "an outside agency, such as the Federal Mediation and Conciliation Service" can be authorised to recommend or appoint a panel, from which the parties would then make their choice.[3297]

This brief overview of the FMCS serves as a further example of the initial approach of the American labour relations system in terms of an envisaged role to be played (in similar fashion to the NLRB) by an independent agency in case of labour disputes involving employers and unions.

9 3 4 4 The Federal courts in America

9 3 4 4 1 Scope and jurisdiction involving unions

Throughout the course of the discussion (both in this chapter and in chapter 8) various instances of the intersection between collective labour law and the role of the federal civil courts in the USA came to light. Given this, and also given the further discussion below) the present examination of the role of the federal courts in regulating trade unions and their accountability will be brief and will only highlight the complexities and inherent danger of the current situation.

In similar fashion to the situation in Britain (as outlined in chapter 6 above),[3298] the USA too does not have a separate or specialised labour court. Apart from the heavy reliance on private arbitration (in both the employment law and collective labour law spheres), collective labour-related disputes are heard primarily before the NLRB (exercising its statutory jurisdiction), or before either the state or federal courts through their implementation of (mostly) the federal legislation or the common law.[3299] As

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industrial action (strike or lock-out) effectively kicks in for a period of 30 days – so as to allow the FMCS an opportunity to attempt to facilitate the resolution of the dispute, prior to their resorting to industrial action – Cihon & Castagnera *Employment & Labor* 459.

[3296] Cihon & Castagnera *Employment & Labor* 460 – this then also allowing for the involvement of the FMCS, to attempt to facilitate a renewed agreement. See further E Render "United States of America" in R Blanpain (ed) *The Actors of Collective Bargaining: A World Report* (2004) 303 304.

[3297] Harper et al *Labor Law* 717.

[3298] See § 6 3 2 4 above.

[3299] It must again be reiterated, as evidenced in the various discussions above (both in this chapter and in chapter 7), that certain types/classes of employees have their own labour-dispute mechanism – such as workers under the RLA, federal government workers or certain agricultural-industry workers. See for

discussed, the NLRB is tasked primarily with disputes pertaining to employer/union unfair labour practices and the so-called "representation cases" (in terms of the NLRA). At the same time, through either its own practices or the through federal common law, the scope of union activities to be deemed to fall within the NLRB's jurisdiction has been broadened. Apart from the NLRB, the application of the various statutory provisions applicable to organised labour in the USA falls within the realm of the state or federal courts, but with frequent overlap between all three forums depending on the specifics of the claim and its factual basis.

However, in the words of Feldacker and Hayes, the following remains notable regarding the interaction between organised labour and the courts:

> "Most aspects of the labor-management relationship and some aspects of the union-member relationship are subject to extensive federal regulation. Some matters, however, are not covered by federal law. Most relationships between unions and their members, which are governed by the union's constitution and bylaws, are enforced solely by state courts… Also, the states retain power to prohibit violent conduct in strikes. Some states even have comprehensive state statutes containing many of the provisions found in the LMRA or LMRDA. If both federal and state agencies attempt to regulate labor relations, there is potential for conflict. Acts may be lawful under federal law and unlawful under state law or vice versa. A federal and state statute might contain similar language, but the NLRB and the state agency might interpret the provisions differently, or reach different factual conclusions. A balance of power has [accordingly] been drawn between federal and state regulation of labor relations based on two fundamental doctrines: preemption and primary jurisdiction. Preemption is the doctrine under which federal law preempts, or supersedes, state law. Primary jurisdiction is the doctrine used in determining whether particular conduct, governed by federal law, is regulated by the NLRB (e.g. a representation election)."[3300]

Many of these issues have already been discussed. However, the quotation does serve as a reminder that in an internal, local/branch union setting involving (for example) a dispute between a member and the officialdom of that local union, the matter could very well be heard and finalised in a local county or state court, or possibly before a specific state's labour-dispute (statutory) mechanism without ever requiring consideration (much less, application) of federal statutory or common law by a federal court.[3301] It remains necessary to acknowledge that: "[n]otwithstanding the

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instance § 7 3 5 3, § 9 2, § 9 3 and § 9 3 4 1 3 above.

[3300] Feldacker & Hayes *Labor Guide to Labor Law* 463.

[3301] As explained by Osborne et al *Labor Union Law* 84, typical remedies available in the state courts would include the following:

development of federal law governing union/member relations, state courts and state common law remain applicable to disputes arising under purely *local union* constitutions and bylaws and also with respect to constitutions of labor organizations that are outside the statutory jurisdiction of [subs] 301(a) [of the LMRA]".[3302]

As point of departure in understanding the federal court system, Hay remarks that the "federal courts are a separate and independent system of courts: 'separate' in the sense that – except for the U.S. Supreme Court in federal matters – they do not function as appellate or superior courts for the state courts".[3303] The federal court that serves as the court of first instance are the so-called "district courts", with at least one being present in every state.[3304] Decisions from district courts may be appealed or reviewed by the twelve regional courts of appeal, with the "regions" being termed "circuits".[3305] Notably, the American federal appellate courts "only review the lower court's determinations on questions of law" – they do not review on the facts of the lower court decision.[3306] Finally, the Supreme Court, as the apex federal court in America – always sees its full bench sit and preside over a matter before it.[3307]

The basis on which an individual union member may approach a federal court,[3308] sometimes raises complex questions and runs the danger of creating inconsistencies. As stated by Osborne et al, given the "converging, overlapping, and frequently inconsistent federal statutory, common law, and administrative decisions emanating from the federal courts and the NLRB", a legal issue arising in terms of a union's

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"A jury trial is available for appropriate damage claims, compensatory damages are recoverable, including for mental distress and punitive damages are likewise available. Union officers can be sued personally for damages in appropriate cases" [footnotes omitted].

[3302] Osborne et al *Labor Union Law* 7, [their emphasis].

[3303] Hay *Law of the United States* 47.

[3304] 47. Hay explains that the larger or more populous states, are furthermore divided into different regions, which may again have individual district courts within them.

[3305] 47. Brief mention, for completeness, can also be made of the thirteenth Court of Appeals, which has limited (but important) jurisdiction – presiding as it does over appeals from, *inter alia*, the Court of Federal Claims (ie, claims against the federal government) – Hay *Law of the United States* 48.

[3306] 48.

[3307] 48.

[3308] Importantly, the LMRDA operates explicitly over private sector unions, with certain exceptions, and does not apply to "[p]ublic employee unions composed *exclusively* of state, rather than federal employees" – with the latter remaining subject to the provisions of state and local labour laws [Osborne et al *Labor Union Law* 8]. The exception spoken of above, involves those unions that represent workers/employees of the federal government, although the LMRDA provisions are "enforced administratively by the Secretary of Labor [and his delegates] and the Federal Labor Relations Authority (FLRA) rather than in court" – Osborne et al *Labor Union Law* 8.

constitution "may be adjudicated in a federal suit under the LMRDA, in a section 301(a) lawsuit applying federal common law, or through a section 8(b)(1)(A) unfair labor practice charge before the NLRB and, accordingly, a variety of inconsistent rules of law have been developed to apply to the same subjects."[3309] The authors provide more concrete examples (with the focus on the different remedies available in different forums).[3310] These examples, for purposes of the present discussion, are adapted to serve as the basis for the examination of the interaction between the federal courts, unions and/or their members.

Where a trade union member has a dispute about the interpretation or application of a union constitution, section 102 of the LMRDA entitles the member to approach a federal district court on the grounds of a contravention of section 101 (assuming that the complaint is covered by one of those protected rights).[3311] Alternatively, a member may rely on the common law of the state where the member is either resident or the union branch is primarily conducting its affairs, to approach the applicable state court and allege a breach of the (membership) contract. Or, in terms of subsection 301(a) of the LMRA he might – depending on the facts – rely on *federal* common law in arguing a violation of contract (represented by the union constitution).[3312] Last-mentioned case could be heard before either a federal *or* state court, since the pre-emption doctrine of *Lucas Flour* requires state courts to, in any event, apply the *federal*

[3309] 12.

[3310] 12-14.

[3311] However, it must be added that whilst the "federal courts have jurisdiction under Title I of the [LMRDA] to remedy violations of the 'Bill of Rights of Members of Labor Organizations'; if a Title I violation *also* amounts to a breach of the duty of fair representation, the court would have jurisdiction to hear both claims" – Hardin et al *Developing Labor Law II* 1898, [my emphasis]. By way of example, the authors offer a scenario where "a suit may lie under §101(a)(1) of the LMRDA on a claim that members of a labor organization had been deprived of their equal rights under the union's constitution to vote on the ratification of a collective bargaining agreement and also that negotiation and enforcement of particular terms of the agreement violated the duty of fair representation" – Hardin et al *Developing Labor Law II* 1898 n184.

[3312] See Osborne et al *Labor Union Law* 28 – in reference to *Plumbing & Pipefitting*, and *Wooddell v International Brotherhood of Electrical Workers, Local 71* 502 US 93 (1991). The latter is qualified by the notable requirement that to date, the Supreme Court is yet to rule on whether or not a *purely local* (as opposed to international/national) union constitution falls under the ambit of subs 301(a). Several federal district courts have ruled that they "remain enforceable in *state* court under traditional *state* common law" – Osborne et al *Labor Union Law* 28, [their emphasis]. For instance, see the ruling in *Korzen v Local Union 705, International Brotherhood of Teamsters* 75 F.3d 286 (1996), which still applies.

common law in terms of section 301.[3313] A further alternative could see the member petition the NLRB *if* the internal application of the constitution (or lack thereof) amounted to union discipline that interfered with that member's employment relationship.[3314]

Where a union (or employer) ULP is involved, the claim would lie to the NLRB,[3315] bearing in mind the relative fluidity with which the NLRB (and the federal courts on review) have allowed the scope of an ULP to change over time.[3316] The same would be of application in disputes pertaining to a union representative election – in other words, ordinarily the NLRB.

Where a member claims that his union has not represented him fairly (see the discussion at § 9 4 below), the NLRB would ordinarily be the first recourse, but the state or federal courts (with concurrent jurisdiction)[3317] may also be approached in claiming contravention of subsection 301(a) of the LMRA, or subsection 9 of the NLRA,[3318] on the basis of either breach of contract, or a contravention of the DFR, respectively.[3319]

[3313] JE Pfander "Federal Jurisdiction over Union Constitutions after *Wooddell*" (1992) 37 *Vill L Rev* 443 448 – with due acknowledgment again to the *Lucas Flour* decision (as per § 8 4 1 above).

[3314] See Osborne et al *Labor Union Law* 76-78, for a discussion of the changes in approach of the NLRB, in terms of its involvement in intra-union disciplinary issues, under the auspices of subs 8(b)(1)(A) of the NLRA (being the union UFL provision).

[3315] Hardin et al *Developing Labor Law II* 1892, this as per the *Garmon* rule.

[3316] See in this regard the discussion by Osborne et al *Labor Union Law* 68-78, regarding the ebb and flow of NLRB decisions in increasingly allowing internal union disputes to be adjudicated upon under the auspices of a ULP (from the mid-1960s to early 2000s), before changing approach again.

[3317] MH Rubinstein "Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re- Arbitration" (2009) 42 *U Mich J L Reform* 517 525-526.

[3318] As pointed out by Hardin et al *Developing Labor Law II* 1895-1896, "the courts are not precluded from deciding [ULP] questions that emerge as 'collateral issues' in actions alleging violations" of the DFR. Importantly however, this is not an unqualified power, with Hardin et al *Developing Labor Law II* 1896 citing *Marquez v Screen Actors Guild, Inc.* 525 US 33 (1998) 50, where the importance of the collateral link is emphasised in the Supreme Court stating (as per O'Connor, J) as follows:

> "The power of federal courts to resolve statutory issues under the NLRA when they arise as collateral matters in a duty of fair representation suit does not open the door for federal court first instance resolution of all statutory claims. Federal courts can only resolve § 7 and § 8 claims that are collateral to a duty of fair representation claim".

[3319] As per the decision in *Vaca*, as above at § 8 4 3. In this regard, Hardin et al *Developing Labor Law II* 1864-1865 state as follows:

> "Because the employees are asserting a federal right arising under a law regulating commerce, the action may be brought in a federal district court without diversity of citizenship, and regardless of the amount in controversy. Alternatively, the employees may sue in a state court of general jurisdiction

To conclude this section, Osborne et al remark, with reference to this state of affairs: "These parallel systems of internal union dispute resolution, each encompassing its own substantive rules of law and specific remedies and procedures, are simply the residue of the historical evolution of union/member laws."[3320]

9 4 The duty of fair representation

The initial development of the DFR was discussed in chapter 8 above.[3321] The discussion introduced the notion that the DFR enables an employee to challenge the quality of their representation against a common law standard of basic adequacy.[3322] Ray et al provides a brief background to the origins of the principle by confirming that once "the principles of exclusive representation and majority rule" had been accepted as the core foundation of collective bargaining within America,[3323] "individuals and minority groups were no longer able to bargain on their own behalf" and "their interests and bargaining power were [accordingly] subordinated to those of the majority".[3324] As such, the "DFR became one of the means of compensating individuals and minorities for this loss of bargaining power".[3325]

The duty arises from the simple fact that the union "serves as the gatekeeper or exclusive prosecutor of employee grievances".[3326] It is accordingly the role fulfilled by a union in the broader context of the American labour relations system – as exclusive representative of its members – that gave rise to the DFR. The DFR stands as a unique

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[with the possibility of review by] the Supreme Court of the United States …" – citing A Cox "The Duty of Fair Representation" (1957) 2 *Vill L Rev* 151 170.

[3320] Osborne et al *Labor Union Law* 14.

[3321] See § 8 4 2 above.

[3322] See § 8 4 2 above, this being a paraphrasing of the Osborne et al *Labor Union Law* 281. For the purposes of this section, the respective chapters focusing on the Duty of Fair Representation in both Osborne et al *Labor Union Law* 277 [chapter 4] and Hardin et al *Developing Labor Law II* 1857 [chapter 25] have been relied on extensively. As required, the necessary checks were conducted through the Westlaw databases to confirm that the caselaw referenced, remains authoritative.

[3323] See CW Summers "Exclusive Representation: A Comparative Inquiry Into a Unique American Principle" (1998) 20 *Comp Lab L & Pol'y J* 47 49, and in general, for his discussion around the unique nature of America's collective labour law being underpinned by the exclusive representative concept.

[3324] Ray et al *Understanding Labor Law* 349. Says Osborne et al *Labor Union Law* 280 in this regard:

"The major goal of the duty of fair representation is to identify and protect individual expectations as much as possible without undermining collective interests. Where individual and collective interests clash, the former must yield to the latter".

[3325] Ray et al *Understanding Labor Law* 349.

[3326] Osborne et al *Labor Union Law* 316.

example – in the context of the comparative jurisdictions considered in this study – of a mechanism designed to offset the collective, majoritarian power of trade unions. It is not surprising that much has been written about the principle.[3327]

[3327] See for instance, *inter alia*, the following sources (listed chronologically): Cox (1957) *Vill L Rev* 151 151-177; HH Wellington "Union Democracy and Fair Representation: Federal Responsibility in a Federal System" (1958) 67 *Yale LJ* 1327 1327-1362; B Aaron "Some Aspects of the Union's Duty of Fair Representation" (1961) 22 *O St LJ* 39 39-63; GL Hellrung "The National Labor Relations Board and the Duty of Fair Representation: National Labor Relations Board v. Miranda Fuel Co., 326 F. 2d 172 (2nd Cir. 1963)" (1964) 13 *Cath UL Rev* 171 171-183; SJ Rosen "Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining" (1964) 15 *Hast LJ* 391 391-435; WP Murphy "The Duty of Fair Representation under Taft-Hartley" (1965) 30 *Mi L Rev* 373 373-390; JA Yablonski "Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation: A Plea for Pre-Emption" (1965) 26 *U Pitt L Rev* 593 593-619; MD Dempsey "Employee's Remedy for a Union Breach of the Duty of Fair Representation: Vaca v. Sipes" (1966) 14 *UCLA L Rev* 1351 1351-1360; Anonymous "Labor Law: Fifth Circuit Determines That Breach of Duty of Fair Representation Constitutes an Unfair Labor Practice" (1967) 1967 *Duke LJ* 1037 1037-1054; JC Falkin "Union's Duty to Fairly Represent Its Members in Contract Grievance Procedures – The Impact of Vaca v. Sipes" (1967) 19 *Syr L Rev* 66 66-86; TP Lewis "Fair Representation in Grievance Administration: Vaca v. Sipes" (1967) *Sup Ct Rev* 81 81-126; LA Withers "Labour Law – The Duty of Fair Representation" (1967) 7 *Washb LJ* 78 78-96; Anonymous "The Duty of Fair Representation in the Administration of Grievance Procedures under Collective Bargaining Agreements" (1968) *Wash U LQ* 437 437-460; JJ Baldwin III "The Duty of Fair Representation and Its Applicability When a Union Refuses to Process an Individual's Grievance" (1968) 20 *S Ca L Rev* 253 253-270; BL Adell "The Duty of Fair Representation – Effective Protection for Individual Rights in Collective Agreements?" (1970) 25 *RI/IR* 602 602-612; Anonymous "Fair Representation and Union Discipline" (1970) 79 *Yale LJ* 730 730-745; RJ Deeny "The Duty of Fair Representation" (1970) 20 *Cath U L Rev* 271 271-311; D Mathews "Post-VACA Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units" (1974) 19 *Vill L Rev* 885 885-918; PH Tobias "Individual Employee Suits for Breach of the Labor Agreement and the Union's Duty of Fair Representation" (1974) 5 *U Tol L Rev* 514 514-562; LC Brown "The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation" (1976) 27 *Syr L Rev* 1199 1199-1230; GS Gibson "The NLRB and the Duty of Fair Representation: The Case of the Reluctant Guardian" (1976) 29 *U Fla L Rev* 437 437-467; CW Summers "The Individual Employee's Rights Under the Collective Agreement: What Constitutes Fair Representation?" (1977) 126 *U Pa L Rev* 251 251-280; JH Fanning "The Duty of Fair Representation" (1978) 19 *Bost Coll L Rev* 813 813-837; BR Naar "The Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases" (1979) 32 *Rut L Rev* 520 520-544; AP Marks "Fair Representation By a Union: A Federal Right in Need of a Federal Statute of Limitations" (1983) 51 *Ford L Rev* 896 896-918; SJ Schwartz "Different Views of the Duty of Fair Representation" (1983) 34 *Lab LJ* 415 415-430; CW Summers "Measuring the Union's Duty to the Individual: An Analytic Framework" in JT McKelvey (ed) *The Changing Law of Fair Representation* (1985) 145 145-155; LE Sheppe "The Duty of Fair Representation and Union Abuse of the Hiring Hall System: Breininger v. Sheet Metal Workers International Association Local Union No. 6" (1990) 32 *Bost Coll L Rev* 186 186-196; LM Modjeska "The Supreme Court and the Duty of Fair Representation" (1991) 7 *O St J Disp Res* 1 1-37; MH Malin "The Supreme Court and the Duty of Fair Representation" (1992) 27 *Harv CR-CL L Rev* 127 127-186; RA Sugarman & LB Hunt "The "Arbitrary" Standard: The Duty of Fair Representation in Collective-Bargaining Negotiations" (1992) 22 *Stets L Rev* 133 133-155; EC Stephens "The Union's Duty of Fair Representation: Current Examination and Interpretation of Standards" (1993) 44 *Lab LJ* 685 685-696;

As mentioned in the previous section (on the federal courts), situations where (a) union member(s) alleges a failure by the union to fairly represent them, give rise to the possibility that the member could approach the courts in a civil action (for damages) based on a section 301 of the LMRA infringement, or the NLRB.[3328] Hardin et al explain that "[p]robably the most common type of fair representation case arises when a union unlawfully refuses to process an employee's grievance".[3329] Related to this is a further key distinction to understand DFR disputes, namely between the so-called "negotiation of a contract"[3330] and the "administration of a contract".[3331] Ray et al explain the difference as follows:

> "The DFR standard varies depending upon whether the union is engaged in contract-making or contract-administration and grievance processing. Negotiation [contract-making] establishes or

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CY Harper "Origin and Nature of the Duty of Fair Representation" (1996) 12 *Lab Law* 183 183-196; WL Velton "Union's Breach of Duty of Fair Representation" (2005) 15 *Amjur POF 2d* 65 65; and, finally, Rubinstein (2009) *U Mich J L Reform* 517 517-555.

[3328] Hardin et al *Developing Labor Law II* 1865 states as follows in this regard:

> "Federal question jurisdiction [for the DFR] arose under Section 9(a) of the NLRA, on which the union's exclusivity rights were based. Section 301 of the [LMRA] confers on federal courts subject-matter jurisdiction over suits for violations of contracts between an employer and a labor organization. Coupled with federal question jurisdiction, section 301 establishes the jurisdiction of a federal court over hybrid fair representation/breach of contract actions" [footnotes omitted].

The NLRB's authority over DFR cases was established – as discussed at § 8 4 2 above – by the *Miranda Fuel* decision. Says DL Gregory "Union Liability for Damages After Bowen v. Postal Service: The Incongruity Between Labor Law and Title VII Jurisprudence" (1983) 35 *Bayl L Rev* 237 249 in this regard:

> "Typically, however, since the union and employer are usually both named as defendants in the § 301/DFR suit, once a breach of the union DFR is shown, the action against the employer for the initial breach of the collective bargaining agreement proceeds as a § 301 suit" [footnotes omitted].

[3329] Hardin et al *Developing Labor Law II* 2560. Cihon & Castagnera *Employment & Labor* 568 state as follows:

> "Most cases involving the duty of fair representation arise from action by the employer; after the employee has been disciplined or discharged, the union's alleged breach of the duty compounds the problem."

[3330] Osborne et al *Labor Union Law* 298.

[3331] 316. By way of further background, Osborne et al *Labor Union Law* 297 state as follows:

> "Based upon the union's statutory authority as the exclusive bargaining representative, the duty of fair representation arose as a matter of status, not of contract. In this status as exclusive bargaining agent, a union performs two essential functions. First, it negotiates a contract with an employer, normally a collective bargaining agreement covering the terms and conditions of employment for the employees in a designated bargaining unit. Second, it enforces that agreement by processing grievances alleging breaches of contract. Most fair representation litigation alleges union misconduct in these 'status' functions, which assume some degree of adversarial relationship between the union representing the individual and the individual's employer" [footnotes omitted].

changes the terms of an agreement that govern the rights and duties of employees and management. It precedes the making of a [CBA] and is directed toward writing and signing the document. Administration follows the making of the agreement and is directed toward enforcing and applying its terms, and grievance settlement occurs within the framework of the system of governing rules. Union business agents negotiate contracts, while shop stewards (often regular employees) administer agreements. Procedures for deciding upon appropriate demands, issue priority, and ratification are different from procedures for deciding what grievance to file and how to settle a grievance".[3332]

As such, given the focus of this study, the discussion below will consider several particular aspects regarding the administration leg of the DFR.

9 4 1 The DFR apportionment between employers and unions

In exploring the nature of section 301 (LMRA) claims for a remedy based on a breach of the DFR, Osborne et al explain the "hybrid" characterisation of these claims:

"A section 301 fair representation action is frequently referred to as a 'hybrid' suit that 'formally comprise[s] two causes of action.' First, the employee alleges that the employer violated section 301 by breaching the collective bargaining agreement. Second, the employee claims that the union breached its duty of fair representation by mishandling the ensuing grievance-and-arbitration proceedings. Although the section 301 claim against the employer precedes the fair representation claim temporally (ie., the alleged breach of contract by the employer precedes the alleged breach of the duty of fair representation by the union), the employee must establish breach by the union in order to prove a violation by the employer".[3333]

As such, the plaintiff (employee) is required to establish both that the employer has breached the contract (the collective bargaining agreement) *and* that the union has breached its DFR – "the two claims are 'inextricably interdependent' and essentially stand or fall together".[3334] The effect of this is that where culpability on the part of the

[3332] Ray et al *Understanding Labor Law* 349.

[3333] Osborne et al *Labor Union Law* 318.

[3334] 318. The authors explain further as follows:

"An employee may file a hybrid breach of contract/breach of fair representation suit against either his or her employer or his or her union or both, but must prove his or her claims against both to prevail against either. As a general rule, the employer is not an indispensable party when an employee sues his or her union alleging a breach of the duty of fair representation. If the employer is not joined, no relief is available against the absent employer. Thus for example, where the employer is not a party, there can be no reinstatement of an unlawfully discharged employee" – Osborne et al *Labor Union Law* 390 [footnotes omitted].

In light of the above, the contrary position also holds – namely that in a hybrid action, the union is not

employer (for breach of contract) cannot be determined, the union cannot be found to have breached its duty.[3335] The converse is also true – the employer cannot be held in breach of contract if the union did not breach the DFR.[3336]

This "inter-connectedness" of the employer and union's culpability is especially relevant in the context of a particularly noteworthy aspect of the DFR doctrine, namely that of apportionment: The American courts, in a damages claim based on a breach of the DFR, award damages against the employer *and* trade union commensurate with their contribution to the damages caused.[3337] As explained by Twomey, the *Vaca* decision served as an "important focal point in the case of *Bowen v United States Postal Service*",[3338] where the Supreme Court held that "when a union is found to have breached its duty of fair representation in representing an employee wrongfully discharged by an employer, the union, in addition to the employer, may be held liable for the damages that it caused."[3339] From this point of departure – the Court found as follows:

"an indispensable party" either – with the employee having the option to only sue the employer for breach of contract, with the associated limitations in available remedies in the absence of the union [Osborne et al *Labor Union Law* 391]. Importantly however, as in the prior example, despite the absence of the union – the employee "must nevertheless allege and prove that his or her union did not fairly represent him or her in the grievance process" – Osborne et al *Labor Union Law* 391.

[3335] 318.

[3336] 318-319.

[3337] Hardin et al *Developing Labor Law II* 1948. The authors explain that this stems from the Supreme Court's *Vaca* decision [at 195, in the ruling of White, J] that held that the "appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach". The aforementioned, in turn, stemmed from the earlier reasoning of the Court [*Vaca* 187-188] – in addressing the "hybrid nature" of the claim, where the following was stated:

> "If a breach of duty by the union and a breach of contract by the employer are proven, the court must fashion an appropriate remedy. Presumably, in at least some cases, the union's breach of duty will have enhanced or contributed to the employee's injury. What possible sense could there be in a rule which would permit a court that has litigated the fault of employer and union to fashion a remedy only with respect to the employer? Under such a rule, either the employer would be compelled by the court to pay for the union's wrong – slight deterrence, indeed, to future union misconduct – or the injured employee would be forced to go to two tribunals to repair a single injury. Moreover, the [NLRB] would be compelled in many cases either to remedy injuries arising out of a breach of contract, a task which Congress has not assigned to it, or to leave the individual employee without remedy for the union's wrong".

[3338] *Bowen v United States Postal Service* 459 US 212 (1983).

[3339] Twomey *Labor & Employment* 301. Put differently, in the words of Osborne et al *Labor Union Law* 401:

> "The Court … held that each defendant, the employer and union, was primarily liable for its share of the back pay and was secondarily liable for the full loss of back pay only if the grievant cannot collect the damages apportioned to the other defendant".

> "[A]n employer who wrongfully discharges an employee protected by a collective bargaining agreement containing an arbitration clause is responsible for the back pay that accrues prior to the hypothetical date upon which an arbitrator would have issued an award, had the employee's union taken the matter to arbitration. Furthermore, all back pay damages[3340] that accrue after this date are the sole responsibility of the union."[3341]

It is understandable that *Bowen v USPS* had a significant effect on organised labour.[3342] Kirschner and Walfoort state that the decision "dramatically altered a balance under which management and labor had coexisted",[3343] with the decision resulting in a union now facing the possibility of being held "primarily liable for a substantial part of a wrongfully discharged employee's back pay".[3344] Despite this

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[3340] Regarding what is to understood to be included in "back pay", Osborne et al *Labor Union Law* 398 states as follows:

> "Back pay generally includes lost wages, overtime pay, vacation pay, health and welfare and pension contributions, earned work credit payments, and life insurance benefits."

[3341] Twomey *Labor & Employment* 301. The court was split in its finding, with the majority siding with Powell J, and his judgment as per Parts I-IV. Four dissenting judges (those being White, Marshall, Blackmun and Rehnquist JJ [concurring and dissenting in part, based on Parts I, II and III of Powell J's ruling] and Rehnquist J [separate dissenting opinion filed, based on Part IV of Powell J's ruling]), reasoned that "the employer should be held primarily liable for all back pay because the employer could have stopped the accumulation of back pay by reinstating the employee" – Twomey *Labor & Employment* 301, citing *Bowen v USPS* 238. The concern on the part of the dissenting justices was based on their arguing that "the majority's ruling will cause unions to take unmeritorious grievances to arbitration lest they expose the union to the risk of back pay liability under the Bowen decision" – Twomey *Labor & Employment* 301, citing *Bowen v USPS* 241-242. See *Bowen v USPS* 230-246 for the minority judgment of the four dissenting judges, and *Bowen v USPS* 246-247 for Rehnquist J's dissenting opinion.

[3342] Says Gregory (1983) *Bayl L Rev* 237 in this regard: "Reiterating and clarifying the apportionment principle of *Vaca v. Sipes*, Bowen significantly expanded the scope of union liability for damages attributable to DFR breach" [footnotes omitted].

[3343] R Kirschner & M Walfoort "The Duty of Fair Representation: Implications of Bowen" (1985) 1 *Lab Law* 19 27 refer to the Supreme Court's decision in "expressly rejecting" the primary defences put forward by the Bowen's union (the American Postal Workers Union, AFL-CIO). The union accordingly argued that "the employer should be held solely liable for such damages, and that [the union's] separate breach of the [DFR] does not make it liable for any part of the discharged employee's back pay damages", since what was key – according to the union – was that "its dereliction merely lifts the bar to the employees suit on the contract, and at most subjects the union to liability for the litigation expenses [of the employee] resulting from its breach" – Kirschner & Walfoort (1985) *Lab Law* 27.

[3344] Kirschner & Walfoort (1985) *Lab Law* 19. See Kirschner & Walfoort (1985) *Lab Law* 20-21 for a succinct summary of how damages were apportioned prior to *Bowen v USPS*. See Gregory (1983) *Bayl L Rev* 252-266 for a more detailed discussion, including analysis of the Supreme Court decision in *Hines v Anchor Motor Freight Inc.* 424 US 554 (1976), another prominent case in the development of the DFR principle (as discussed further below). Regarding the latter, Twomey *Labor & Employment* 300

imbalance (and lack of uniformity in terms of the apportionment formula/theory)[3345] the point is that the American system allows for a hybrid process to hold either the employer, union, or both, accountable and that *both* can be ordered to pay commensurate damages (through a single claim).[3346] Effectively, the courts engage in a process of "re-litigation" by revisiting an already-concluded contractual action (for example, an arbitration finding that was initiated according to the terms of a CBA), so as to determine liability on the part of the employer and the union. This very point was addressed by the Supreme Court in the *Hines v Anchor Motor Freight* decision,[3347] which is of particular interest to the broader question of union accountability.

In this judgment, the court made a number of important points: (i) The existence of an outcome in an already-completed and, on the basis of the facts before it, fair and reasonable arbitral process, cannot preclude further remedies being available to an employee, if the circumstances warrant same; (ii) This carries all the more weight on account of the fact that, *had* the union's actions corrupted the contractual processes (at the time), then the employee *would* have had recourse under section 301; (iii) Policy arguments cautioning against the interference in legal certainty (the "finality rule" included in CBAs)[3348] or the undermining of the collective bargaining system, on account of matters being re-litigated long after the fact, is offset by the substantial

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summarises its importance in confirming that whilst an adverse arbitration award is ordinarily "final and binding on the grievant and a bar to court suit for damages", where a breach of DFR is established – in this case, effectively due to a "perfunctory" defence [as per *Vaca*] on the part of the International Brotherhood of Teamsters, as union – then the "bar of finality from the arbitral decision" is removed. See further Feldacker & Hayes *Labor Guide to Labor Law* 376.

[3345] Osborne et al *Labor Union Law* 401; Hardin et al *Developing Labor Law II* 1959.

[3346] Osborne et al *Labor Union Law* 401 summarises the rulings of *Vaca* and *Bowen v USPS* as follows:

> "In both *Vaca* and *Bowen*, the apportionment of damages must serve the following purposes: (1) damages must be apportioned according to each party's fault; (2) the union must be held responsible for any increase in the employee's damages that were caused by the union; and (3) the employee must be made whole. Actual apportionment varies with the circumstances of the breach" [their emphasis].

Regarding the approach followed in the NLRB (as per Osborne et al *Labor Union Law* 402-403), the key matter *remains* that of *Iron Workers Local Union 377* 54 NLRB 326 (1998) – which saw the NLRB "[accept] the apportionment principles set forth in *Vaca*, *Bowen*, and *DelCostello*" [their emphasis] – despite uncertainty as to whether or not the NLRB would continue adhering to its finding [Osborne et al *Labor Union Law* 403 n610].

[3347] *Anchor Motor*, at § 9 4 1 above.

[3348] In this regard, the "finality rule" spoken of here is in reference to the provisions commonly included within CBA's, that affirm that the outcome of the chosen grievance procedure (usually, arbitration – in terms of the CBA) will be "final and binding" on the parties thereto. See for instance Anonymous "Union Administration and Procedure" (1987) 3 *Lab Law* 478 499-500.

burden to be carried by the employee in establishing that both the discharge/dismissal was contrary to the [CBA] contract, and that there was a breach of the union's DFR (in order to be successful in claim against either); (iv) Grievance processes cannot be expected to be error-free, and frivolous errors will still be shielded by the finality rule; and, finally, (v) In instances where the employees' representation by their union has been dishonest, in bad faith, or discriminatory then, in the interests of maintaining both the integrity and adequacy of the contractual [CBA] system, the finality rule can be trumped. [3349]

9 4 2 The DFR statute of limitations

The American courts were also quick to develop guidelines for the time limits for processing of a grievance (underlying a DFR claim). In the Supreme Court decision in *DelCostello v International Brotherhood of Teamsters*,[3350] the court – in the absence of specific statutory guidance – "borrowed" the "six-month statute of limitations for making charges" of ULP's in terms of subsection 10(b) of the NLRA,[3351] rather than permitting the application of time periods in state laws (which could have been utilised, given the pre-emption doctrine/*Lincoln Mills* approach).[3352] Claimants in a section 301 DFR claim thus have six months within which to institute their claim,[3353] which is far short of the period that would have applied had the state laws been adopted as

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[3349] *Anchor Motor* 570-571.

[3350] *DelCostello v International Brotherhood of Teamsters* 462 US 151 (1983), courtesy of Brennan, J.

[3351] TA Kelley "Labor Law Gap-Filling: Federal Common Law Ideals Versus Litigation Realities" (2011) 72 *Ohio St. LJ* 437 439 states as follows, regarding the absence of a limitations' provision in respects of s 301 of the LMRA:

> "Congress provides no express statute of limitations for such a judicially-fashioned claim; in similar circumstances, the federal court will normally identify the most analogous state cause of action and apply its statute of limitations to the federal claim."

The author explains further, regarding the Supreme Court making use statute of limitation "borrowing", that same "is a surprisingly common occurrence in federal law: congressional silence with respect to the statute of limitations to apply to a cause of action arising under federal legislation" [Kelley (2011) *Ohio St. LJ* 441]. See further Hardin et al *Developing Labor Law II* 1933-1941 for a more detailed discussion of the development of the approach first applied in *DelCostello*.

[3352] Twomey *Labor & Employment* 301. See further Kelley (2011) *Ohio St. LJ* 438-439, who – in continuing with the reason as above – states:

> "However, the *DelCostello* Court chose to look past state law, and instead applied the statute of limitations of a federal labor law it felt best promoted the interests hybrid claims were perceived to balance", [their emphasis].

[3353] Twomey *Labor & Employment* 301; Hardin et al *Developing Labor Law II* 1934.

guidance instead.[3354]

9 4 3 The DFR and the NLRB

As far as DFR cases before the NLRB are concerned,[3355] a key point is that, unlike the courts that consider the DFR and contract breach issues "sequentially in the same proceeding",[3356] the NLRB "will normally require a bifurcated proceeding".[3357] When considering the union's actions (or lack thereof) in terms of determining the merits of a grievance,[3358] the focus is on whether the union "violated the duty of fair representation by failing to properly process a grievance and that the union should be required to make the grievant whole for losses suffered as a consequence of a union's mishandling of the grievance."[3359] If this is found to be the case, the NLRB will ordinarily order the union to proceed with the arbitration/grievance process (as regulated by, for instance, the CBA) to place members in the position they would have been in had the union done what it was supposed to have done initially.[3360] However, in those instances where it is no longer possible to process the grievance as would have been required (typically because of a "time bar" within the CBA),[3361] the NLRB will institute what is known as a "compliance hearing" to determine whether or not, had

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[3354] Says Kelley (2011) *Ohio St. LJ* 439-440 in this regard:

> "[S]tate contract statutes that were traditionally applied to § 301 claims generally provide for limitations periods that can last up to ten years and beyond … [B]y forging a six-month statute of limitations for hybrid §301 actions in the name of federal labor law uniformity, the Supreme Court unintentionally created both a significant obstacle for plaintiff-employees seeking to assert their rights under collective bargaining in federal courts, and a powerful tool for defendant-employers seeking to keep those employees from pulling them into costly litigation" [footnotes omitted].

[3355] As affirmed by Hardin et al *Developing Labor Law II* 1884, in light of the *Miranda* decision, the NLRB reasoned "that the union's obligation under section 9 to represent all employees fairly and impartially gave rise to a right of the employees under section 7 to fair representation by the union" – and that it is this breach of the union's DFR that amounts to an "infringement" of the s 7 rights, and accordingly, a ULF by means of a violation of subs 8(b)(1)(A) of the NLRA. To this can be added, as per subsequent NLRB decisions, ULP's as infringements of subss 8(b)(2) and 8(b)(3) – Hardin et al *Developing Labor Law II* 1885.

[3356] Osborne et al *Labor Union Law* 319.

[3357] 319. The authors make the point that the reason for this is simply that "[i]n most cases [before the NLRB] the employer's alleged breach of contract is not an [UFL] and the employer is not a party in the NLRB proceeding".

[3358] 317.

[3359] 319 – this being in terms of *Iron Workers* 1.

[3360] 319.

[3361] 319.

the arbitration/grievance procedure been completed as it should have been, the applicant/member would have been successful.[3362] This will determine what relief, if any, the applicant/member is entitled to.

9 4 4 The DFR and exhaustion of internal remedies

A significant issue is whether or not a union member/employee must first exhaust internal remedies prior to seeking assistance of either the NLRB or the courts. While not absolute,[3363] the point of departure is whether or not internal union processes could "result in reactivation of the employee's grievance or award the complete relief sought by the employee".[3364] In cases where this is found *not* to be the case, the Supreme Court's ruling in *Clayton v United Auto Workers*[3365] provides that the employee may then opt to either "file a Section 301 suit or a Section 8(b)(1)(A) complaint".[3366] Osborne et al remark that, in light of *Clayton*, "courts have a discretion" to determine the requirement of the exhaustion of internal remedies – but with the following factors having to be considered:

[3362] 319.

[3363] Cihon & Castagnera *Employment & Labor* 569 makes reference to the Supreme Court decision in *Glover v St. Louis-San Francisco Railway Co.* 393 US 324 (1969), where was reasoned (as per Black, J) that "employees need not exhaust contract remedies when the union and employer are cooperating in the violation of employee rights", since "[i]n such cases, attempts to get the union to file a grievance or to process it through to arbitration would be an exercise in futility". In this regard, the Supreme Court quoted from *Vaca* 184-185 as follows:

> "'(I)t is settled that the employee must at least attempt to exhaust exclusive grievance and arbitration procedures established by the bargaining agreement … *However, because these contractual remedies have been devised and are often controlled by the union and the employer, they may well prove unsatisfactory or unworkable for the individual grievant.* The problem then is to determine under what circumstances the individual employee may obtain judicial review of his breach-of-contract claim despite his failure to secure relief through the contractual remedial procedures'" – *San Francisco Railway* 330, [my emphasis; references omitted].

As such, Black J reasoned that to require the appellants before the Court to first "proceed formally with contractual or administrative remedies would be wholly futile" – given the nature of the claim involving racial prejudice (as supported by the facts) on the part of the union, against the appellants [*San Francisco Railway* 330].

[3364] Cihon & Castagnera *Employment & Labor* 570.

[3365] *Clayton v International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* 451 US 679 (1981).

[3366] Cihon & Castagnera *Employment & Labor* 570. By implication, the converse then applies as well – in that, where the internal appeal remedy *can* "provide the relief sought", then such must be attempted *prior* to launching with the "hybrid" application – Cihon & Castagnera *Employment & Labor* 570.

> "[F]irst, whether union officials are so hostile to the employee that he could not hope to obtain a fair hearing on his claim; second whether the internal union appeals procedures would be inadequate either to reactivate the employee's grievance or to award him the full relief he seeks under §301; and third, whether exhaustion of internal procedures would unreasonably delay the employee's opportunity to obtain a judicial hearing on the merits of his claim."[3367]

As a general rule, any statutes of limitations (that is, six months) are suspended (or "tolled") while any internal procedures are being utilised by members/employees.[3368] A further noteworthy point explained by Osborne et al is that "[a]n employee cannot plead ignorance of his or her internal union remedies", since the "exhaustion obligation is embodied in the union's constitution and is contractually assumed by the employee when he or she joins the union".[3369]

Finally, the exceptions to the exhaustion of internal remedies requirement include scenarios where the expected remedy(ies) would prove to be "inadequate",[3370] or where the union or its officialdom responsible for the appeals process appear biased, "*or are the [very same] officials against whom the complaint is directed*".[3371]

9 4 5 The DFR and the processing of grievances

While an employee/member does not have an "absolute right to have his grievance taken to arbitration",[3372] it remains essential (in terms of *Vaca*) that the union made their decision (to not proceed with the grievance process) on the basis of "good faith and in a nonarbitrary manner".[3373] With regard to the union processing the grievance,

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[3367] Osborne et al *Labor Union Law* 378, quoting from *Clayton v United* 689 – where the court added:

> "If any of these factors are found to exist, the court may properly excuse the employee's failure to exhaust".

[3368] Osborne et al *Labor Union Law* 379.

[3369] 380.

[3370] 381.

[3371] 381, [my emphasis].

[3372] 320.

[3373] 321. See the discussion of *Vaca* at § 8 4 3 above. Regarding the latter, Feldacker & Hayes *Labor Guide to Labor Law* 375 state as follows:

> "The *Vaca* decision clearly establishes that a union does not have to take every grievance to arbitration. A union has the right to settle or to drop a grievance even though the grievance may have merit, as long as its decision does not violate the union's duty of fair representation".

The authors proceed to quote from the *Vaca* decision, where the following is stated by White J:

> "Though we accept the proposition that a union may not arbitrarily ignore a meritorious grievance or process it in perfunctory fashion, we do not agree that the individual employee has an absolute right to have his grievance taken to arbitration regardless of the provisions of the applicable collective

the courts have held that the union essentially "functions in a manner not wholly unlike that of an attorney representing a client in court".[3374] Importantly, this does not mean that the union official, as representative of the worker/member, is held to the same (legal) standard as an attorney.[3375] This point was confirmed by the Supreme Court in the 1990 decision of *United Steelworkers v Rawson*.[3376] In this case the court found that "mere negligence did not violate the [DFR]" and held that "a union does not have a contractual duty to the employees beyond the [DFR] *unless there is contractual language specifically indicating an intent to create such an obligation enforceable against the union by the individual employees*".[3377]

As far as the actual "level or standard" that the member/employee can expect from their union in presenting the grievance is concerned, Osborne et al provide a useful overview:

> "The grievance or arbitration procedure need not be error free. 'Mere errors of judgment' or 'occasional instances of mistake' by the union agent presenting the grievance to the arbitrator do not constitute a breach of the duty of fair representation. Nor is the fact that the grievance is later deemed meritorious dispositive of a breach of duty. Tactical errors on the part of the union are insufficient to show a breach of the duty of fair representation. As long as the union acts in good faith, the courts cannot intercede on behalf of employees who may be prejudiced by rationally founded decisions that operate to their disadvantage. There must be a showing that the union's error was the result of discriminatory, hostile, or arbitrary conduct that seriously undermined the integrity

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bargaining agreement ... In providing for a grievance and arbitration procedure which gives the union discretion to supervise the grievance machinery and to invoke arbitration, the employer and the union contemplate that each will endeavor in good faith to settle grievances short of arbitration" – Feldacker & Hayes *Labor Guide to Labor Law* 375; *Vaca* 191.

[3374] Osborne et al *Labor Union Law* 321.

[3375] 321. Speaking of which, in the event that external counsel is utilised by a union in the processing/presentation of a grievant, Osborne et al *Labor Union Law* 393 confirm that such cannot "be held liable for malpractice to the individual grievants", since the client of the attorney remains the union, *not* the grievant.

[3376] *United Steelworkers of America, AFL-CIO v Rawson* 495 US 362 (1990).

[3377] Feldacker & Hayes *Labor Guide to Labor Law* 376, [my emphasis] – this in terms of *Steelworkers v Rawson* 374. The court's wording was as follows:

> "But having said as much, we also think it necessary to emphasize caution, lest the courts be precipitate in their efforts to find unions contractually bound to employees by collective-bargaining agreements. The doctrine of fair representation is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a 'wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.'... [citing *Huffman* 338] If an employee claims that a union owes him a more far-reaching duty, he must be able to point to language in the collective-bargaining agreement specifically indicating an intent to create obligations enforceable against the union by the individual employees" – *Steelworkers v Rawson* 374.

of the arbitration process."[3378]

As can be expected, given the complexity and numerous processes involved within collective and individual labour disputes, there are countless aspects of trade union fair representation that have required consideration by both the American (federal district and appellate) courts and the NLRB.[3379] For the purposes of the present discussion (and the broader study) some of these aspects are worthy of further consideration.

Firstly, with regard to when a union is expected to process the grievance before it, the basic point of departure is that the issue must have "ripened into a controversy".[3380] Related to this, is the principle that "only where the union's delay cannot be explained reasonably and causes real harm to the grievant does the delay violate" the DFR.[3381]

Secondly, with regard to the decision whether or not to proceed with or process the grievance further, it is acknowledged that there is a broad discretion on the part of unions using their existing processes to make this decision.[3382] This discretion, as

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[3378] Osborne et al *Labor Union Law* 343 – citing, *inter alia*, *Anchor Motor* 570-571 and *Vaca* 193-195 [Osborne et al *Labor Union Law* 343 n303].

[3379] By way of example, Osborne et al *Labor Union Law* 322-354, provide an overview of the applicable caselaw in regards to, *inter alia*, the following topics (of processing the grievance): (i) The time limits of when the grievance process must be initiated within; (ii) Conflicts of interest arising where the union – as exclusive representative – is required to assist/represent two or more members/groups of members with competing claims; (iii) What the obligations are of the grievant/member/employee, in terms of their having to cooperate/assist the union in the processing of the grievance; (iv) The nature (and requirements) of the actual investigating process; (v) What, if any, specific aspects need to be present in terms of a union or its officialdom interpreting the terms of a CBA, and acting (or failing to act) accordingly; (vi) The right of a grievant to attend a grievance meeting; (vii) The expectation of knowledge on the part of members/grievants of their union's own internal procedures/remedies (for example, the right of a member to appeal a decision *not* to process the grievance further); and, finally, (viii) The expected conduct of union or its representative during specific processes of grievance (such as in the arbitration hearing). See further Hardin et al *Developing Labor Law II* 1910-1933, for a similar discussion of grievance processing, as interpreted by the courts.

[3380] Osborne et al *Labor Union Law* 324.

[3381] 325 – in reliance on, *inter alia*, *Walker v Consolidated Freightways, Inc.* 930 F.2d 376 (1991) 382, 384, which saw its subsequent appeal denied before the Supreme Court [*Consolidated Freightways, Inc. v Walker* 502 US 1004 (1992)].

[3382] Osborne et al *Labor Union Law* 334. The authors state further in this regard:

> "The procedure may be formal or informal, set down in writing, or [union] tradition [or custom]. Decisions may be made by a business agent, by the union's principal officer, by the union's executive board, by the membership, or by higher levels of the union. A union's failure to follow its standard procedures constitutes 'strong evidence of bad faith'" – as per Osborne et al *Labor Union Law* 334, citing from Feinberg CJ in *Lewis v Tuscan Dairy Farms, Inc* 25 F.3d 1138 (1994) 1143-1144.

pointed out by Osborne et al, involves consideration of a number of factors:

> "[The union] may consider tactical and strategic factors such as (1) the likelihood of success through arbitration; (2) its desire to maintain harmonious relations among workers and between them and the employer; (3) the cost of arbitration, its limited resources, and consequent need to establish priorities, just as other prosecutors do; (4) past precedent in similar cases; (5) the impact on its future credibility with the employer and/or the arbitrator; (6) its assessment of the relative credibility of the employer's and the grievant's version of the events; and (7) whether an arbitration victory would be in the long-term interests of the grievant and other unit employees".[3383]

A further noteworthy aspect is that a union's reliance on advice from their attorneys or counsel does not "necessarily insulate the union from liability".[3384] Regardless, provided the union is able to demonstrate that its decision not to proceed further with the grievance – by following its processes and with due consideration of the merits of the grievance – was not arbitrary, in bad faith or discriminatory, the decision will not be deemed to be in contravention of the union's DFR.[3385]

Thirdly, as far as settlement agreements are concerned, Osborne et al (citing *Vaca*)[3386] point out that "unions are free to negotiate and accept settlements even without the grievant's approval".[3387] While a failure to notify the member/employee of

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[3383] Osborne et al *Labor Union Law* 334-335, [footnotes omitted].

[3384] 335, citing, *inter alia*, *Gregg v Chauffers, Teamsters & Helpers Union Local 150* 699 F.2d 1015 (1983) 1016-1017. In the latter case, the union in question had decided to withdraw the matter from arbitration on the same day as the grievance was received, thereby "indicating that the decision to withdraw was not carefully considered" [*Gregg v Chauffers* 1016]. Regarding the reliance on the attorney, Wright, CJ states:

> "The union's contention that its reliance on the advice of counsel satisfied its duty of fair representation is meritless … The court [in the matter cited as authority by the union] held that the union's referral of a member to the union's retained attorney and subsequent refusal to interfere in the attorney-member relationship was not arbitrary. The only action taken by the union in [the cited case] was the initial choice of a competent attorney and referral to him. In contrast, here the union withdrew appellees' grievances, totally foreclosing arbitration of them. [The union] contends that even if its action breached the duty of fair representation of its members, it is immune from liability because it relied on the advice of counsel. Such a rule would virtually eliminate a remedy for arbitrary, discriminatory, or bad faith union action, as long as an attorney recommended such action. We are not persuaded that reliance on an attorney's advice should insulate the union from liability for its breach of its duty to represent its members fairly" [*Gregg v Chauffers* 1016-1017], [references omitted].

[3385] Osborne et al *Labor Union Law* 335.

[3386] *Vaca* 192.

[3387] Osborne et al *Labor Union Law* 336. With this being said, the authors make further reference to the *Banks v Bethlehem Steel Corp.* 870 F.2d 1438 (1989) decision, in which the court (care of Hug, CJ) was tasked with considering the appropriateness of the settlement agreed to by the United Steelworkers

the terms of settlement "may demonstrate negligence or poor judgment, such an omission, without more, does not violate" the union's DFR.[3388] However, where it is found that the union's officialdom made "misrepresentations to the membership in settling a labor dispute", then dependent on the overall facts before the court this may result in the union being found in breach of its DFR.[3389] Furthermore, given the union's role as exclusive representative for all members/employees within a particular bargaining unit, a union is permitted to reach settlement so as to benefit the greater unit (by for instance, negotiating improved future bargaining terms), even if this might not be in the best interests of the individual/smaller group subject to that settlement.[3390]

Finally, Osborne et al make reference to situations where unions simply provide advice to the employees/members that they represent (under the broad notion of the union protecting employee rights).[3391] While it is accepted that a "union has no obligation to advise employees of their rights or assist them in the enforcement of their rights under a variety of statutes that are not directly related to the negotiation or administration of a contract",[3392] this changes where such advice *is* aligned to the CBA (and accordingly falls within the union's DFR). In such a case, "good faith" on the part of union in providing such advice, is again expected.[3393]

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union. In so doing, the 9th Circuit Court of Appeals considered the arguments raised in attempts to establish a breach of the union's DFR, which included the strength of the grievance, the union's election not to proceed further (coupled with its failure to investigate the grievance), and any possible ulterior motives in settling the grievance for an amount far below what the grievant expected – Osborne et al *Labor Union Law* 336 n269.

[3388] Osborne et al *Labor Union Law* 336-337, citing, *inter alia*, *Smith v Hussmann Refrigerator Corp.* 619 F.2d 1229 (1980) and *Eichelberger v NLRB* 765 F.2d 851 (1985).

[3389] Osborne et al *Labor Union Law* 337, citing *Bloom v International Brotherhood of Teamsters Local 468* 752 F.2d 1312 (1984). The case centred on the unsuccessful attempt (on appeal) by the members to hold the union liable in damages for emotional distress caused by the unions DFR breach:

> "The district court held the union had, in bad faith, breached its duty of fair representation, and awarded damages in a measure of the difference between the settlement the union members actually obtained from [the employer] and the settlement they might have obtained by bargaining further instead of believing the union's false promise of preferential hiring retrenchment" – *Bloom v Teamsters* 1313, care of Wallace, CJ.

[3390] Osborne et al *Labor Union Law* 338-339.

[3391] 349.

[3392] 354.

[3393] Osborne et al *Labor Union Law* 349 state as follows regarding the envisaged scenarios that can see advice being provided:

> "Unions advise employees during the ratification of a collective bargaining agreement, when employees inquire about their contractual rights, during the processing of grievances, and at many other times concerning the often adversarial relationship between the union and the employer",

Of interest are two examples offered by Osborne et al where a union may breach its DFR through its advice: Firstly, "[a] union may breach its duty by giving incorrect advice concerning the potential ramifications of a sympathy strike or other work stoppage"; Secondly, where the union "disclos[es] favorable information" but simultaneously omits or misrepresents "unfavorable material".[3394] Regarding the first example, one relevant case referred to by the Osborne et al[3395] is *Chavez v United Food & Commercial Workers International Union*.[3396] In this case the members alleged a breach of the DFR by both their local and international unions. The basis of their argument stemmed from their dismissal for participating in strike action as "economic strikers"[3397] rather than "unfair labor practice strikers" (where the latter would mean they "could not be permanently replaced") and that their participation in the strike action was predicated on the misrepresentations made by union officials.[3398]

In its defence before the district court,[3399] the local union argued that it was not technically the representative of the workers, given the fact that the NLRB ruled against its majority status and, as such, it did not owe the workers a DFR in terms of subsection 9(a) of the NLRA.[3400] The argument failed.[3401] On appeal, the appellate court also disagreed with the local union's argument that "its representations were inactionable opinions of law" and affirmed that "lay union representations on legal

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[footnotes omitted].

[3394] Osborne et al *Labor Union Law* 349.

[3395] 349 n334.

[3396] *Chavez v United Food & Commercial Workers International Union, AFL-CIO-CLC* 779 F.2d 1353 (1985).

[3397] As discussed at § 9 2 2 above. Regarding the distinction, as ULP strikers, this "would have entitled them to immediate reinstatement upon an offer to return to work, [but] instead [as] economic strikers [they were] entitled to reinstatement only as vacancies occurred" [*United Food* 1356].

[3398] *United Food* 1355. The officials in question, "Jennum" and "Jackson", were the President of the local union (district) union and "an authorized representative" of the international union, respectively [*United Food* 1355]. On the facts, had the local union been successful in their NLRB claim that the employer was committing an ULP by refusing to bargain with it – the strikers would have been deemed ULP strikers – but since the NLRB ruled against the union (and that the employer was entitled to demand a representation election, given the dispute pertaining to the unions majority status) – the strikers were deemed to be economic strikers [*United Food* 1355-1356]. As a result, upon their dismissal, "after a delay of up to two years, all of the [workers] were reinstated with full seniority benefits" [*United Food* 1356].

[3399] The workers "allege[d] a breach of duty of fair representation which resulted in wage losses due to delay in job reinstatement as a result of the strike against [the employer]" – *United Food* 1356.

[3400] *United Food* 1356.

[3401] Duly affirmed by the 8th Circuit Court of Appeals, care of Heaney, CJ – *United Food* 1357.

matters may be actionable but that a less stringent DFR applies because "'[a] union representative is not a lawyer and cannot be expected to function as one'".[3402] Note that the appellate court also reversed some of the damages awards granted by the district court against the union on the basis that the employees were made aware mid-way through the strike action that they were no longer deemed ULP strikers (and at risk of losing their jobs) – after this point in time they were therefore *not* influenced by the union's misrepresentation.[3403] The appellate court also confirmed no finding against the International union (there was no evidence "that it represented itself as the [employees'] exclusive bargaining representative") and made no award against the local union for attorneys' fees since "the record supports [the] finding that there was insufficient evidence of bad faith conduct on the part of [the local union] to justify an award of fees".[3404]

Osborne et al also refer to *Baskin v Hawley*,[3405] which involved a dispute between the deceased estate of a union member, his union and former employer regarding the (alleged) non-payment of pension contributions. This resulted in a refusal of pension cover and a damages claim for emotional distress as a result of the union's breach of its DFR. The decision saw the union ordered to pay damages for the lost pension.[3406] For purposes of this study, the crux is the finding that, by not revealing to the member either the existence of the CBA that compelled payment of pension contributions, or that the union still had access to pension records from the time (which would have established same), any duty on the employee to mitigate his losses was offset.[3407] The court held that "[the union], because of the special relationship between a union and its members, had an obligation to disclose to Baskin information that it knew might

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[3402] As cited from the 8th Circuit *Curtis v United Transportation Union* case – [*United Food* 1358, [references omitted].

[3403] *United Food* 1358-1359.

[3404] 1359.

[3405] *Baskin v Hawley* 807 F.2d 1120 (1986).

[3406] The court at 1123 states as follows, regarding the decision reached by Kearse, CJ:

> "For the reasons below, we affirm so much of the judgment as awarded Baskin $22,784.16 against the Union and ordered it to pay him $88 per month for the remainder of his life; we agree with the district court's decision to set aside the verdict of $650,000 for emotional distress but, concluding that the court should have ordered a new trial on this claim rather than granting the Union judgment [notwithstanding the judgment], we vacate the judgment in favor of the Union and remand for retrial of this claim before a properly instructed jury; and we vacate the judgment dismissing the claim against [the employer] and remand for trial of that claim."

[3407] 1131.

give him a claim against the Union."[3408]

9 4 6 The DFR and its remedies

As far as the remedies for a breach of the DFR are concerned – through the courts or the NLRB – Hardin et al emphasise the point of departure laid down in *Vaca*: the "appropriate remedy for a breach of a union's duty of fair representation must vary with the circumstances of the particular breach".[3409] One possibility is that the union can be held liable for the "damages resulting from the union's refusal to process the grievance".[3410]

More generally, where employees have suffered losses as a result of a breach by both a union and employer, they have been awarded "backpay, future losses, compensatory damages, and attorneys fees".[3411] Notably, as explained by Hardin et al, "[p]unitive damages are not recoverable against the union in fair representation cases", as per the Supreme Court in *Electrical Workers (IBEW) v Foust*.[3412] The court's reluctance to allow for punitive damages was based on the concern that "lucrative monetary recoveries unrelated to actual injury would be a powerful incentive to bring unfair representation actions" which would potentially destabilise the collective bargaining system as a result of it affecting a "unions' willingness to pursue individual complaints."[3413]

The approach to award an employee monetary compensation in the absence of an arbitration award (circumstances permitting) is not universally supported.[3414] Writing in 2009, Rubinstein's argument is that the entire point of departure of arbitration in the broader American labour relations system is that it is "a continuation of the collective bargaining process"[3415] and designed to keep the courts *out* of labour disputes. Thus,

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[3408] 1131. The gist of the union's argument was that this "special relationship" (grounded within the union's DFR) ended upon Baskin's retirement.

[3409] Hardin et al *Developing Labor Law II* 1948 – citing from *Vaca* 196.

[3410] 1948.

[3411] 1949, [footnotes omitted].

[3412] *International Brotherhood of Electrical Workers v Foust* 442 US 42 (1979).

[3413] Hardin et al *Developing Labor Law II* 1950 – citing from *IBEW v Foust* 48. The authors make the further point that the "[f]ear of punitive damage awards could cause unions to process meritless grievances, curtailing the union's leeway in handling grievances" – Hardin et al *Developing Labor Law II* 1950.

[3414] See Rubinstein (2009) *U Mich J L Reform* 519-520 n13, for a list of articles focusing on how the payment of "monetary damages is not consistent with the principles underlying *Vaca*" [their emphasis].

[3415] Rubinstein (2009) *U Mich J L Reform* 548 n137 quoting from Malin (1992) *Harv CR-CL L Rev* 174.

allowing an "unfairly represented employee" to "side-step arbitration and receive monetary damages",[3416] is not affording the necessary respect to both the collective bargaining grievance system and arbitration process.[3417]

With regard to remedies provided by the NLRB, Hardin et al remark that it has "entered broad orders requiring the union to cease and desist from its improper conduct and to take affirmative steps to make the charging party whole".[3418] These included instructing unions "to process or arbitrate grievances that it had wrongfully refused to handle".[3419]

9 4 7 The DFR – conclusion

This discussion of the DFR has brought to light certain aspects that are of particular interest to this study. At the same time, it bears repeating that any insights from the development and the principles of the DFR must be seen in light of the unique environment – that of exclusive representation – it operates in.

Even so, the discussion showed that, firstly, the existence of the DFR has led to an examination of the specific functions of and – for lack of better word – "services" offered by unions as part of their duty as exclusive representative for workers and members within their bargaining units.

Secondly, what has been demonstrated is that the DFR may be enforced as a single, "hybrid" action (either before the courts or the NLRB) that can see a member/employee argue for the liability of *both* the employer and union, in those instances where the facts warrant such a finding. These hybrid claims also sees a potential apportionment of liability focused on "making whole" the claimant. Importantly, the discussion also provides insight into the checks and balances that

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[3416] 548.

[3417] 547-548.

[3418] These include cease and desist orders directed at unions, to "desist from failing to provide good-faith representation" – Hardin et al *Developing Labor Law II* 1942.

[3419] Hardin et al *Developing Labor Law II* 1941-1942, [footnotes omitted]. By way of further example (in a matter where the ULP proceeding was only instituted against the union), Hardin et al state:

> "[The NLRB] also ordered a union: (1) to ask for reinstatement of an employee whose grievance it failed to process; (2) to ask that the employer waive any time limitations barring the processing of the grievance; (3) to process the grievance diligently and in good faith; and (4) to make the employee economically whole until the employee is reinstated, or obtains substantially equivalent other employment, or until the grievance is processed to a proper conclusion" – Hardin et al *Developing Labor Law II* 1943.

have been applied in order to preserve the legal certainty of the arbitral process (that preceded court action).

Thirdly, development of the DFR also shows consideration for the exhaustion of internal remedies. The discussion showed how the courts and NLRB will take guidance from the particular circumstances of the case before them to determine whether or not a member/employee would be able to find appropriate relief were the internal union mechanisms to be utilised.

Fourthly, the discussion showed that unions have a broad discretion to decide whether or not to proceed with a grievance. Related to this, is the particularly noteworthy (for the purposes of this study) discussion regarding the approach of the American courts' in instances where general, but incorrect, advice is given to members or employees. The discussion showed that union officials are not to be measured against the standard required of attorneys. Even so, "inactionable opinions of law" as offered by union officials may still result in liability.

Finally, despite arguments against the tendency of the courts to award monetary awards for breaches of the DFR, the different remedies available to plaintiffs in DFR actions, provide a comparative basis for further consideration in the concluding chapters of this study.

9 5 Conclusion

This chapter considered the current legislative regulation of trade unions and their accountability against the backdrop of the development of labour relations in the USA between adoption of the LMRDA in 1959 and today. The discussion brought to light a number of important points about the (similar) patterns and developments established in the discussion of Britain. At the same time the discussion showed specific examples that require due consideration in the chapters to follow. Particularly, the role of the OLMS in the direct regulation of trade unions offered meaningful insight about the enforcement of legislation through an administrative agency. Furthermore, the idiosyncratic DFR, limited perhaps by the context of exclusive representation under which it operates, is particularly noteworthy as a potential (substantive) model for the regulation of trade unions and their accountability.

The peculiar nature of American collective labour law, so grounded on primary legislation that originated in 1935, saw a major revision in 1947 before a final

significant (re)adjustment was made some sixty-odd years ago (by means of the LMRDA). Unlike what was demonstrated in chapter 6 in relation to Britain – and as will become evident in chapter 12 below in relation to South Africa – the USA alone presents an industrial relations system completely devoid of modern legislative development and completely reliant on judicial interpretation.

In similar fashion to that of Britain, but for different reasons, it was the economy that instigated the pronounced decline of organised labour during the latter part of the twentieth century. Importantly however, employers (and their lobbyists) played a *far* greater role in ensuring that organised labour, their unions and their political allies, were unable to effect legislative changes that were so desperately sought.

Against the background of the distinctly complex federal theories surrounding pre-emption, the interaction between state and federal law and the most important provisions of legislation, it was demonstrated how – in the absence of updated legislative guidance and coupled with a failing and increasingly politicised statutory mechanism such as the NLRB – organised labour is prevented from reaping more localised benefits and protections at state level. A system *initially* intended to shield trade unions from state-law inconsistencies no longer offers such protection and, arguably, offers – to a large extent – federal inconsistencies in its stead.

The chapter also considered the various (and important) LMRDA Titles, already introduced in chapter 8 (and as they are contained in the US Code). The individual provisions – useful as they are in terms of providing examples of specific legislative provisions that have been incorporated so as to bring about direct accountability on the part of unions – are overshadowed by a simple, yet significant point: Despite America's lack of contemporary legislation, existing legislation provides evidence of the potential richness of having the judiciary interpret issues before them on a case-by-case basis, but while still influenced and guided by the original intention of the LMRDA.

It would not require a significant leap of the imagination to envisage this also happening in a constitutional dispensation such as South Africa, subject to the overarching and original intent of the LRA. At the same time, it raises the question whether application of legislation should be left to the ordinary courts, specialist labour courts, statutory tribunals, or statutory offices – or possibly a combination thereof.

In this regard, the various statutory institutions involved in the regulation of trade unions and their accountability in the USA were considered. This discussion

demonstrated the central role of arbitration in the industrial relations system. The functions, procedures and increasing challenges facing the NLRB were also considered. The complexity of the principles applicable to the overlap and intersection between federal labour law and the civil courts was demonstrated.

Of particular importance is consideration of the OLMS and the significant lessons to learn from the role of this institution for this study. Its duties make it eminently comparable with the office of the CO in Britain – and, as will become apparent in chapter 12 – the office of the Registrar in South Africa. At this stage, the discussion already shows how such an agency, despite the best legislative intention (and language) remains open to political manipulation – despite being typically declared to function in the name of trade union democracy and the best interests of trade union members. Secondly, an examination of the effect of the increasingly detailed requirements of the Bush II OLMS provided important lessons. One lesson is that more information does not necessarily mean more transparency and that, in the absence of an independent, statutory body to review and act on the information, it remains highly questionable to what extent members want to or can use this information. The absence of auditing requirements for trade union financial information is also glaring. The use of an electronic reporting system to provide real-time and easily accessible information, serves as a particularly powerful example of what can be done in the digital age, in terms of increased accountability.

Finally, the DFR was considered separately, as the American chapter's equivalent of Britain's industrial action (as per chapter 6). The DFR is unique, but in its application, three aspects in particular are worth noting: First there is the "hybrid action", the effect of which is that the *member's rights* are placed first and foremost in relation to both the employer and the trade union. As demonstrated, where joint liability of both employer and union is established, then both are proportionally held liable. This too is a unique solution in terms of ensuring that *both* other parties in the employer/union/worker-member relationship are held accountable for their failure to comply with their obligations. In short, the hybrid action ensures that *all* the blameworthy parties are brought to account. Secondly, the principles developed by the American courts in terms of assessing whether or not the union or its officials breached their DFR, serve as a useful example of what could potentially be taken into account by South African courts. Thirdly, useful insight was gathered into the interplay between trade unions and their attorneys, as well as their possible liability for the

advice they offer their members – an aspect that is particularly important for the further discussion.

CHAPTER 10: THE HISTORICAL DEVELOPMENT OF TRADE UNION REGULATION IN SOUTH AFRICA: FROM PROHIBITION TO RACE-BASED ASSIMILATION

> "But any labour lawyer with even the most rudimentary knowledge of the matter knows that to focus on legislative developments or on labour law itself is to see only part of the picture … The lesson here for labour lawyers should not be ignored. Perhaps nowhere else in the law is the complex question of the relation between law and social relations so apparent as in labour law. Labour law is a strand tightly woven into the fabric of our society. It cannot be understood in the abstract. Its context is provided by a society's labour relations structure and its political and economic system. This is something South African labour lawyers understand."[3420]

10 1 Introduction

This chapter is the first of three chapters examining the regulation of trade unions and their accountability in South Africa. In line with the underlying premise of this dissertation and as was the approach to the discussion of trade union regulation in the UK and the USA, the discussion of South Africa is also built around the stages of trade union prohibition, assimilation and readjustment to the current legal position. Immediately, however, it must be mentioned that – contrary to the discussion of Britain and the USA – the South African case is different. The primary reason for this is the decided racial dimension of the labour market and its regulation in South Africa for the better part of the twentieth century. Webster and Adler[3421] state that "[t]here is a widespread view that South Africa is *sui generis*, that the deeply entrenched nature of racial division is such that the country cannot be compared with any other."[3422] While this view is perhaps an overstatement, it does serve to describe the unique nature of South Africa's labour history – a history of "deeply entrenched racial division[s]"[3423] where the labour market and its regulation was shaped by the race or ethnicity of employees and trade union members.[3424]

[3420] C O'Regan "1979-1997: Reflecting on 18 Years of Labour Law in South Africa" (1997) 18 *ILJ* 889 890.

[3421] E Webster & G Adler "Introduction: Consolidating Democracy in a Liberalizing World – Trade Unions and Democratization in South Africa" in G Adler & E Webster (eds) *Trade Unions and Democratization in South Africa, 1985-1997* (2000) 1 6-7.

[3422] The focus of Webster & Adler's *Consolidating Democracy* is on the role played by trade unions within the democratisation process of countries, such as South Africa, that have shifted away (politically, socially and economically) from former authoritarian-based systems.

[3423] Webster & Adler "Introduction" in *Consolidating Democracy* 6.

[3424] Simply put, South Africa had two industrial relations systems: one for the minority ethnic group who

For purposes of this study (and the comparison between countries it requires), this means a number of things. Firstly, simply, the racial basis of the South African industrial relations system should always be borne in mind – with the required sensitivity[3425] – particularly in light of one of the hypotheses shaping this study, namely that present regulation is a product of past influences.[3426] Secondly, the racial nature of the South African system blurred the lines between the phases of assimilation and readjustment, much more so than in the case of Britain and the USA. It is safe to say that at least until after the Wiehahn Commission towards the end of the 1970s and into the 1980s, South Africa had a dual industrial relations system. The one system (white) had passed assimilation and reached readjustment by 1956, while the other

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enjoyed a privileged position, thanks in no small part to them being represented in/by government; and another for the majority of the population – whose interests were not directly represented. S Van der Horst "Labour" in E Hellmann (ed) *Handbook on Race Relations in South Africa* (1949) 106 109 states in this regard:

> "The labour market has been very strongly influenced by the multi-racial character of South African society. The type and grade of work done by individuals, and hence the wages earned, are determined by their racial group as much as by their individual aptitudes and preferences ... The most outstanding characteristic of the occupational distribution of the population is the close relation between occupation and race."

[3425] A particularly difficult aspect in this regard, is making use of the correct terminology from the past, whilst still attempting to remain sensitive to modern-day conventions. For example, depending on the time period that a relevant source was written in, or is referring to, the same legislative instrument can be termed as the Black Labour Relations Regulation Act, or, as it was known prior to its amendment in 1973, the Black Labour (Settlement of Disputes) Act. However, it can also be referred to by its original designation, as the Native Labour (Settlement of Disputes) Act, or by its subsequent re-designation following amendment, namely the Bantu Labour (Settlement of Disputes) Act. The reason underpinning this naming-transition, is explained by PW Cunningham et al "The Historic Development of Industrial Relations" in JA Slabbert et al (eds) *Managing Industrial Relations in South Africa* (RS 1994) *Historic Development* 2–1 2–12 n1, who state that the term "Blacks" was to be used instead of "Bantu", following the enactment of the Second Black Laws Amendment Act 102 of 1978, as per subss 17(1)-(3). See further, in this regard, M Horrell *Race Relations as Regulated by Law in South Africa, 1948-1979* (1982) 15. Regarding the use of the word "native", Horrell *Race Relations* 2 states: "From 1951 the SA National Party Government began using the term 'Bantu' instead of 'Native', and after 1962 this became official policy although it was resented by those concerned. Later, in 1978, the term 'Black' was officially substituted."

[3426] See in general LM Thompson *A History of South Africa* 3 ed (2001) 154-187, and his discussion in chapter 5 (duly entitled "Segregation Era (1910-1948)"), regarding the various racially-based policies introduced during this period – many of which can be traced back to periods long before the discovery of South Africa's mineral wealth. See further S Terreblanche *A History of Inequality in South Africa, 1652-2002* (2002) 247, who states:

> "During the first half of the 20th century the English establishment was obsessed with two things: entrenching white political power, and entrenching racial segregation. We can regard these as the two pillars on which the edifice of the new [Apartheid] state was assiduously built."

(black) system only reached assimilation and adjustment (at the same time), by the end of the 1970s and into the 1980s. In fact, as the discussion will show, it is perhaps one of the ironies of this study that as early as 1935 (with the findings of the Van Reenen Commission) there was awareness that (white) trade unions (and their officials) do not always act in the best interests of their members, followed by a relatively short period of readjustment towards the regulation of trade unions. Thirdly, it may already be said that it is not surprising, given the racial divide in South African society and its labour market, that politics and trade union regulation were (and still are) closely aligned, much like in Britain, but for very different reasons.

It is thus useful to divide the discussion of the initial assimilation of and readjustment to trade unions in South Africa into two chapters – chapter 10, which deals with assimilation of (white) trade unions and adjustment up to 1956 and chapter 11, which deals with assimilation of (black) trade unions and further readjustment up to and including the Wiehahn Commissions' findings and its aftermath into the 1980s. In line with the approach to Britain and the USA, the discussion of the common law approach to the regulation of trade unions will also be considered in chapter 11 (the chapter dealing with readjustment to uniform regulation of all trade unions in South Africa). This will be followed in chapter 12 by an examination of the current legislative framework for the regulation of trade unions and their accountability in South Africa, which simultaneously constitutes a further (and ongoing) legislative readjustment to the non-racial regulation of all trade unions in light of the democratic values adopted in 1994 and starting with the enactment of the LRA.

With these remarks in mind, this chapter aims to discuss the progression from trade union prohibition through assimilation until the mid-1950s. Early trade unionism in South Africa is examined against the backdrop of the discovery of mineral resources, the associated influx of workers and increased industrial action taking place on the mines (in particular), culminating in the Rand Rebellion. The role of the state, employers and unions is considered in the lead up to these events. The focus will then shift to the enactment of the first piece of national industrial relations legislation (the Industrial Conciliation Act 11 of 1924 ("ICA 1924")), which signalled the start of the assimilation phase of trade union regulation. Consideration of this legislation also requires consideration of its racial premise and the impact it had on trade unions and workers. The chapter then considers legislative enactments subsequent to the 1924 Act – notably the Industrial Conciliation Act 36 of 1937 ("ICA 1937") – and how these

continued to shape the South African labour market on the basis of race. This is done against the backdrop of the Great Depression, changes in the various industrial markets in South Africa and the role of specific Commissions of Enquiry (notably the Van Reenen Commission). Thereafter, the impact of World War II is considered, both on industrial relations and on the general election that was to follow in 1948, which ushered in a new (and infamous) political era. The enquiry and report of a further Commission of Enquiry (the Botha Commission) is then considered along with the influence it had on the legislation promulgated in 1953 and 1956.

10 2 The prohibition and proscription of trade unions in South Africa

10 2 1 Early trade unionism in South Africa

Slightly more than a century ago, the economy of South Africa was predominantly agrarian in nature[3427] and rural employment far outnumbered that in urban areas.[3428] Following British rule, guidance for the development of the common law, particularly in answer to the steadily increasing amount of disputes that were arising between worker and employer, was sought in English legal principles.[3429] This entrenched the hybrid system that still characterises modern South African labour law.[3430] Grogan explains that while labour law was originally based primarily on the common law, which

[3427] Cunningham et al "Historic Development" in *MIRSA* 2–3 state: "Before the discovery of diamonds in 1867 and gold on the Reef in 1886, South African was dominated by an agrarian economy. In the absence of collective labour, employment relationships were individualistic and paternal."

[3428] F Van Jaarsveld & S Van Eck *Principles of Labour Law* 2 ed (2002) 4. During this time, Van Jaarsveld & Van Eck *Principles* 4 state further, the contract of employment was an adequate means with which to regulate and negotiate labour relations. Whilst under Dutch dominion, the applicable common law principles were based on the concept of *locatio conductio* – see in this regard M Conradie "The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of (Un)Fair Labour Practices Pre-1977" (2016) 22 *Fundamina* 163 165-169.

[3429] These were either incorporated in the various regional/provincial statutes or applied through the courts. See Conradie (2016) *Fundamina* 175-178, who provides an extensive list of the legislation applicable during this period, and the influence of English & Roman-Dutch law in the field of employment. See further M Schaeffer "The History of Industrial Legislation as Applied in South Africa with Special Reference to Black Workers" (1977) *TSAR* 49 49, who discusses the various industrial relations' legislation in force in the Transvaal, as applicable to black workers, namely the Master and Servants Law 13 of 1880 (Transvaal), and the Industrial Disputes Prevention Act 20 of 1909 – and who quotes from s 3 of the 1880 Act before stating "[t]hus we have the first hesitant steps towards trade unionism in this country."

[3430] J Grogan *Workplace Law* 12 ed (2017) 2; Cunningham et al "Historic Development" in *MIRSA* 2–3-2–4.

emphasised the concept of freedom of contract as a core principle, the capacity of the parties to determine the terms of their relationship by means of an agreement has been steadily diminished through legislative involvement.[3431]

The formulation of an indigenous legal system was expedited by the discovery of mineral resources.[3432] This resulted in dramatic industrial and economic growth and a surge in immigration levels,[3433] with the associated influx of workers leading to increased labour activity (and, paradoxically, skilled-labour shortages) in various industries.[3434] In turn, this soon led to a need for worker protection and representation and, ultimately, a need for trade unions.[3435] As was the case with many countries that were originally colonies of the British Empire, the majority of initial trade associations that emerged locally were duplicates of the craft unions of their industrial country of origin, Britain.[3436] However, the changing political environment of the time increasingly resulted in the craft-skills criterion no longer serving as the sole determinant of union membership, with race beginning to play a fundamental role in determining the nature

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[3431] Grogan *Workplace* 3-4.

[3432] M Finnemore *Introduction to Labour Relations in South Africa* 11 ed (2013) 25. Prior hereto, the abolishment of slavery in England in 1807, certainly played a part in labour shortages in the Cape Colony – which saw the concomitant introduction of labour legislation. See Conradie (2016) *Fundamina* 174-175.

[3433] Van Jaarsveld & Van Eck *Principles* 4–5; PS Nel (ed) *South African Employment Relations: Theory and Practice* 4 ed (2002) 124; P Alexander & R Halpern "Introduction: Comparing Race and Labour in South Africa and the United States" (2004) 30 *J SA Stud* 5 10. Finnemore *Introduction* 27 further confirms that 1904 saw the importation of a large number of Chinese workers, destined to work on the mines in place of those black employees who did not return to their work following the end of the Anglo Boer War in 1902.

[3434] Finnemore *Introduction* 25-26.

[3435] 26; K Williams "Trade Unionism in South African History*"* in K Jubber (ed) *South Africa Industrial Relations and Industrial Sociology* (1979) 63 63-64.

[3436] G Wood & JK Coetzee *Trade Union Recognition: Cornerstone of the New South African Employment Relations* (1998) 24. The year 1881 saw the first trade union being established in South Africa (the Amalgamated Society of Woodworkers), and was simply a foreign branch of its English parent union (the Amalgamated Society of Carpenters and Joiners of Great Britain). See further Van Jaarsveld & Van Eck *Principles* 9, 22; M Christianson et al (eds) *Essential Labour Law: Individual Labour Law 1* 3 ed (2002) 7; JA Grey Coetzee *Industrial Relations in South Africa: An Event-Structure of Labour* (1976) 1-2. However, see the remarks of MA Du Toit *South African Trade Unions: History, Legislation, Policy* (1976) 10, regarding the conjecture surrounding the early formation of the first trade unions in South Africa. W Visser "Exporting Trade Unionism and Labour Politics: The British Influence on the Early South African Labour Movement" (2005) 49 *N Con* 145 provides an overview of the interplay between trade unions and the formation of the South African Labour Party (discussed below), and the central role played herein by British and Australasian workers, drawn as they were to the diamond and gold mines of South Africa.

of these associations.[3437] The resulting shift in focus saw unions continue to concentrate on racial rather than specific craft-skills issues as the new means of safeguarding their members' interests.[3438]

With reference to the increase in unionism, Coetzee states that South Africa, unlike many other countries at that time, saw its relations between the state and labour associations develop on a *voluntary* basis and that for 30 odd years the former colonies and Republics (as did the country as a whole after 1910) had recognised industrial bargaining procedures (in effect collective bargaining) as a means of settling disputes pertaining to wages and working conditions.[3439] This was, to some extent, facilitated by the markedly different (to Britain and the USA) accommodating approach of the South African common law to the existence and status of trade unions (discussed in chapter 11 below). The voluntary nature of labour relations underpinned the expansion in union numbers and size[3440] – culminating in the formation of the South African Labour Party[3441] (in 1910), certain union federations[3442] and the 1915 decision of the Transvaal Chamber of Mines to recognise the Mine Workers' Union.[3443]

[3437] Craft workers of European descent soon found that, based purely upon their ethnicity, they were able to position themselves in a much more privileged and exclusive labour position than black workers. See Wood & Coetzee *Cornerstone* 24; Finnemore *Introduction* 25-26.

[3438] Wood & Coetzee *Cornerstone* 24. See Christianson et al *Individual Labour* 8, who state:

> "The difference in political power between Whites and Blacks also became entrenched at this point as trade unions catering largely for white workers mobilised increasingly on the basis of race (instead of certain skills)".

[3439] Grey Coetzee *Event-Structure* 12 adds that from 1920 onwards, the establishment of joint agreed machinery in industry for the avoidance of disputes was actively encouraged.

[3440] 6. Grey Coetzee at 6 states that between 1921 and 1922, the membership of unions under white leadership in South Africa, grew to approximately 118 000. Compare this view with that of P Alexander "Coal, Control and Class Experience in South Africa's Rand Revolt of 1922" (1999) 19 *CSSAAME* 31 37, who places this number in excess of 135 000.

[3441] Grey Coetzee *Event-Structure* 4. Regarding the eventual impact of the Labour Party, specifically with regards to trade unions, HJ Simons "Trade Unions" in E Hellmann (ed) *Handbook on Race Relations in South Africa* (1949) 158 169 states:

> "The close association that exists in Great Britain and Continental countries between trade unions and working-class political parties is not a feature of the movement in South Africa. Some unions have formal connections with the Labour Party, but racial and nationalist dissensions are too pronounced for such a relationship to become widespread. The Labour Party, having its attention focussed on parliamentary action, makes no bid for the support of the disenfranchised Non-Europeans …".

[3442] Grey Coetzee *Event-Structure* 4. See further Cunningham et al "Historic Development" in *MIRSA* 2–4.

[3443] Grey Coetzee *Event-Structure* 5 avers that the union played a further important role in the development of unionism in South Africa, in that in 1920, the labour association officially adopted the

Of further importance was the formation in 1918 of the Industrial and Commercial Workers' Union ("ICU"),[3444] by the black African worker Clements Kadalie,[3445] which sought to represent less-skilled workers[3446] who could not benefit from the policies of white craft unions who were "enforcing the apprenticeship system rigidly to create and maintain their scarcity value."[3447]

10 2 2 The proscription of trade unions

Given South Africa's reliance on its mineral wealth, it is no surprise that the first noteworthy examples of industrial action emanated from the mining industry. Changes in manufacturing methods during the latter part of the nineteenth century and early 1900s resulted in increased competition for specific positions between white skilled, and white and black semi- and unskilled workers.[3448] As the situation steadily deteriorated, various legislative measures were enacted to address the increase in strike action.[3449] While the first organised strike occurred in April 1884 on the Kimberley diamond mines,[3450] industrial action only gradually increased following the

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shop steward system into their union procedural structure, the first recognition of such a system in South Africa.

[3444] Finnemore *Introduction* 31 places the founding of the ICU as occurring in 1919.

[3445] For a brief background of the role played by the ICU within South African labour relations, see Finnemore *Introduction* 31-32. See further the autobiographical account of the formation of the ICU by its founder – C Kadalie *My Life and the ICU: The Autobiography of a Black Trade Unionist in South Africa* (1970).

[3446] Inherently included within this category were the vast majority of black employees.

[3447] Grey Coetzee *Event-Structure* 6.

[3448] 3, 6, 7-8. Regarding additional factors that contributed towards the increased competition, Cunningham et al "Historic Development" in *MIRSA* 2–5 state the following:

> "The bank crisis (1880) during which a number of farmers went bankrupt, a drought, the rinderpest epidemic (1896) and the Anglo-Boer War (1899-1902) drove many whites to the towns. A new class of poor, unskilled and dispossessed whites emerged. This devastation of the agricultural community resulted in a surplus of white labour in urban areas. Many were employed in the public sector, especially on the high railways. Faced with rising costs, mine management sought to further reduce the high cost of skilled labour. The consequence was a restructuring of the work process. The response was a militant struggle by white labour to maintain the differential between skilled and unskilled labour."

Of further relevance (as mentioned above), was the 1904 decision to facilitate the influx of Chinese workers and cheap labour from Mozambique. See in this regard Alexander & Halpern (2004) *J SA Stud* 9.

[3449] For a more detailed description of the industrial action that occurred during this period, see Cunningham et al "Historic Development" in *MIRSA* 2–5.

[3450] Grey Coetzee *Event-Structure* 6-7 recounts in vivid detail the consequences of this industrial action, demonstrating just how different early labour relations were. By example, in quoting Walker & Weinbren

turn of the century, particularly in the industrialised centre of the mine-industry, the old Transvaal.[3451] At the same time, while employers were becoming less than welcoming to the increased power exerted by unions within their workplaces, there was also a gradual re-evaluation of the role of the state in preserving industrial peace. Between 1907 and 1922, martial law was implemented "no less than four times"[3452] in response to industrial action, with three Indemnity Acts promulgated by Parliament in order to protect the state against the perceived unlawful acts of strikers.[3453] Coetzee reasons that in any industrial country the state must perform the role of preserving "the coherence of society" and thus usually sought to intervene in situations where concerted action was perceived to threaten the internal security of the (still-fledgling) state.[3454] Accordingly, a central characteristic of the initial response by the government to industrial action was the use of various repression tactics,[3455] all aimed at putting a stop to the consequences of industrial action, rather than dealing with its underlying causes. However, change was imminent. In 1914, as a result of growing fears on the part of the government,[3456] there was a marked shift in the suggested approach of the government.

This year saw an Economic Commission of Enquiry[3457] issue a report that

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[2000 Casualties: A History of the Trade Unions and the Labour Movement in the Union of South Africa (1961)] Grey Coetzee *Event-Structure* 7 states:

> "An inquest took place and later a judicial tribunal found that the killing of seven unarmed strikers and the wounding of some forty others 'was amply justified'. None of the dependants of the killed men ever received compensation and none of the hired gunmen was prosecuted."

[3451] Grey Coetzee *Event-Structure* 7.

[3452] 7.

[3453] 7. Cunningham et al "Historic Development" in *MIRSA* 2–5, 2–7 states that between 1909 and 1914 three key enactments were introduced, namely: The Industrial Disputes Prevention Act of the Transvaal 20 of 1909; the Workmen's Compensation Act 25 of 1914; and the Riotous Assemblies and Criminal Law Amendment Act 27 of 1914. See further Grey Coetzee *Event-Structure* 12; Wood & Coetzee *Cornerstone* 33.

[3454] Grey Coetzee *Event-Structure* 12.

[3455] Grey Coetzee at 12 states that these consisted out of, *inter alia*, the declaration of martial law, the use of the police and military to protect property and maintain general order, the prosecution and even deportation of immigrant strike leaders, and the prohibition of riotous assembly by groups of individuals.

[3456] Grey Coetzee *Event-Structure* 12-13 avers that foremost in the minds of the powers that be, was that constant direct repression of industrial action, particularly such action organised "with adamant resolution by militant White worker-leaders", might result in the situation where the majority of the white workforce would be swayed to support the views of certain "self-confessed communist labour-leaders" – a state of affairs clearly undesired by the government of the day.

[3457] RSA Report of the Economic Commission UG 37/1914. See further N Nattrass & J Seekings "The Economy and Poverty in the Twentieth Century in South Africa" (2010) unpublished paper presented

recommended statutory recognition be granted to white trade unions, along with the formation of a conciliation board specifically focused on industrial disputes.[3458] The continued industrial action prevalent during this time[3459] prompted several legislative attempts at implementing the recommendations of the Commission, though all were to fail in gathering sufficient support to be enacted (the first such attempt was in 1914).[3460] Further attempts by the state to investigate labour relations, particularly in light of developments preceding and including 1919,[3461] led the South African government to convene a National Conference of Employers and Employees, the purpose of which was to consider various aspects relating to terms and conditions of employment.[3462] However, the unwillingness of the government to act upon any of the proposals suggested at the conference resulted in increased industrial action, with as many as 60 strikes reported in 1920 alone.[3463] With the rising cost of living and a worldwide economic recession following World War I[3464] the relative peace of this

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at a seminar hosted by the Centre for Social Science Research: Social Surveys Unit at University of Cape Town, 01-07-2010 1 9.

[3458] Grey Coetzee *Event-Structure* 13.

[3459] See Williams "Trade Unionism" in *Industrial Sociology* 67-69 for a succinct discussion of this period, and the underlying causes thereof.

[3460] Grey Coetzee *Event-Structure* 13 states that the proposed measures were contained in the 1914 Industrial Disputes and Trade Unions Bill, which was passed by Parliament but was unsuccessful in mustering support in the Senate, mainly due to "vehement opposition" by the Labour Party. For the various reasons underlying the failure of these legislative attempts, see Grey Coetzee *Event-Structure* 13-14.

[3461] Grey Coetzee *Event-Structure* 5 states:

> "Expansion, confidence, and militancy were attributes of South African trade unionism at this time and, because of widespread industrial unrest, the politically-inspired labour movement was not only growing, but forcing the pace of social reform."

[3462] Grey Coetzee *Event-Structure* 5 avers that one of the positive consequences initiated by the Conference was that of remuneration free from gender bias. See further S Bendix *Industrial Relations In South Africa* 5 ed (2010) 60, who says of the Conference: "In 1919, the government called a national conference of employers and employees, at which it was resolved that 'recognition of employees by employers of labour would alleviate industrial unrest'."

[3463] Grey Coetzee *Event-Structure* 5. Grey Coetzee *Event-Structure* 5 states further of this period: "Dissatisfaction with post-war [World War 1] conditions and anti-Government feeling contributed greatly to the unrest, and also gave impetus to a steadily gaining purpose – a purpose which could be best be summed up by the popular British syndicalist slogan: 'Workers' control'." It must be mentioned that strikes in the immediately preceding years were not only limited to the white worker unions. Grey Coetzee *Event-Structure* 12 states that between 1918 and 1920, an average in excess of 42 000 black workers were involved in industrial action (in industries varying from dockworkers to municipal workers), with Kadalie's ICU often being blamed for masterminding the strikes.

[3464] Grey Coetzee *Event-Structure* 3.

period was soon to be disturbed.[3465]

10 2 3 The Rand Rebellion

1922 saw the so-called "Rand Rebellion",[3466] or "Miner's Revolt",[3467] which had as one of its most important consequences the promulgation of legislation specifically intended to regulate future labour relations.

In his analysis of industrial action in the collieries on the Rand which formed part of the 1922 Revolt,[3468] Alexander quotes Coulter (later to become the head of Anglo-American's coal interests) to indicate the ever-growing influence of trade unions within some of the major companies and industries:

> "Actually it was a lock-out as the Chamber of Mines were weary and tired of the Mine Workers Union… During [1920 and 1921] shaft stewards were appointed by the Unions and our lives were plagued by constant interference from these stewards which made it quite impossible to carry on operations smoothly. It was a great relief on the 1st January 1922 to get rid of these stewards who were all locked out together with other members of their union."[3469]

Alexander believes that this view was an exaggeration of the extent of union influence at the time, but adds that it does serve to highlight the underlying goal of

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[3465] Christianson et al *Individual Labour* 8. Grey Coetzee *Event-Structure* 5, 7 confirms that over sixty strikes were recorded as taking place in 1920 alone. Furthermore, Grey Coetzee *Event-Structure* 5 reasons that the underlying causes behind the increase in industrial action was a combination of dissatisfaction with post-war conditions in general and in the employment context, and a general anti-Government sentiment that permeated certain quarters of organised labour. Regarding the impact that the War had on local unionism, Grey Coetzee *Event-Structure* 5 states:

> "The First World War's main effect on South African trade unionism had been to enhance its strength and social standing. The co-operation of trade unions was indispensable for military and industrial mobilization, and wartime full employment greatly improved the unions' bargaining position."

[3466] Finnemore *Introduction* 30-31.

[3467] This uprising involved white mine employees who downed tools and started a bloody protest which was only ended when JC Smuts (the then Prime Minister) ordered the use of governmental troops to quell the uprising. Finnemore *Introduction* 31 states that the protest lasted 70 days, during which time 247 people died, 591 were injured, and of the 46 persons convicted for their participation in the action, 4 trade unionists were hanged. See further Grey Coetzee *Event-Structure* 8-11; Alexander (1999) *CSSAAME* 31.

[3468] For a succinct exposition of the inter-relationship between the colliery and gold mine strikes, which effectively formed the 1922 Revolt, see Alexander (1999) *CSSAAME* 38-39.

[3469] Alexander (1999) *CSSAAME* 38, [capitalisation as quoted]. Similarly, Alexander (1999) *CSSAAME* 38 quotes from the post-strike Report of the Mining Industry Board, as issued by the Transvaal Chamber of Mines, as stating: "Interference was carried to such an extent that the men frequently looked to the [union] stewards rather than to managers for directions regarding their work."

employers at the time, which was to "humiliate the unions and reassert untrammelled managerial control over the mining industry".[3470] While the Rand revolt was officially initiated by a ballot organised by the Mine Workers' Union[3471] – which saw in excess of 22 000 miners and associated workers down tools on the 10th of January 1922[3472] – there were numerous contributory factors.[3473] Essentially, however, there were two reasons: firstly, there was the change in policy that allowed black workers with sufficient experience to be used to fill positions previously reserved for white workers;[3474] secondly, and related, there was the suspicion that government was colluding with the Chamber of Mines in order to facilitate plans to this end.[3475]

The 1922 revolt was defeated through a drastic military response, which not only signified a definite opposition to organised labour, but also a particular opposition to industrial action.[3476] At the time, statutory regulation of trade unions (as opposed to legislative endeavours to control the nature and consequences of industrial action) was virtually non-existent.[3477] However, at least as far as the role of trade unions (*white*

[3470] Alexander (1999) *CSSAAME* 38.

[3471] For a detailed account of the nature of the meeting so held, on 5 March 1922, in order to vote on potential strike action – and a list of the various unions so present – see Du Toit *Trade Unions* 13.

[3472] Grey Coetzee *Event-Structure* 9-10.

[3473] Grey Coetzee at 7 cites as one of the additional reasons being attempts by the Chamber of Mines to reduce wages of the mine workers.

[3474] According to Grey Coetzee *Event-Structure* 8, this situation was compounded in no small manner by the outbreak of the First World War, which saw large numbers of mineworkers join for military service after being assured they would have their jobs back on their return. However, the realities of the conditions being experienced in Europe on the frontlines, saw comparatively few miners available for re-employment. Grey Coetzee *Event-Structure* 9-10 thus reasons that the increasing encroachment of semi-skilled black workers who were being used as substitutes in the absence of those involved in the War effort, together with the Chamber of Mines' apparent preference for "cheap compound-housed Black labour" (particularly in view of the fact that the latter did not enjoy the right to vote, and thus posed less of a political threat than the white workers) – resulted in a general concern on the part of white workers regarding the future prospects of employment.

[3475] 9.

[3476] 8-9 discusses the role played by General Smuts and his government in the lead-up to the Revolt, and appears to suggest that more blame for the uprising might be laid at the feet of the mine employers. Notwithstanding whom was responsible, and to what degree, the overwhelming use of State force in ending the industrial action, certainly speaks volumes as well.

[3477] Grey Coetzee *Event-Structure* 26, writing as he did in the mid-1970s, had the following to say regarding trade unions and the state:

> "South Africa, as other democratic states, accepted trade unionism as an essential social institution, and worked towards some form of partnership. But what is striking about this relationship, is how little it has been regulated by legislation. Except for the Conciliation Acts which limit the freedom of the trade unions, the actual control exercised by the Government over the domestic affairs of the unions is relatively slight and in most cases if often no more than the trade unions themselves desire

worker unions) was concerned, the 1922 revolt resulted in dramatic political and legislative changes.

Coetzee summarises the aftermath of the 1922 revolt as follows:[3478]

> "[W]hat the White workers failed to achieve then was won at the polls in the 1924 General Election. The South African Party Government of General J.C. Smuts was defeated by the embittered White workers. The Labour Party formed a pact (the Pact Government) with the National Party under General J.B.M. Hertzog, after their two provisos were accepted: firstly, that to circumvent a recurrence of strikes such as the 'Great Strike'… labour legislation immediately be introduced …"[3479]

10 3 The acknowledgement and assimilation of (white) trade unions in South Africa

10 3 1 The Industrial Conciliation Act of 1924

While the newly elected government immediately saw to the formation of a new Department of Labour,[3480] ICA 1924 was to be the key feature of future labour relations. In his discussion of the background developments preceding the enactment of ICA 1924, Coetzee states that the government sought to provide for compulsory conciliation by disputing parties and simultaneously to provide a forum for negotiating any matters that might give rise to a potential industrial dispute.[3481] It served to introduce industrial-level bargaining between employer and employee representatives

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for the sake of the security of their organizations. The relationship between trade unions and the State in South Africa came about more by learning from experience than by conscious design."

[3478] Regarding this point, it should by now be clear, in light of the preceding examination of unionism history in Britain and America – that politics and labour, and the political future of governments – are never far removed from one another.

[3479] Grey Coetzee *Event-Structure* 11.

[3480] Grey Coetzee at 14 states that Colonel Creswell, leader of the Labour Party and party to the Pact Government, became the first Minister of Labour.

[3481] Grey Coetzee *Event-Structure* 14. Regarding further commentary on the process culminating in the promulgation of ICA 1924, Simons "Trade Unions" in *Race Relations* 160-161 quotes Malan [The Cambridge History of the British Empire VIII (1936) 655], "one of the chief architects of the Union's industrial legislation", as saying:

> "Parliament was asked by the Minister of Mines and Industries, F.S. Malan, not only to pass measures enabling the Government to deal effectively with disturbances of the peace, but also to enact remedial legislation providing the necessary machinery both for the prevention of industrial disputes and for dealing with them should they unfortunately occur. These measures were not immediately acceptable to a Parliament which had still to be educated up to the necessity of dealing sympathetically with labour organizations; but step by step the necessary measures were passed *to provide the Union with an up-to-date industrial code modelled largely on corresponding legislation in Great Britain*" [my emphasis].

(employers' organisations and trade unions),[3482] provided that these associations were duly registered in terms of the Act.[3483] Furthermore, ICA 1924 regulated conditions under which strikes or lock-outs were allowed,[3484] the legal status of trade unions,[3485] and the repeal of certain statutes.[3486] Importantly, the Act did not initially grant a right to freedom of association,[3487] with employer victimisation of employees interested in joining (or already members of) trade unions still regarded as being a common right of management.[3488] However, of crucial significance was the fact that ICA 1924 was completely based "on racial categorisation and discrimination".[3489]

10 3 2 Racial segregation

The primary, undisputed focus of ICA 1924 was the interests of *white* employees.[3490] Of secondary importance, though very much less so than white

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[3482] Chapter III of ICA 1924 dealt specifically with matters pertaining to such representation and was entitled "Trade Unions and Employers Organizations".

[3483] The registration of trade unions and employers' organisations was regulated in terms of subss 14(1)-(6).

[3484] Subsections 12(1)-(3).

[3485] Subsection 15(1) stated: "Every trade union or employers' organization registered under this Act shall be a body corporate and shall be capable in law of suing and of being sued and, subject to the provisions of any law prohibiting or restricting the acquisition or holding of land, or purchasing or otherwise acquiring, holding and alienating property, movable or immovable."

[3486] One of which was the 1909 Industrial Disputes Prevention Act of the Transvaal, at § 10 2 2 above.

[3487] Lever JT *South African Trade Unionism in an Era of Racial Exclusion* D Lit et Phil thesis University of South Africa (1992) 74, in explaining the process surrounding the introduction (and eventual promulgation) of the Bill in Parliament, states that negotiations between the various stakeholders culminated in "the dropping of the clause which made illegal any stipulation by an employer that his workers should not belong to a trade union". Such protection was to be introduced by statute in 1937.

[3488] Du Toit *Trade Unions* 15.

[3489] M Christianson et al (eds) *Essential Labour Law: Collective Labour Law 2* 3 ed (2002) 10. It must be noted that it would be inaccurate to suppose that the underlying reason for the ICA 1924 was purely race-related. As stated by Lever JT *Trade Unionism* 85, "the creation of the new industrial relations framework was a case-study in economic politics; and the solution was largely an economic one: the encouragement of joint monopolies of employers and employees to regulate wage competition and to institutionalise collective bargaining." However, in recognition of the fact that race certainly played a significant role, Lever JT *Trade Unionism* 85 continues to state:

> "But on another level… the [1924] Act rested on a basic ethnic foundation – the virtual exclusion of the African worker. The Act thus gave major impetus to the tendency towards the separationist or exclusionist tendencies in white labour's activities, and must therefore be accounted one of the major factors giving rise to South Africa's partial labour movement. The causal chain was of course less than simple. The Act was influenced by exclusionist practices already in existence; in turn, it strengthened and elaborated these practices".

[3490] Finnemore *Introduction* 32-33, in describing the impact of ICA 1924 on the various affected parties,

interests, was a focus on the interests of coloured and Asian employees.[3491] This was brought about through the definition of the term "employee" in the Act.[3492] The ICA 1924 in effect created two separate systems, one for white workers (and, to some extent, coloured and Asian workers)[3493] and their trade unions and another (by implication, due to their exclusion from the process) for black workers.[3494] While black trade unions were not illegal,[3495] they could not fulfil their primary role (that of representing the interests of their members). Black workers were excluded from the definition of "employee", which prevented them from joining or forming registered trade

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avers:

> "White workers were increasingly drawn into a protected position in the capitalist system, while black workers remained excluded from political and economic power … White workers emerged as the labour aristocracy at the expense of black labour".

Black employees were therefore excluded from any benefits that could possibly be gained from industry-level bargaining (see Christianson et al *Collective Labour* 10), and the representation of black unions was thus, essentially, ignored. The issue of black worker representation was only to be properly dealt with in the 1950s, when they were provided with separate industrial-conciliation machinery as a result of later legislative enactments, to be discussed below. See further Grey Coetzee *Event-Structure* 53. RA Jones & HR Griffiths *Labour Legislation in South Africa* (1980) 23, in explaining one of the three central reasons for the promulgation of ICA 1924, state:

> "[I]t formed part of the overall policy of providing preferential employment opportunities to white workers as opposed to blacks in an attempt to alleviate the 'poor white' problem …".

[3491] Christianson et al *Collective Labour* 10. Coloured, Indian and/or Asian employees were not excluded from the definition of employee, due to the various statutes referred to in the definition of "employee", not being of application to them. They were thus entitled to the same rights under the 1924 Act as white workers, which allowed them to form or join registered unions, and access the formalised industrial relations machinery set out in terms of the Act. See J Maree & D Budlender "Overview: State Policy and Labour Legislation*"* in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 116 117; A Lichtenstein "Making Apartheid Work: African Trade Unions and the 1953 Native Labour (Settlement of Disputes) Act in South Africa" (2005) 46 *J Afr Hist* 293 297; Christianson et al *Collective Labour* 10.

[3492] Cunningham et al "Historic Development" in *MIRSA* 2–8 explains that the majority of black Africans were excluded from the application of the Act, since the term "employee" (as defined in s 24) was defined as not including persons who fell under the jurisdiction of any "Native Pass Laws and Regulations" provisions, or similar regulations, such as the Native Labour Regulation Act 15 of 1911 (see Wood & Coetzee *Cornerstone* 33). Since the latter measures were specifically aimed at black, pass-bearing Africans, this effectively limited the scope of the 1924 Act along racial lines.

[3493] Herein including, the so-called Coloured, Indian, and Asian employees.

[3494] In practice, only a very select group of black trade unions in the Orange Free State and the Cape did not fall foul of the exclusionary definition and could thus make use of the Act's bargaining structure. Very few of them did so. See Christianson et al *Collective Labour* 10; Grey Coetzee *Event-Structure* 15. The extent of employee exclusion was further confirmed (and in fact, extended) by s 51 of the Industrial Conciliation Act 36 of 1937, which sought to exclude, in addition, certain "native areas" (as defined in terms of specific legislation) from the scope and effect of Industrial Council agreements and awards.

[3495] Lichtenstein (2005) *J Afr Hist* 298; Grey Coetzee *Event-Structure* 53.

unions[3496] and excluded them from the only industrial relations system that was statutorily regulated.[3497] As a consequence, the 1924 ICA initiated the future duality of the South African labour system.[3498]

10 3 3 Industrial councils and increasing trade union growth

The 1924 Act sought to provide a mechanism through which agreements could be negotiated at a centralised level by means of various industrial councils.[3499] However,

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[3496] See for example, the following sources: Jones & Griffiths *Labour Legislation in South Africa* 24 state:

> "In other words, the majority of male black workers were excluded from the definition of 'employee', and since only employees could belong to, and participate in, a registered trade union, they were effectively excluded from membership of any legally registered and recognised trade union."

See further Christianson et al *Collective Labour* 10: "For example, trade unions, which accepted black employees as members, were precluded from being parties to industrial councils"; Grey Coetzee *Event-Structure* 15: "Pass-bearing Blacks or Blacks specifically recruited were … excluded from the definition of an employee who could become a member of a registered trade union"; and P Alexander *Workers, War & the Origins of Apartheid: Labour & Politics in South Africa, 1939-48* (2000) 11: "However, the provisions of the Act only applied to registered trade unions, and to obtain registration a union had to be composed of 'employees'".

[3497] Christianson et al *Collective Labour* 10; Lichtenstein (2005) *J Afr Hist* 298.

[3498] Finnemore *Introduction* 32. According to Christianson et al *Collective Labour* 10, ICA 1924 "actively discouraged" black worker participation in trade unionism – essentially this being brought about by virtue of the fact that the procedural systems put in place by the Act, did not permit participation by the vast majority of black workers. According to Grey Coetzee *Event-Structure* 19, racially-based legislation regarding black workers can be traced back to the Black Labour Regulation Act 15 of 1911. With regards to this Act, Cunningham et al "Historic Development" in *MIRSA* 2–6 state:

> "One of the first Acts to regulate black-labour matters was the Native Labour Relations Act of 1911. This Act placed recruitment and employment of blacks on a more satisfactory basis. It proved to be a comprehensive measure which, while recognising the rights as well as the obligations of employers, also afforded blacks employed on the mines greater protection."

[3499] The mechanism (in terms of Chapter II of ICA 1924, entitled "Prevention and Settlement of Industrial Disputes, ss 2-13) was implemented through different Industrial Councils, which would facilitate and regulate bargaining between the parties. Christianson et al *Collective Labour* 9 state that the employers' organisations and trade unions of a particular industrial sector would negotiate after reaching agreement that an industrial council was required for that specific sector. The parties would finalise the specific details of the (soon-to-be-registered) council, which would then seek registration in terms of ICA 1924. Once this requirement was met, the said council would then function as the official forum through which negotiation was to take place. Furthermore, the agreement would be binding on all relevant members of the different representatives (ie, the employers represented by the employer organisation, and the members of the various trade unions so represented), but could also be extended through the publication of a notice in the Government (then Union) Gazette. Therefore, it was possible that employers and employees alike, who were not part of the initial negotiation process but where active within that specified industry (eg, all mines), could be bound by the agreement reached at the council. In this way, and in similar fashion to how the system functions today, the agreements served as a means of standardisation by ensuring equality of terms of employment across the industry and

the theory proved to be far removed from the practicalities of the daily life of labour and its complex relationships.[3500] The entire process became over-bureaucratised and the emphasis on council level negotiation resulted in deterioration of shop-floor organisation.[3501]

While the latter part of the 1920s saw a burgeoning manufacturing industry develop[3502] in conjunction with the huge economic stimulus generated by the mining sector,[3503] the initial presence of certain factors resulted in fluctuating trade union membership numbers.[3504] Nonetheless, this period also saw the formation of various trade unions,[3505] some of which were non-racial (such as the South African Trades and Labour Council) as a result of the cosmopolitan nature of factories, which

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thus preventing discontent based on disparities in wages and the like. Furthermore, strike action only became an option following the successful completion of a lengthy and complex procedure created in terms of the Act so as to operate as a procedural barrier in an effort to curtail its occurrence. See further Wood & Coetzee *Cornerstone* 28-29; Grey Coetzee *Event-Structure* 14.

[3500] According to Wood & Coetzee *Cornerstone* 29, the intricacy and centralised composition of the system, together with the privileged position of the white trade unions, resulted in the latter making use of a few well-placed officials within the system to achieve their goals.

[3501] Alexander *Labour & Politics* 11 quotes RH Davies [*Capital, State, and White Labour in South Africa, 1900-1960: An Historical Materialist Analysis of Class Formation and Class Relations* (1979) 195] as saying that ICA 1924 "had the effect of bureaucratising the white trade unions (or at least of increasing the level of bureaucratisation already present)". See further Lever JT *Trade Unionism* 86 who, with regards to the effects of the Act, states:

> "[A]long with sectionalisation went bureaucratisation. The Act gave a powerful thrust to the formation of unions able to operate within, and take advantage of the new network of regulations and institutions. Increasingly what was needed was less the militant union organiser than the adroit negotiator and adept office manager."

[3502] J Lewis *Industrialisation and Trade Union Organization in South Africa, 1924-1955: The Rise and Fall of the South African Trades and Labour Council 42* (1984) 47 quoted the then Labour Department's journal [The Social & Industrial Review 5.6.29 478] as stating: "South Africa is in the midst of a far-reaching economic revolution, the keynote of which is the efflorescence of a great variety of secondary industries and the progressive industrialisation of large sections of the population."

[3503] Finnemore *Introduction* 26. A side effect of this growth was increased unionisation, particularly amongst black males and white females, as they found employment in the new market. See further Christianson et al *Individual Labour* 8. See further Cunningham et al "Historic Development" in *MIRSA* 2–9, who also reason that the changes brought about in the nature of South African industry during this period in time, resulted in many of the traditional craft unions being displaced by rapidly-growing industrial unions.

[3504] Du Toit *Trade Unions* 15.

[3505] The period in question saw numerous trade unions and federations come into existence, many of which played important roles in attempting to further organise black labour and their unions. However, the extent of these developments – and the detail required to properly discuss them – places them outside the current scope of this study. For information regarding this period, see Alexander *Labour & Politics* 12-22 and Du Toit *Trade Unions* 14-16, 34-40.

employed workers from various race-groups.[3506] Importantly, this increased activity also resulted in the government introducing further legislation.

10 3 4 The Industrial Conciliation Act of 1930

1930 saw the first amendment to ICA 1924, with the promulgation of the Industrial Conciliation Amendment Act.[3507] Of particular significance for this study is that the Act sought to introduce, for the first time, provisions specifically aimed at the internal regulation of trade unions. This the Act did by outlining specific aspects that were to be provided for in the rules of all registered trade unions and employers' organisations.[3508] However, the 1930 provisions must be seen in context. Firstly, given the fact that the Act was an amendment of the original 1924 legislation – which applied

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[3506] Christianson et al *Individual Labour* 8. See further Williams "Trade Unionism" in *Industrial Sociology* 72-75.

[3507] Industrial Conciliation Amendment Act 24 of 1930. For a succinct overview of the amendments made to the original Act, see Grey Coetzee *Event-Structure* 20. Of further relevance, was the introduction of the Riotous Assemblies Amendment Act 19 of 1930, which sought to further amplify the scope of the original 1914 Act by prohibiting any meeting of persons that might serve to engender conflict between "white Europeans" and any other inhabitants of South Africa. It must be noted that minor amendments were again made to the Industrial Conciliation Act in 1933, with the promulgation of the Industrial Conciliation (Further Amendment) Act 7 of 1933.

[3508] Subsections 14(1)-(6) of ICA 1924 regulated the circumstances surrounding the registration of trade unions and employers' organizations. Of particular interest, was subs 14(4), which stated that any alterations to the rules of trade unions (or employer organisations) that registered would only have effect once a copy of the revised rules had been submitted to the Registrar, and the latter had "certified that the alteration is in accordance with law". Whereas subs 14(2)(d) [as initially discussed at § 3 4 2 above] only made mention of unions (wanting to register) having to submit copies of their "rules", given the wording of the subsection, this essentially amounted to what would now be understood as a union constitution. Accordingly, whereas no specific provision was made for internal regulation of labour organisations, the aforementioned did amount to a limited oversight role on the part of the Registrar, who in terms of subs 14(4) would need to be satisfied of *lawful* amendments. Whilst not immediately contentious, the role of the Registrar in certification of amendments to union constitutions was to see legal challenges (following subsequent legislative amendments) in regards to one of South Africa's most prominent unions of the time – as discussed in more detail below. Nevertheless, s 11 of the 1930 Act amended ICA 1924 s 14 by inserting the additional subss (7)-(10). In particular, subs 11(9) prescribed the regulations pertaining to the rules of unions and employers' organizations. These included, *inter alia*, the following: Fixing the qualifications of membership; appointment, removal and powers of officers; the calling and conduct of special meetings; the acquisition and control of property; a periodic audit of accounts and the circulation to members or branches of a certified statement of income and expenditure of the union (or employers' organisation); the circumstances under which a member shall cease to be entitled to any of the benefits of membership; and, the amendment and repeal of the union (or employers' organisation) rules.

to employees as defined in that Act and their trade unions[3509] – the amendments were again focused solely on trade unions catering for the minority of workers. Secondly, while black trade unions and their members were active during this period[3510] it remains difficult to state with any certainty to what extent they would have sought to impose self-regulation in terms of these provisions, or, for that matter, even seen a need to do so in the first place. Therefore, while the 1930 Act remains noteworthy for its introduction of internal trade union regulation, this must be tempered by recognising that its provisions were only applicable to trade unions recognised for, and permitted to operate within, the then racially-based industrial relations system.

10 3 5 The Van Reenen Commission and the Industrial Conciliation Act of 1937

Du Toit states that renewed economic growth in the wake of the Great Depression saw a major influx of foreign capital and a concomitant upsurge in the need for trade union protection of the economic welfare of workers, with membership numbers exceeding 120 000 in 1935.[3511] This also resulted in governmental enquiries into the suitability of labour legislation. Following the recommendations of the Van Reenen

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[3509] Lichtenstein (2005) *J Afr Hist* 298 summarises this state of affairs as follows:

> "What African workers were usually denied, however, was direct participation in the negotiations that determined the conditions of their working lives. Nevertheless, African trade unions were by no means illegal; they simply were barred from state recognition and collective bargaining as overseen and guaranteed by juridical and administrative mechanisms."

[3510] In commenting on the ability of the African workforce to collectively oppose legislative measures being introduced by the government at this time, B Fine et al "Trade Unions and the State: The Question of Legality" in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 191 195 state the following:

> "Yet in the mid-[19]20s, the African section of the labour force, especially in industry, was relatively weak – and certainly far weaker than it is today. This is not to say that African workers did not fight important struggles against employers and the state during this period, but that they were not a strong enough force (numerically, organisationally, ideologically) to counter the intense pressure which the state was imposing on white workers."

[3511] Du Toit *Trade Unions* 15. For a particularly concise and useful overview of the labour challenges of this period, see D O'Meara "Analysing Afrikaner Nationalism: The 'Christian-National' Assault on White Trade Unionism in South Africa, 1934-1948" (1978) 77 *Afr Aff* 45 47-50.

Commission[3512] (instituted in 1934),[3513] 1937 saw the repeal of ICA 1924 (as amended)[3514] by ICA 1937. In the lead up to the 1937 Act, the Van Reenen Commission already showed awareness of situations where union officials did not necessarily act in the best interests of their members:

> "Voorbeelde is onder die aandag van die Kommissie gebring, waar verenigings [trade unions] ineengestort het, nie weens die houding van die arbeiders nie, *maar weens die onbevredigende metodes wat hul organiseerders aangewend het*. Daar is blykbaar 'n klas persoon wat die sekretarisskap van 'n vakvereniging beskou as 'n maklike manier om 'n bestaan te maak. Hulle doen die vakverenigingbeweging groot kwaad aan en vermeerder onverskilligheid tot 'n mate wat herstel dikwels byna onmoontlik maak nadat agteruitgang eers 'n aanvang geneem het.[3515]

[3512] Lewis *Industrialisation* 58 in citing the findings of the Commission [RSA Report of the Industrial Legislation Commission UG 37/1935 para 350], quotes the following regarding ICA 1924 and unionism in South Africa: "The Promulgation of the Industrial Conciliation Act marked a definitive revival in trade unionism. This is recorded by Gitsham and Trembath (Labour Organisation in South Africa (1926): '…the Act has tended to foster the growth of trade unions among those workers who were previously badly organised. Several new Unions have grown up or have become stronger since the Act was passed…'." Regarding the question of race as a determinant in the context of organised labour, the following was said at RSA Industrial Legislation Commission paras 361-362:

> "Die kleurvraagstuk vorm ook 'n ernstige struikelblok vir doeltreffende vakverenigingorganisasie in Suid-Afrika … Dit kan beweer word dat die vakverenigingbeweging in die Unie hoofsaaklik 'wit' is en dit is dus nie verbasend dat die verskil tussen die lone vir georganiseerde en ongeorganiseerde arbeid gewoonlik so groot is nie. Die feit dat sekere klasse werkers, veral pasdraende naturelle, uitgesluit word van die woordbepaling 'arbeider' in die Nywerheids-versoeningswet [Industrial Conciliation Act] moet in hierdie verband egter nie uit die oog verloor word nie. Al sou sulke werkers in afsonderlike verenigings georganiseer word, kon hul nie ingevolge die Wet geregistreer word of fungeer nie, en as hul tot lidmaatskap van bestaande verenigings toegelaat word, sou hul nie vir die doel van die Wet erken wees nie".

Regarding the perceived value of trade unions within the broader context of South African industrial relations, the Report stated the following [RSA Industrial Legislation Commission para 365]:

> "Dit word nie algemeen besef dat die vakverenigingbeweging 'n byna onmisbare deel van ons maatskaplike stelsel vorm nie. Teenswoordig, waar die arbeiders in 'n enkele werkswinkel dikwels baie honderde beloop, sou die reëling van individuele dienskontrakte baie administratiewe moeilikhede veroorsaak en om hierdie rede alleen is dit die beleid van baie werkgewers om hul arbeiders aan te moedig om by vakverenigings aan te sluit en sodoende kollektiewe onderhandeling moontlik te maak."

Chapter X, Part III of RSA Industrial Legislation Commission paras 678-688 furthermore made the recommendation, for the first time, for the establishment of an industrial court ["*nywerheidshof*"] with the requisite higher-court status.

[3513] Cunningham et al "Historic Development" in *MIRSA* 2–8; Van Jaarsveld & Van Eck *Principles* 11.

[3514] In terms of s 86 of the new Act, the original ICA 1924, and its subsequent amendments in 1930 and 1933 were repealed.

[3515] Para 30 of the RSA Industrial Legislation Commission [my emphasis].

The 1937 Act was to be the last major legislative enactment relating to the white industrial relations system for almost 20 years. The Act preserved, in essence, the industrial relations system first implemented in 1924,[3516] but also redefined the term "trade union",[3517] provided for the establishment of conciliation boards,[3518] mediation,[3519] voluntary arbitration[3520] and compulsory arbitration,[3521] added new (and further expanded existing) provisions pertaining to the union constitution,[3522] and introduced the first of the rights of enquiry for the Industrial Registrar. In this regard, section 13(1) of the Act authorised the Registrar to launch an enquiry into occurrences within a trade union under specific circumstances[3523] and included the power of the Registrar to interrogate witnesses.[3524]

ICA 1937 also introduced the forerunner of the modern-day right to the freedom of association by prohibiting employers from making it a condition of employment that any employee shall not be or become a member of a trade union.[3525] This right was augmented by section 66. This section provided that any employer who, *inter alia*,[3526]

[3516] For instance, the Act maintained (and in fact – further regulated) matters pertaining to the Industrial Councils, first established in terms of the original Act.

[3517] The word "employee" was now specifically inserted into the definition of the term "trade union", thereby further confirming that registered trade unions who sought to participate in the industrial relations system set out in the Act, could not have as members, those workers who were excluded in terms of the definition of "employee". The latter definition, incidentally, also had its scope expanded by the new Act.

[3518] Ss 35-43 of the ICA 1937.

[3519] Section 44 of the ICA 1937.

[3520] Subsections 45(1)-(13) of the ICA 1937.

[3521] Subsections 46(1)-(10) of the ICA 1937.

[3522] Section 9 of the ICA 1937, entitled "[m]atters for which the constitution of a trade union ... must provide", listed, *inter alia*, within its subsections 9(a)-(k) the following aspects pertaining to internal union procedures: (i) "the appointment, removal and powers of office-bearers and officials" [subs 9(b)]; (ii) "the calling and conduct of meetings of members or of representatives of members of the union" [subs 9(c)]; (iii) "the keeping of books of account and the periodical auditing of accounts at least once every calendar year, and the making available to members of true copies of the audited accounts and of the auditor's reports thereon" [subs 9(f)]; (iv) "the circumstances under which a member shall cease to be entitled to any of the benefits of membership" [subs 9(h)]; and, finally, (v) "the alteration of the constitution" [subs 9(i)].

[3523] This aspect of the Registrar's powers, in terms of the various Industrial Conciliation Acts that were passed, are discussed in greater detail below.

[3524] Subsections 13(2)-(6) of the ICA 1937.

[3525] Subsections 78(1)-(3).

[3526] Apart from dismissal, subs 66(1) also prohibited a reduction in rate of remuneration, alteration of the terms of employment, or any alteration of the concerned employee's position, relative to that of his or her fellow employees. In terms of subs 66(1)(a), ICA 1937 also prevented employers from discriminating (by means of dismissal or the similar alternatives listed above) against employees who

dismisses an employee based on a suspicion or belief that "that employee belongs or has belonged to any trade union",[3527] shall, "whether or not the suspicion or belief is justified or correct, be guilty of an offence."[3528] Finally, the Act introduced protection against trade unions and their officials from any legal proceedings that might arise in respect of certain wrongful acts committed in furtherance of a strike or lockout, provided that such industrial action was not forbidden in terms of the Act.[3529]

The new Act thus significantly expanded upon the initial concepts and systems adopted in 1924. When compared to its predecessor, ICA 1937 may be described as the first complete industrial relations enactment – demonstrative of the rapid growth experienced in the South African industry. However, ICA 1937 was identical to its predecessors in one, vital respect: it too only applied to "employees" as defined. Therefore, South Africa's burgeoning industries and the labour force required to drive them, continued to be framed by a system based upon race. Black workers and their trade unions still found themselves on the outside looking in.

10 3 6 The duality of racially-based labour relations entrenched

10 3 6 1 The period around WWII

The issue of the non-recognition of black workers and their trade unions was gradually becoming a concern, not only among black South Africans[3530] but also in government, particularly when, two years after the promulgation of ICA 1937, World

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have, as required in terms of the Act, provided information to either an industrial council, its officers, a conciliation board, a mediator, an arbitrator appointed in terms of the Act, or a court of law.

[3527] Subsection 66(1)(c) of the ICA 1937.

[3528] Subsection 66(1). The options (for instance, reinstatement) available to employees who were dismissed under such circumstances were listed in subs 66(2) of the ICA 1937.

[3529] Section 79.

[3530] In demonstration of the growing desire for formal recognition amongst various segments of the black population, Alexander *Labour & Politics* 56, after explaining the role played by the fledgling African National Congress, quotes from a letter written by the Director of Native Labour, wherein the following was stated:

> "The old reverence of the European has long gone by the board. It has been replaced by a Bantu nationalism, founded in a determination to secure by and for themselves, what they feel European Authorities have refused the Natives … It is, however, in the industrial and labour world that Native activities are becoming so pronounced and impressive. Native leaders have learnt the power of organisation and of organised labour. Native labourers are rapidly being taught and learning the same thing. The Government's refusal to give recognition to Native Trade Unions means nothing … A position is created where, willy nilly, employers have to recognise the Unions as they only practicable way of preventing serious stoppages of work".

War II broke out.[3531] The War had a dramatic impact on the future politics and labour relations of South Africa,[3532] not the least of which was the victory of the National Party three years after the end of the War in the 1948 general election.[3533]

[3531] Alexander *Labour & Politics* 9 states the following:

> "On 1 September 1939 Germany invaded Poland, and two days later the British government declared war on Germany. The South African cabinet was divided: six ministers, including General Hertzog, the Prime Minister, supported neutrality, whilst seven, led by General Smuts, favoured opposition to Germany. On 4 September, in the House of Assembly, Hertzog secured 67 votes, compared with 80 for Smuts. That evening, Hertzog resigned, and the Governor-General asked Smuts to form a government".

[3532] The impact of the War upon labour within South Africa, and organised labour in particular, was far reaching. One example of this, was the introduction of increasingly strict measures pertaining to industrial action, specifically with regards to black labour – in particular the promulgation of the infamous "War Measure 145" (Alexander *Labour & Politics* 53), which was to remain in use long after the conclusion of the War. Regarding this last point, Du Toit *Trade Unions* 17 states:

> "The most serious short-coming was however, that the Industrial Conciliation Act could not be applied in the case of Black workers. A remedy was the proclamation of War Measure No.145 of 1942, which prohibited strikes by Black workers and allowed the Minister of Labour to appoint arbitrators to settle disputes with Black workers. In the absence of machinery to cope with disputes in the case of Black workers, this measure … was not immediately recalled after the war. Only on 1 May, did the Bantu Labour (Settlement of Disputes) Act, (No. 48 of 1953), which was aimed at the regulation of conditions of service and the prevention and settlement of disputes concerning Black workers, take over its function."

Thus, the measure sought to prohibit all strikes by African workers, at risk of the severe penalty of 3 years imprisonment or the payment of a £500 fine – in efforts to quell the growing occurrences of industrial action which was, *inter alia*, threatening the smooth manufacturing process necessary for the War effort. In describing the nature of the measure, Alexander *Labour & Politics* 44 states:

> "The government was particularly concerned about the character of many of these strikes, and this was probably its primary consideration when, at the end of 1942, it abandoned a plan to include Africans within the legal definition of 'employee', and instead introduced a new, repressive and racially-divisive war measure, Number 145. Ministers were especially disturbed, firstly, by Afrikaner women and African men joining together in Johannesburg [in industrial action]; secondly, by Indians and Africans making common cause in Durban [also by means of industrial action]; and, thirdly, by a series of African strikes on the Rand that represented perhaps the most significant black challenge to white authority for 22 years".

The "plan" to include African employees, as mentioned above, was prompted by the perceived threat of possible invasion, which was a very serious concern during the early stages of the war. Smuts and his government were also wary of the support shown towards Germany by segments of the Afrikaner population – and were considering awarding recognition to Black unions and workers, as a means of firstly, rectifying the problems arising from black urbanisation, but secondly, also as a means of gaining their support – thereby pre-empting any such going the way of those elements opposed to the War. When the tide turned, and it became clear that the Allied Forces were gaining the upper-hand, the debate regarding the recognition of black employees and their unions, disappeared as quickly as the military threat of Japanese invasion. See in this regard Alexander *Labour & Politics* 55-60.

[3533] Regarding the election, Alexander *Labour & Politics* 122 states the following:

> "[T]hose liberal writers who have chosen to stigmatize white workers as a class are almost certainly mistaken. Not only was the organized labour movement generally opposed to apartheid, but also it

10 3 6 2 The 1948 election and Separate Development

Regarding the 1948 election, Alexander states:

> "Among the array of factors which shaped Smuts's priorities and provided the immediate context for the Nationalists' victory, three, in particular, might be emphasized. First, the war led to a rapid expansion of the black proletariat and created conditions for the explosion of black self-activity and self-confidence. This posed massive social and political problems for which the cabinet lacked solutions; it became lethargic and incapable of effective government. Secondly, Smuts's insistence on maintaining racially-divided trade unions undercut the possibility of developing a significant material basis for opposing racist sentiment amongst white workers. Thirdly, the economic importance of gold, and the political clout of the Chamber of Mines, carried enormous weight with Smuts. Time and again, his concern not to antagonize mining interests inserted itself into our narrative: manpower control, cost of living allowances, the recognition debate …"[3534]

1948 heralded the introduction of the new government's policy of "Separate Development",[3535] which in the words of Du Toit meant that changes "not only in the political, but also in the economic sphere, were in the offing".[3536] At this time, and while numerous attempts were made to organise African workers prior to the 1950s,[3537] most of these efforts proved unsuccessful in marshalling anything more than a

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> is most unlikely that the majority of white workers voted for pro-apartheid candidates in 1948. The election was only narrowly won by the Nationalists, who did so on the basis of an electoral system biased in favour of rural constituencies … There were, after all, good reasons why white workers should oppose the Nationalists. In particular, the party proposed to attack both the autonomy of the trade unions and their institutionalized influence in industrial councils and apprenticeship committees … However, election outcomes are determined by abstentions as well as votes cast, and disillusionment with Smuts, and the lack of any creditable left alternative, were major in the Nationalists' victory".

Importantly, the victory of the Nationalist Party over that of the United Party and South African Labour Party coalition also marked the beginning of the end for the SALP. See in this regard Alexander *Labour & Politics* 122-123.

[3534] Alexander *Labour & Politics* 123.

[3535] Du Toit *Trade Unions* 20.

[3536] 20.

[3537] Finnemore *Introduction* 34 recounts the efforts of the Council for Non-European Trade Unions ("CNETU"), formed in 1941, which by 1945 claimed a total membership of 158,000 amongst its 119 affiliated unions. However, the complete absence of statutory backing, due to their exclusion from the labour relations system that was then in place, left the union in a comparatively weak position with regards to any attempts at bargaining. Whilst 1946 did see it organise a strike action involving over 70 000 miners, it was quickly put down by police – and the subsequent arrest of several union leaders, under the alleged threat of communism, served as a severe setback for black labour associations. For further details regarding the 1946 strike, see Cunningham et al "Historic Development" in *MIRSA* 2–10.

comparatively small minority of the available labour force.[3538] While, in the period between 1940 and 1948, the number of white workers in the manufacturing industry had increased from 114 272 to 162 201, the number of black workers employed in this sector increased from 161 765 to 307 597,[3539] without the vast majority of these workers enjoying formal recognition as part of the industrial relations system. Isolated attempts at organisation proved to be the exception rather than the rule – particularly in view of the fact that the 1950s was an era of intense political activity,[3540] which resulted in ever-increasing control measures introduced by the government.[3541]

[3538] Christianson et al *Individual Labour* 8-9 explain that the growth of white nationalism, particularly considering the National Party being elected to office in 1948, saw the steady decrease in black workers unions' power. Cunningham et al "Historic Development" in *MIRSA* 2–10 trace the decline to the 1946 industrial action discussed above, and cite Lodge [T Lodge *Black Politics in South Africa Since 1945* (1983) 20] as saying: "[The 1946 strike] signalled the end of any serious consideration by the African political leadership of any reformist proposals put forward by the government". The harsh governmental suppression of black strike action, coupled with "large-scale repression of union-activists" following the passing of the Suppression of Communism Act 44 of 1950, saw initial attempts at large-scale black labour associations fail. See Finnemore *Introduction* 34-35; Cunningham et al "Historic Development" in *MIRSA* 2-11.

[3539] Lichtenstein (2005) *J Afr Hist* 297.

[3540] For a summation of the socio-political changes that were happening within South African society during this volatile period, see Cunningham et al "Historic Development" in *MIRSA* 2–13-2–15; Williams "Trade Unionism" in *Industrial Sociology* 78-80.

[3541] Christianson et al *Individual Labour* 9. Regarding the approach of the government Cunningham et al "Historic Development" in *MIRSA* 2–11 state:

> "During this period it became patently manifest that the country's political and industrial-relations systems were inseparable. The employment of blacks in urban areas was primarily governed by four Acts. These were the Native (Urban Areas) Consolidation Act 25 of 1945, Native (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952, Native Service Levy Act 64 of 1952 and the Native Building Workers' Act 27 of 1951. These Acts controlled the place of residence of blacks, where and under what conditions a black could sell his labour, made possible his removal from certain areas and stipulated financial and other obligations on the part of employers when employing blacks."

See Du Toit *Trade Unions* 17-18 regarding the approach of the Government during this time, particularly with regards to its clampdown (as mentioned above) on Communism. As further stated by Alexander *Labour & Politics* 123:

> "The Nationalists' victory led to a transformation of the labour movement, as may be seen by focusing on three key acts. The first of these [the other two being legislation enacted in 1953 and 1956] is the 1950 Suppression of Communism Act, which, as Ivan Walker and Ben Weinbren [IL Walker & B Weinbren *2000 Casualties: A History of the Trade Unions and the Labour Movement in the Union of South Africa* (1961) 241] put it, 'proved to be the most effective weapon used by the Government in the campaign to smash the free trade unions'. Not only was the Communist Party outlawed, which would have been bad enough, but any trade unionist whom the government branded as a communist was banned from holding office. By the end of 1955 this included 56 officials, comprising 28 whites, 17 Africans, 7 coloureds and 4 Indians ... According to Ben Schoeman, the Minister of Labour, those whom the government banned had 'done a great deal for their members', and were 'probably among the most competent union organisers in the country' [HJ

Even so, as a result of the perceived threat of trade unions (both black[3542] and white),[3543] internal union strife[3544] and the industrial action organised by trade unions,[3545] the new Labour Minister (Ben Schoeman – appointed in 1949)[3546]

Simons & R Simons *Class and Colour in South Africa, 1850-1950* (1983) 598]. Inevitably, the leaders who replaced them were less experienced, more cautious and less effective".

The year 1955 nevertheless saw the formation of the South African Congress of Trade Unions (SACTU), which served to unify a diverse group of already established labour associations. Whilst lasting less than a decade, SACTU was principal in clearing the way for future black trade federations. See Wood & Coetzee *Cornerstone* 24-25, who briefly highlights the (somewhat contested) reasons attributed to SACTU's downfall. Numerous other trade unions were naturally active during this period as well – for a brief summary of the more important ones, see Alexander *Labour & Politics* 124-125; Du Toit *Trade Unions* 36-42.

[3542] In demonstrating the attitude prevalent amongst the ruling party, with regards to organised labour, Cunningham et al "Historic Development" in *MIRSA* 2–11 [citing A Hepple "Labour and Labour Laws in South Africa" (1956) 1 *Af S* 24 25] quotes part of a speech delivered in Parliament by the then Minister of Labour, Ben Schoeman, who in rejecting black trade-union rights said: "[T]he stronger the Native trade-union movement becomes, the more dangerous it would be to the Europeans of South Africa … we would be committing race suicide if we give them [the black trade unions] that incentive (to organise)". See further Lichtenstein (2005) *J Afr Hist* 299.

[3543] The government's reaction to certain activities of the predominantly white labour federation, the South African Trades and Labour Council (SATLC), was but one example of the prevailing attitude towards organised labour. The federation was purportedly still accepting black workers as members in their affiliated unions. This state of affairs blatantly disregarded a cabinet decision made early in 1945, which according to Alexander *Labour & Politics* 110, ordered all registered trade unions to immediately "expel male African members on pain of de-recognition." This decision was duly challenged by some of the affected unions in *Sweet Workers' Union v Orkin N.O. & Minister of Labour* 1946 CPD 305, with Newton-Thompson AJ & Jones J finding in favour of the Minister (the outcome being that for a trade union to be registered in terms of the 1937 Act, same could only have as members those workers who fall within the definition of "employee" in terms of s 1 of the Act) – *Sweet Workers* 311. In explaining the consequences of the judgment, Alexander *Labour & Politics* 111 states that "in clarifying the legal situation, the courts had struck a major blow against multiracial unionism, but the government was still left with the problem of how to deal with African unions." Lichtenstein (2005) *J Afr Hist* 299, in describing how these SATLC affiliate unions were "provoking the greatest level of anxiety for the Nationalists", reasons that their actions played a significant role in the subsequent decision to appoint a Commission to investigate South Africa's labour laws and trade unions structures, claiming:

"It was precisely this sort of affront to apartheid that the Nationalists pledged themselves to eradicate as they contemplated the task of conforming South Africa's labor laws and trade union structures to the project of apartheid."

[3544] Central herein was the Mineworkers' Union (MWU) – with reference to cases involving the union being liberally sprinkled across different sections of this and the remaining chapters to follow. The MWU's internal woes are discussed in more detail below, in the examination of the 1956 legislation at § 10 3 6 4.

[3545] Particularly those organised during the mid to late 1940s, as discussed at § 10 3 6 1 and § 10 3 6 2 above. Regarding strike action that occurred in the early part of the 1950s, see Alexander *Labour & Politics* 124.

[3546] Lichtenstein (2005) *J Afr Hist* 299.

proceeded to appoint the Botha Commission,[3547] tasked with investigating the entire spectrum of industrial relations and labour legislation.[3548]

For purposes of this study, the Botha Commission is of particular interest given its terms of reference, where the following was stated:

> "(d) [D]ie invoering, deur middel van wetgewing, van toereikender beheermagte ten opsigte van die wyse waarop vakverenigings [trade unions] en werkgewersorganisasies hulle sake bestuur (met inbegrip van hul finansiële sake) en waarop hul verkiesings hou, ten einde te verseker dat die bepalings van hul konstitusies na behore nagekom word en die sake van sodanige vakverenigings en organisasies billik en behoorlik behartig word in ooreenstemming met die wet en met die lede se wense in verband daarmee;[3549]
> (e) die wenslikheid, of andersins, van die omskrywing van die funksies van vakverenigings en werkgewersorganisasies en van hul ampsdraers en beamptes in hul hoedanigheid as sodanig, op so 'n wyse dat dit alleen betrekking het op sake wat die belange van hul lede raak in hul hoedanigheid van werknemers of werkgewers en met betrekking tot onderskeidelik hul werkgewers en werknemers, en op sake wat daaruit voortspruit; …"[3550]

In addition, the Commission was tasked with investigating the functioning of existing black trade unions, the regulation of those unions, determination of the role (if any) to be played by black trade unions[3551] and to consider whether or not any labour-related mechanisms ["*masjinerie*"] should be created for the prevention and adjudication of industrial disputes involving black workers.[3552]

10 3 6 3 The Botha Commission

10 3 6 3 1 Core concepts

When considered in light of the underlying focus of this study,[3553] the Botha

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[3547] RSA Report of the Industrial Legislation Commission of Enquiry [Kommissie van Ondersoek in sake Nywerheidswetgewing] GG 62/1951 (hereafter RSA Commission of Enquiry).

[3548] Cunningham et al "Historic Development" in *MIRSA* 2–11-2–12 states that the scope of the legislation requiring investigation by the Commission comprised of the then-current Industrial Conciliation Act 36 of 1937, the Factories, Machinery and Building Works Act 22 of 1941, the Wage Act 44 of 1937 and the Shops and Offices Act 41 of 1939. For a discussion of the impact of the Wage Act, in its different guises, on the South African economy and various working-classes, see in general DE Pursell "South African Labor Policy: "New Deal" for Nonwhites?" (1971) 10 *Ind Rel J Econ Soc* 36.

[3549] RSA Commission of Enquiry para A(d) iii [my emphasis].

[3550] Para A(e) iii.

[3551] Para B iii.

[3552] Para C iii.

[3553] Whereas the Commission was tasked merely with the making of recommendations (the extent to

Commission Report introduced three central concepts into the discourse of South Africa's approach to trade unions and their regulation: Recognition of the important role to be played by trade unions in industrial relations; the realisation that trade unions' internal procedures are deserving of focused attention; and lastly, the important role of black trade unions in the labour market, albeit in a *separate* system. Regarding the first and second points, chapter 6 of the Report dealt with "[t]he prevention and conciliation of disputes"[3554] which focused on aspects of collective bargaining (along with chapter 7, which dealt with closed-shop agreements)[3555] and chapter 8 addressed the control and functions of trade unions (along with employers' organisations).[3556] With regard to black trade unions, chapter 9 of the Report dealt with "*[a]fsonderlike vakverenigings en werkgewersorganisasies vir die verskillende rasse*",[3557] with chapter 10 focusing on the protection of workers of all races.[3558] The Report envisaged separate trade unions and employers' organisations for different population groups and also contained a proposal to implement a work-reservation scheme based on race in order to prevent unfair competition between the different racial groups for the same types of employment. In addition, schedule seven of the Report[3559] set out comprehensive guidelines for the "formation and administration of

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which these were to become part of later industrial relations' legislation is discussed below), it provides vital insight into aspects surrounding the contextualisation of trade unions within the broader South African industrial framework during the 1930s to 1950s – and in particular, is indicative of the pervading mindset with which the relationship between members and their unions (to the extent that it was addressed by the Commission) was viewed during the middle of the previous century in South Africa.

[3554] "Die voorkoming en beslegting van geskille" – RSA Commission of Enquiry 82-118 paras 510-788. [Note to reader: Where, for the sake of ease of reference, page numbers are included in references pertaining to the Botha Commission Report, such are made with reference to the Afrikaans language version of the Report. All paragraph numbering is identical between both versions].

[3555] "Die beginsel van geslote geledere" – RSA Commission of Enquiry 119-123 paras 808-842.

[3556] "Beheer en funksies van vakverenigings en werkgewersorganisasies" – RSA Commission of Enquiry 125-151 paras 852-1035.

[3557] RSA Commission of Enquiry 152-162 paras 1036-1112.

[3558] "Beskerming van werkers van alle rasse" RSA Commission of Enquiry 162-169 paras 1113-1157.

[3559] RSA Commission of Enquiry 339-346.

trade unions"[3560] and included proposals regarding unions' constitutions,[3561] their management and administration[3562] and their finances.[3563]

10 3 6 3 2 Control and functions of unions

Chapter 8 of the Report requires careful analysis. As point of departure, the Commission confirmed the need to investigate the internal procedures of unions and employer organisations.[3564] The Commission addressed the following key areas: (i) The objectives and functions of trade unions;[3565] (ii) The political activities of trade

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[3560] Sch 7. Regarding the point of departure of the Schedule, the following is stated [RSA Commission of Enquiry sch 7 paras 1-2]: "Die Kommissie se ondersoek het 'n groot aantal tekortkomings in die bestuur van vakverenigings aan die lig gebring, veral in die geval van die kleiner geregistreerde vakverenigings en ongeregistreerde Naturellevakverenigings. Hierdie verskynsel dui daarop dat sommige van hierdie vakverenigings, aangesien hulle dit nie kon bekostig om behoorlik gekwalifiseerde en opgeleide beamptes in diens te neem nie, verplig was om hulle te verlaat op die leiding van hul vooraanstaande lede wat egter self dikwels in die duister verkeer het weens gebrek aan kennis en ervaring, en die feit dat daar nie vir hulle geskikte, beknopte en eenvoudige literatuur oor die onderwerp beskikbaar was nie. Dit is redelik om aan te neem dat sulke vakverenigings 'n geredelik beskikbare handleiding sal verwelkom. Hoewel dit nie in sy opdrag ingesluit is nie, ag die Kommissie dit wenslik om kortliks aan te dui hoe hierdie tekortkominge uitgeskakel en vakverenigings bestuur kan word ten einde te verseker dat hulle doeltreffend funksioneer… *Dit sal aan 'n nuttige doel beantwoord as dit die lede van vakverenigings help om op meer intelligente wyse aan die bestuur van hul vakverenigings deel te neem. Om gesonde organisasies te word, moet al die lede van vakverenigings in staat wees om aktief in hul sake belang te stel*" [my emphasis].

[3561] Paras 5-7.

[3562] Paras 8-31.

[3563] Sch 7 paras 32-59. Regarding the latter, Schedule 8 of RSA Commission of Enquiry 347 provided a proposed template of an income and expenditure account, and balance sheet, for registered trade unions.

[3564] 125 para 853 contains the following justification:

> "Verskeie getuies het beswaar gemaak teen die insluiting van hierdie kwessies as 'n onderwerp vir die Kommissie se ondersoek, en beweer dat dit die vakverenigingbeweging in 'n ongunstige lig stel. Die Kommissie kan nie hierdie sienswyse aanneem nie. *Reeds voor die benoeming van die Kommissie het daar uit verskillende kringe aantygings gekom dat hierdie organisasies te veel mag besit en dat dié mag misbruik word,* en al is dit alleen om vas te stel of hierdie aantygings waar is of nie, is 'n ondersoek na hierdie aangeleenthede in die beste belang van die betrokke liggame, afgesien van ander oorwegings. Daarenteen het die Kommissie gevoel dat as werkgewersorganisasies en vakverenigings nie daarin kon slaag om hom te oortuig dat hierdie aantygings ongegrond is nie*, dit sy taak sou wees om vas te stel watter addisionele beheermaatreëls nodig is om te verseker dat hulle in die toekoms hul mag redelik en billik gebruik" [my emphasis].*

[3565] 125 paras 854-873 saw the Commission discuss various aspects pertaining to whether unions, specifically in light of the definition of trade unions in terms of the definitions section of ICA 1937, should be solely/strictly limited to purely labour related matters – before concluding that the (then) existing status quo could be maintained.

unions;[3566] (iii) Aims/objectives that unions' constitutions should make provision for;[3567] (iv) The membership of trade unions ("*organisasies*");[3568] (v) The management of trade unions[3569] (discussed separately below); (vi) The financial management of trade

[3566] RSA Commission of Enquiry 129 paras 878-884 addressed this issue with the recommendation that trade unions, along with their officials and office-bearers, should not be permitted to participate in "party-political" activities, nor to make use of their union's mechanisms in support thereof.

[3567] 130 paras 885-902 encompasses the relevant paragraphs of the Report where these matters were discussed. The section commences with 21 points, that were crystallised from the constitutions of the various unions that the Commission had access to in the course of conducting its research – and represented the collective aims that were regulated in said constitutions. The various points were discussed, before concluding with the recommendation [RSA Commission of Enquiry 131 paras 896-897] that, firstly, union constitutions must specify what their funds will be used for, and secondly, that unions be prevented from using their funds for any other purposes not so specified in their constitutions (and in particular, for, *inter alia*, promoting unlawful strikes). Consequently, an additional recommendation was made that the Registrar had the discretion to allow for such registration (in spite of the aforesaid), if particular circumstances warranted it.

[3568] RSA Commission of Enquiry 135 paras 922-930, where the following was stated by manner of introduction [par 922]:

> "Daar was heelwat eenstemmigheid oor die kwessie van 'n organisasie se reg om lede aan te neem, te weier, uit te sit, te skors, of boetes op te lê. In verband met die weiering van 'n aansoek om lidmaatskap is verklaar: 'Lidmaatskap verleen sekere regte en lê sekere pligte op, en wanneer bekend is dat die applikant 'n persoon is wat gewoonlik sulke regte of pligte nie eerbiedig nie, of hom skuldig maak aan onetiese gebruike wat die vereniging kan skaad, of wat teen die belange van die lede is, moet die vereniging die reg hê om lidmaatskap sonder opgaaf van redes te weier.' Ander getuies was dieselfde mening toegedaan op grond daarvan dat 'n besluit van hierdie aard inherent in die beginsel van vryheid van assosiasie opgesluit lê, en het bygevoeg dat dit onmoontlik is om redes vir weiering op te gee aangesien die besluit gesamentlik geneem word en dit nie bekend is watter faktore die lede van die organisasie beïnvloed het nie."

In light of several points raised by witnesses to the Commission, regarding avenues of appeal, common law protection, and the right to take the matter to the Courts, the Commission made the following remark [par 926]:

> "Die Kommissie stem in 'n groot mate in beginsel saam met die sienswyse wat voor hom uitgespreek is en meen dat … werknemersorganisasies soveel vryheid moontlik in die bestuur van hul eie sake behoort te geniet, veral omdat die toepassing van tug van fundamentele belang vir gesonde organisasies is. Hy [the Commission] *is nietemin oortuig dat die beginsels wat voor hom genoem is, hoe regverdig dit ook al mag wees, nie altyd in die praktyk billik toegepas is nie*. Na die mening van die Kommissie *moet die kwessie van redelikheid nooit uit die oog verloor word nie,* al bestaan daar gronde vir weiering van 'n aansoek om lidmaatskap of uitsetting of skorsing uit 'n organisasie of vir die oplê van boetes" [my emphasis].

As a result of the latter, the Commission recommended [par 927] that whereas "daar geen inmenging moet wees in die regte van … vakverenigings om lidmaatskap te weier of om lede uit te sit of te skors nie", such persons should nonetheless have the competency to approach the Minister of Labour, who in turn would have the authority to request reasons from the union involved, and publish a report recording such. In addition, the recommendation was made that unions should prescribe (within their constitutions) the circumstances for awarding such fines, and that the amount in question needs to be within reasonable limits.

[3569] RSA Commission of Enquiry 136 paras 931-952.

unions;[3570] (vii) Office-bearers and officials of trade unions;[3571] (viii) Control measures with regards to registered unions' funds;[3572] and, finally, (ix) Powers of the Industrial Registrar[3573] (also discussed separately below).

10 3 6 3 3 Internal management of unions

Regarding the management of trade unions, the Commission concluded, in answering the question whether it is the responsibility of government to ensure that elections are held both in terms of a trade union's constitution and in a democratic manner, that "*misbruike en onreëlmatighede nie so dikwels voorgekom het nie dat [dit] so 'n ingrypende nuwe maatreël as direkte staatsbeheer oor verkiesings regverdig nie*".[3574] The Commission instead recommended secret ballots to elect a union's executive committee[3575] and showed particular interest in the Australian Commonwealth Conciliation and Arbitration Act 8 of 1949. This Act prescribed the various rights, duties and obligations of the Australian Industrial Registrar in instances where a union member laid a complaint of election impropriety.[3576] The Commission recommended insertion of similar provisions in ICA 1937.[3577] Several paragraphs were focused on procedures surrounding meetings,[3578] the minutes and quorums of these meetings,[3579] as well as voting/ballot procedures.[3580]

[3570] 140 paras 959-973 and 144 paras 981-990.

[3571] 143 paras 978-979, saw the Commission state the following [143 para 979]:

> "In 'n paar gevalle was ampsdraers en beamptes van vakverenigings skynbaar geneig om lede te domineer of te beïnvloed, wat tot 'n onbevredigende toedrag van sake gelei het. Aan sommige van hierdie beamptes is lenings toegestaan en skenkings en ander buitengewone betalings gedoen".

See RSA Commission of Enquiry 143-144 subparas 979(1)-(4) for further examples of alleged union official misconduct, as revealed to the Commission during the course of the enquiry.

[3572] 146 paras 991-1006.

[3573] 150 paras 1021-1033.

[3574] 136 para 933.

[3575] See 136 para 935 – and RSA Commission of Enquiry 136-137 paras 936-938 for proposals regarding salaried officials.

[3576] 137 paras 939.

[3577] 137 paras 941.

[3578] 137 paras 942-944. Included herein, was the recommendation that the Registrar, following complaints from either office-bearers, officials or members of that union – and in the absence of suitable compliance by the union with warnings (requests) being directed at it by the Registrar – be allowed to deregister that union [para 944] (subject to further conditions regarding the ability of the trade union to continue functioning).

[3579] 137-138 paras 945-948.

[3580] 138 paras 949-952. The Commission recommended that secret ballots need not be used in all

10 3 6 3 4 Powers and duties of the Registrar

The question of the powers and duties of the Industrial Registrar, saw the Commission state the following:

> "Die Nywerheidsregistrateur is kragtens artikel 13[3581] van die Nywerheid-versoeningswet gemagtig om ondersoek in te stel na die sake van vakverenigings… en na voltooiing daarvan 'n verslag voor te lê aan die Minister, wat dit kan publiseer.[3582] Dit wil voorkom asof geen verdere stappe daarna gedoen kan word nie, en die vraag ontstaan of die Registrateur groter bevoegdheid behoort te verkry om stappe teen 'n vakvereniging … of die ampsdraers of beamptes, te doen weens versuim om die bepalings van die konstitusie na te kom of weens onwettige of onreëlmatige handelinge."[3583]

In this regard, the Commission referred to a memorandum from the Department of Labour and suggested that the Registrar be empowered to investigate unions *without* needing to first inform the applicable union.[3584] Two reasons were given for this: firstly, suspicion on the part of trade union members that the formality of requesting an explanation from the trade union *prior* to an investigation allows a trade union to potentially abuse the notice provided;[3585] secondly, where irregularities are discovered, any action on the part of the Registrar previously was limited to (i) the publication of a report by the Minister of Labour, or (ii) deregistration in terms of

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cases, but only in instances of vital importance, such as those prior to strike action, amendments to constitutional clauses and the like [para 950]. Further hereto, the Commission recommended that only those strikes – where the majority of at least 66 percent of the members in that particular organisation/industry where the applicable dispute is taking place, voted (in a secret ballot) in favour of that strike – should be deemed lawful and (consequently) protected [para 952].

[3581] Subsection 13(1) ICA 1937 states:

> "If at any time the registrar has reason to believe that a trade union … or any of its office-bearers or officials is not observing the provisions of its constitution or is otherwise acting unlawfully, and if, after he has brought the matter to the notice of that union or organisation, he does not receive from it within a period specified by him a satisfactory explanation, he may conduct an enquiry into the carrying out by that union… or its office-bearers or officials of its or their powers and duties under this Act or its constitution …".

[3582] Subsection 13(9).

[3583] RSA Commission of Enquiry 150 para 1021.

[3584] 150 para 1021. The implications of this, regulated as it was in terms of subs 13(1) of ICA 1937, are discussed in more detail at § 11 2 1 below.

[3585] 150 subpara 1021(a) states:

> "[M]oet die Registrateur eers die ampsdraers om 'n verduideliking vra, en daar is die suspisie dat registers daarna soms nie beskikbaar is nie. Hierdie bepaling kan geskrap word sodat die Registrateur die reg het om voort te gaan sonder die aanvanklike formaliteit van 'n verduideliking".

subsection 15(1),[3586] but *only* if it appeared from the investigation that the trade union was not functioning as a union.[3587] The effect of this provision was that the single most drastic enforcement mechanism available to the Registrar (namely deregistration) could *only* be imposed if the union in question was, for all intents and purposes, no longer functioning. Were the union otherwise performing its duties, even in those instances where it (or its representatives) was not complying with its constitution (or otherwise acting improperly), then deregistration (or the threat thereof) could not ensue. The Commission stated, given available evidence that impropriety was *not* brought to the attention of the Registrar, that the current legislation was inadequate:

> "[D]ie sienswyse bevestig dat die bepaling van artikel 13 ontoereikend is – en ondersoek kon gevolglik nie ingestel word nie. Volgens die Kommissie se beskouing het hierdie tekortkoming van artikel 13(1) grootliks bygedra tot die algemene onbevredigende stand van sake van sommige organisasies. As toereikender beheerbevoegdhede beskikbaar was, sou hierdie onreëlmatighede waarskynlik nie voorgekom het nie, en sou die toedrag van sake bevredigender gewees het, veral in die kleiner organisasies."[3588]

As a result, the Commission issued three recommendations, namely: (i) That the Registrar be permitted to launch an investigation at any point;[3589] (ii) That the Registrar be empowered to prevent a trade union from functioning with regard to any matter that the Registrar deems to be unconstitutional, unlawful or contrary to the public interest (until such time that the matter is referred to the Minister for consideration); and, (iii) That the Registrar is authorised to deregister the union if, *inter alia*, it neglects to comply with any of the provisions of its constitution.[3590] In conclusion, and in response to concerns raised before the Commission about such (potentially) unfettered powers on the part of the Registrar, the "*beveiligingsmatreël*" of allowing for an appeal to the Minister of Labour was also recommended.[3591]

[3586] Subsection 15(1) of the ICA 1937.
[3587] RSA Commission of Enquiry 150 subpara 1021(b).
[3588] RSA Commission of Enquiry 150-151 para 1022.
[3589] 151 para 1023 – subject to certain factors that should be taken into consideration, as listed at subpara1024(1)-(4).
[3590] 151 para 1025, read with subpara (1)-(3).
[3591] 151 para 1026.

10 3 6 3 5 The Native Labour (Settlement of Disputes) Act of 1953

The report of the Commission, issued in 1951, eventually culminated in three primary pieces of legislation,[3592] the first of which – and one of the central methods of governmental control over black trade unions – was the 1953 Native Labour (Settlement of Disputes) Act.[3593] In the course of discussing legislation regulating black labour and black trade unions in South Africa, and after making the point that black labour "has always constituted the largest share of the South African labour force",[3594] Du Toit states:

> "The question can therefore rightly be asked why hardly anything is heard of unions catering for Black workers. A few do exist but are unknown because they cannot be registered in terms of the Industrial Conciliation Act. They receive no official recognition. As far as conditions of work are concerned, they have practically no significance because they cannot do much for the benefit of their members. Since they are not recognised by the State, they are not recognised by employers … With the existing situation in mind, the Government of the time endeavoured to do something in order to place Black unions, of which quite a number then existed, on a sound footing and to rid them of undesirable influences. The first significant step was taken by way of an attempt at separate legislation providing for the registration of Black trade unions."[3595]

Earlier endeavours to regulate black trade unions made it as far as being introduced before Parliament in the form of a Bill,[3596] but never became law[3597] – the question regarding the recognition of black trade unions simply remained too controversial.[3598]

[3592] Apart from the two labour legislation acts, Cunningham et al "Historic Development" in *MIRSA* 2–12 list the other important promulgation as being the Wage Act 5 of 1957.

[3593] Native Labour (Settlement of Disputes) Act 48 of 1953 – later to be retitled the Bantu Labour Relations Regulation Act by the Bantu Labour Relations Regulation Amendment Act 70 of 1973. See Cunningham et al "Historic Development" in *MIRSA* 2–12. As mentioned at § 10 1 above, Horrell *Race Relations* 2 states that in 1962 it became official policy of South African National Party Government to use the term "Bantu" instead of "Native". In 1978, following the Second Black Laws Amendment Act 102 of 1978, the term "Bantu" was replaced by the term "Black", which thus resulted in the Act being re-designated as the Black Labour Relations Regulation Act.

[3594] Du Toit *Trade Unions* 33.

[3595] 33. It must be noted that his comments were made prior to later legislative amendments that made significant changes to the South Africa labour relations system (to be discussed below and during the course of chapter 11).

[3596] 33-34.

[3597] Lichtenstein (2005) *J Afr Hist* 300 states:

> "Two years later when he proposed the Native Labour Act to parliament, Minister of Labour Schoeman disregarded his own [Botha] Commission's recommendation, flatly refusing recognition of any kind to African trade unions."

[3598] Lichtenstein (2005) *J Afr Hist* 299 states, in this regard:

In its stead, the 1953 Native Labour Act was promulgated. While providing separate machinery for black labour relations, the Act was silent about the recognition and incorporation of black trade unions, providing for worker committees instead.[3599] The Act redefined "employee" as contained in ICA 1937 in such a manner so as to completely exclude *all* black workers from the realm of the industrial relations system set up and regulated in terms of the 1937 Act.[3600] As a result, the 1953 Act (through a myriad of procedural requirements)[3601] essentially introduced a completely separate

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"The problem with such full legitimation [of placing black worker unions on equal footing with white worker unions], as the Botha Commission saw it, was that African trade union rights to sit on committees and industrial councils, to negotiate, hold office, elect leaders and vote on collective decisions and participate 'on a basis of absolute equality with workers of other races' might undermine the racial inequality fundamental to South African society. Recognizing quite rightly that union enfranchisement 'might be regarded as a precursor for the enfranchisement of natives' the Botha Commission in the end opposed it. Few bodies have so clearly articulated the emancipatory potential of trade union rights for a racially subordinate class".

[3599] Du Toit *Trade Unions* 34. Regarding the government's underlying policy in this regard, Grey Coetzee *Event-Structure* 55, in quoting Minister Schoeman in the parliamentary debate in the House of Assembly during the formulation of the Act [House of Assembly Hansard col. 872, 1953), states:

"My proposals are the following: first of all, we do not prohibit native trade unions. Consequently the question of freedom of association does not arise. They will have the right to associate, they will have the right to form their own trade unions. We do not prohibit it. But what we do in this Bill is to create machinery which will ensure justice for native workers; which will enable them to channelize their grievances and bring them to the attention of the authorities – some alternative machinery. If that machinery is effective and successful, the natives will have no interest in trade unions and trade unions will probably die a natural death."

[3600] Section 36 of the 1953 Act amended s 1 ICA 1937 by stating the following:

"Section one of the Industrial Conciliation Act is hereby amended by the substitution for the definition of "employee" of the following definition – [new paragraph] "'employee' means any person employed by, or working for any employer and receiving, or being entitled to receive, any remuneration, and any other person whatsoever who in any manner assists in the carrying on or conducting of the business of an employer, but does not include a person who in fact or is generally accepted as a member of any aboriginal race or tribe of Africa; and 'employed' and 'employment' have corresponding meanings;". With regards to the definition of "employee" in terms of the 1953 Act, subs 1(iii) defined 'employee' as meaning "an employee who is a native". Subsection 1(vii) defined 'native' as meaning "a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa".

[3601] The main features of the Act included: the prohibition of all strikes (including sympathy strikes) by black workers, the introduction of various bureaucratic institutions in terms of ss 3-8 (Native labour officers, regional Native labour committees, a Central Native Labour Board), which were all controlled by white administrators, and the settlement of disputes by means of these institutions (ss 10-14). Lastly, works committees (elected by the workers), were restricted to the factory level only, were to function as mere advisory bodies, and required managerial consent before being formed. For more detailed discussion of the various provisions, see Grey Coetzee *Event-Structure* 53-55; Cunningham et al "Historic Development" in *MIRSA* 2–12-2–13; D Horner "African Labour Representation up to 1975*"* in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour*

industrial conciliation system[3602] determined along racial lines.[3603] Importantly, however, the 1953 Act in no manner or form defined, made reference to, or sought to regulate any matters pertaining to black trade unions. Trade unions representing the majority of the South African labour force were once again to fall outside the ambit of any statutory or legal recognition.[3604] The 1953 Act was, essentially, an abysmal failure. Over a period of fifteen years, a ludicrously small number of regional committees were formed,[3605] with few black employees even aware of the possibility of forming them. The true effect of the Act is best summarised by Horner as follows:

> "It would not be unfair to infer that the alternative system of labour relations imposed upon Africans by the state was inadequate and that when it was subjected to stress it cracked. African workers eschewed it, employers showed a marked reluctance to use it in a meaningful way, and even the state implemented it without vitality."[3606]

Bulletin (1987) 124 126-129; G Albertyn "South African Industrial-Relations Legislation" in K Jubber (ed) *South Africa Industrial Relations and Industrial Sociology* (1979) 84 92-96; and Schaeffer (1977) *TSAR* 53.

[3602] Regarding the application of the Act, section 2(2) stated that the Act would not apply to those workers who, *inter alia*, were either employed in the agricultural sector, domestic servants, "natives employed by the Government of the Union (including the Railway Administration) or a provincial administration," or (subject to certain other provisions), those who were employed in the gold or coal mining industry.

[3603] Grey Coetzee *Event-Structure* 54. See further Grogan *Workplace* 342, who states that the 1953 Act introduced an "entirely separate legislative framework for black workers in general" to South African labour law, instead of the separate legislation for black unions as was suggested by the Botha Commission of Inquiry. Regarding this latter point, Cunningham et al "Historic Development" in *MIRSA* 2–12 states that "[t]he government's rejection of freedom of association and, as an alternative, the introduction of a committee system for black workers, signified government opposition to the Botha Commission's 1951 proposals for black trade-union rights subject to certain conditions.

[3604] Lichtenstein (2005) *J Afr Hist* 300 states the following:

> "The Native Labour Act, as presented to parliament in August 1953, established an elaborate, hierarchical and highly paternalistic structure of industrial legislation for Africans (excluding those in mining, agriculture and domestic labor, of course) that allowed the Department of Labour to 'look after' their interests without any input from the workers themselves."

Conradie (2016) *Fundamina* 186 explains as follows:

> "The [1953] Act was initially enacted as a measure to serve as an alternative for the acknowledgement of black unions. Employees were not really encouraged to participate directly in the determination of their conditions of employment … The main purpose of the [works] committees was to serve as a vehicle through which white employers could communicate with black workers. These committees were therefore only consulted in the event of a dispute in a workplace [footnotes omitted]."

[3605] Horner "Labour Representation" in *Independent Unions* 127.

[3606] 129. See further Albertyn "Industrial-Relations Legislation" in *Trade Unionism* 92 who states:

> "The Government did not accept [the Botha Commission] recommendation and, as a quid pro quo, legislated for an in-company system of committees to represent Black workers in the 1951 … Act.

10 3 6 4 The Industrial Conciliation Act of 1956

The consequences of re-defining "employee" in ICA 1937 through the 1953 Act gained additional significance with the subsequent introduction of the Industrial Conciliation Act 28 of 1956 ("ICA 1956").[3607] The entrenchment of the dual-labour relations system, first conceptualised in 1924 and further refined by the 1953 definition of "employee",[3608] was formalised by ICA 1956, which served to exclusively regulate white trade unions and a white labour relations system.[3609] ICA 1956 was far more extensive than any of its predecessors, which was indicative of the increasingly complex field of labour relations experienced in South Africa. However, it is particularly important for a further reason: apart from introducing numerous new regulations,

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The committee system was adopted by only a few employers and no important development took place until the Act was amended in 1973, following the labour unrest of that year".

However, compare this to the views of Schaeffer (1977) *TSAR* 53, who states:

"The efficacy of the act may be gauged from the fact that for the year ending December 1972, to take a year at random, the annual report of the department of labour showed that Bantu labour officers visited 295 urban employers who employed 145 171 blacks, and 42 visits were paid to country employers. During that year 80 disputes arose in which approximately 9 800 blacks were involved and these we all settled satisfactorily."

With that being said, Schaeffer (1977) *TSAR* 54-55 then acknowledges the industrial unrest that erupted in 1973, amongst black workers who simply chose not to utilise the existing industrial relations mechanisms put in place for them – which in and of itself suggests that the 1953 Act was not as well received as the author suggests.

[3607] Industrial Conciliation Act 28 of 1956. With regards to the findings of the Botha Commission, Lichtenstein (2005) *J Afr Hist* 299 describes the reaction of the Minister of Labour to the suggestions made by the Botha Commission regarding the possible (albeit severely restricted) recognition of black trade unions, as being one of "dismay" – so much so that Du Toit *Trade Unions* 22 avers that the resulting controversy was the reason behind there being an eight year gap from when the Commission was appointed to the eventual promulgation of the 1956 Act. The Act was later to be renamed the Labour Relations Act 28 of 1956, following the passing of the Labour Relations (Amendment) Act in 1981.

[3608] As defined in terms of s 36 of the Native Labour (Settlement of Disputes) Act 48 of 1953.

[3609] As mentioned above, Cunningham et al "Historic Development" in *MIRSA* 2–12 confirm that whereas ICA 1924 made provision for Indian/Asian and Coloured workers, ICA 1956 revoked all such former rights – essentially due to the new prohibition on racially-mixed, registered unions. Thus, as summarised by Alexander Labour & Politics 124-125:

"Whereas the 1924 act had institutionalized a deep divide between African and non-African workers… this new amendment [ICA 1956] instituted a further cleavage, separating white workers from coloureds and Indians. In terms of labour legislation, this was the most important difference between segregation and apartheid."

procedures and bodies,[3610] it included, in the words of Landman,[3611] the "first *determined* attempt to impose democracy on registered unions".[3612] In his discussion of the background to the provisions relating to internal union functioning, Landman reasons that the Act was passed "at a period in our history which had witnessed internal dissension in the exclusively White mine workers union"[3613] and confirms the

[3610] Along with new statutory job reservation mechanisms (which also saw the creation of an Industrial Tribunal charged with making recommendations regarding the implementation of job reservation), stricter controls were imposed on mixed-race trade unions – specifically regulating matters which would prevent future "mixed" unions, and the procedures that (then) existing "mixed" unions had to comply with in order to not fall foul of the law. For a more detailed discussion of the Act, see A De Kock *Industrial Laws of South Africa* (1956) 68-164, 410-490; M Schaeffer et al *Industrial Law in South Africa* 2 ed (1973) 19-115; Jones & Griffiths *Labour Legislation in South Africa* 108-121.

[3611] Regarding union democracy under ICA 1956, see in general AA Landman "Trade Union Democracy and the Law in South Africa" (1987) *MBL* 92 92.

[3612] 94 [my emphasis]. The study emphasises that it was the first "determined" attempt at regulating internal union procedures, since it would be inaccurate to place the focus on it being the *first* attempt. As is apparent from the discussion above, 1930 and 1937 [duly noted by Landman (1987) *MBL* 94 n34] both saw provisions enacted that specifically sought to either regulate aspects of internal union affairs – not to mention the recommendations of the Botha Commission. However, ICA 1956 remains the first example of where these initial steps towards internal regulation were brought to bear in a single, unified statutory approach.

[3613] Landman (1987) *MBL* 94. See further Landman (1987) *MBL* 94, who states that the "conflict in the mine workers union had generated several reports by government-appointed boards of inquiry into that union's internal affairs". Landman (1987) *MBL* 96 n60 refers to the Report of the Mine Workers' Union Commission of Enquiry UG 52/1951, under the chairmanship of Q de Wet, KC, which spanned 44 paragraphs across 11 pages. For an example of the formation of one such investigation, see the Appointment of Mineworkers' Union Commission of Enquiry GN 904 in *UG* 4578 (CLXIV) of 13-04-1951. Further evidence is provided by the earlier Report of the Mine Workers' Union Commission of Enquiry UG 36/1946, under the chairmanship of Brig. E Williamson – this spanning 291 paragraphs across 23 pages, and being far more detailed than the 1951 report, given that it was issued during the height of the internal struggle between (broadly-speaking) the English- and Afrikaans-speaking member-groups within the MWU, and the long-serving (and influential) General Secretary, one Brodrick. The report provides detailed accounts of the alleged corruption and malfeasance involving Brodrick (and other officials), and the use of funds initially ring-fenced for the MWU members by the Chamber of Mines. For details of further Reports issued in similar vein to the aforementioned, see Landman (1987) *MBL* 94 n37. But suffice it for now, to point to two cases prior to ICA 1956, that provide details of the legal challenges besetting the MWU: First, *Klemp v Mentz, NO and Others* 1949 2 SA 443 (W) 444 sees Ramsbottom, J confirm that "up to July of this year [1949] no validly held elections had taken place [within the MWU] since 1941" – a period of some eight years. The facts before the court, required a consideration of, *inter alia*, the powers of the Registrar (in terms of ICA 1937) in certifying amendments to a union constitution, and the remedies afforded to a party, that was dissatisfied with the Registrar's decision in terms of the Act. Coupled hereto, reference is made to *De Beer v Mineworkers' Union and Others* 1948 4 SA 503 (T), at *Klemp v Mentz* 444, as background to the underlying reasons, which resulted in a government (Minister of Labour) appointed, three-man commission, that was tasked with overseeing the daily management of the union until such time that the internal election issues could be resolved. Whilst the aforementioned cases do serve in explaining the *legal* background of the issues

reliance that Parliament placed on the recommendations of the Botha Commission in drafting the new Act.[3614]

By 1956, then, South Africa was poised for its first major readjustment in the regulation of white trade unions and their accountability. What this readjustment entailed is discussed in chapter 11. At the same time, it would be another 25 years before black trade unions were brought into the fold through a further readjustment towards uniformity in regulation following on the recommendations of the Wiehahn Commission. This further readjustment is also discussed in chapter 11.

10 4 Conclusion

The first insight of note from the discussion of the early days of trade unions and their regulation in South Africa, is that a race-based class system permeates the entire South African labour relations system, a system conceptualised in legislation as early as the ICA 1924. This reality is fundamental to the *sui generis* nature of South Africa's political, socio-economic, and labour structures and has to be borne in mind in any evaluation of South Africa's approach to the regulation of trade unions. In fact, for most of the twentieth century, any reference to a trade union is in effect a reference to a white worker union – since black worker unions were at no stage considered part of the formal industrial relations system and its machinery.

While South Africa's initial legal approach to the prohibition and proscription was not quite similar to that of Britain and the USA, the response of government to increased trade unionism and industrial action was no less determined. Violence was a key feature, seen largely in equal measures on the part of both collective labour and in the state's response. What remains noteworthy is the (relatively-speaking) rapid transition from prohibition to the acknowledgement and assimilation phase of South Africa's approach to trade unions – assisted in no small part by the transformation of the broader South African economy and industrial system (in its shift from a

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before the Courts, this was the culmination of long-standing internal disputes within the MWU, that followed years of alleged corruption amongst specific union leadership (accused of being too supportive of the Chamber of Mines) – which no doubt was well known to both the Van Reenen and Botha Commissions. For further background to the political basis of the factional disagreements, and the struggle for the broader control of the MWU, see in general O'Meara (1978) *Afr Aff* 64-70, exploring as it does the role of the "Hervormingsorganisasie binne die Mynwerkersunie". See the further discussion of the aforementioned reports, and caselaw surrounding these events, at § 11 4 5 4 below.

[3614] Landman (1987) *MBL* 94.

predominantly agrarian to a predominantly minerals based economy). At the same time, the transition to the assimilation of trade unions was also driven, in no small manner, by the increasing power and influence of the unions, particularly in the mining industry. In this regard, a significant and violent confrontation between the state and (predominantly) mining industries' organised labour during the 1922 Rand revolt, resulted not only in a change of government, but also in a significant and far-reaching change to the statutory framework for labour relations (commencing in 1924) in South Africa. The 1924 ICA was modelled largely on the British legislation at the time and served to confer corporate legal status on trade unions (that were regulated thereunder) as early as 1924.

The 1930 amendment to the ICA 1924 saw the introduction of provisions aimed at regulating what aspects needed to be included in trade union constitutions and, as such, constitutes South Africa's first statutory attempt at regulating the internal affairs of unions. In addition, the Van Reenen Commission of 1935 indicated their awareness of malfeasance by the officials of certain unions – a fact pointing to a growing awareness that some unions, some of the time, do not always act in the best interests of their members. The ICA 1937 introduced an extension of matters to be included in trade union constitutions, together with, under specific circumstances, increased powers for the Registrar to investigate internal union affairs.

Against the backdrop of World War II, there was a profound change in South Africa's political direction in the 1948 elections at a time where there was a significant increase in black workers in the South African economy. This challenge – of how to manage black workers and their unions – gave rise to the Botha Commission, itself being set against increased political control exercised over the disenfranchised, and thereby, majority, of the citizens of South Africa.

The Commission saw legislation as the vehicle through which increased control could be exercised over how trade unions conduct their affairs and hold elections. This was to ensure that the provisions of union constitutions would be complied with and that their affairs would be conducted properly and reasonably and in alignment with both the law and wishes of their membership. The Commission's key outcomes are of significance for this study: firstly, the Commission confirmed the importance of trade unions for the orderly functioning of a labour relations system; secondly, it was accepted that the internal functioning of unions is deserving of legislative attention; and thirdly, it was found that that, while black trade unions and their members are of

importance, they are to be accommodated in a *separate* system. With regard to the internal functioning of trade unions, one of the key objectives of the Commission was to assist members to participate in a more intelligent manner in the management of their unions' affairs – since, to become a healthy labour association, all union members must be capable of being actively interested in those affairs.

Key (and more detailed) recommendations made by the Commission included the following: (i) Secret ballots in those situations deemed "serious" enough to warrant it (for example, election of the union's executive committee; constitutional amendments and pre-strike ballots); (ii) Changes to the investigatory powers of the Registrar, in respect of complaints regarding unlawful behaviour by officials or non-compliance with the union constitution; and, finally, (iii) Increasing the Registrar's powers to de-register unions for certain acts of non-compliance (or actions contrary to the public interest), subject to appeal to the Minister of Labour.

One outcome of the Botha Commission was the ICA 1956 – of critical importance in signalling the first determined attempt to impose democracy on unions. This Act is examined in chapter 11 below. However, in 1953 legislation was adopted that introduced a completely separate labour relations system for black workers and, by implication, their trade unions. There was an unwillingness by the government of the day to formally recognise black trade unions despite the recommendations of the Botha Commission, because of the fear that such recognition would be the precursor to political recognition, or, at the very least, the demand therefore – that is, a fear of the "emancipatory potential" of trade union rights for a racially subordinate class.

Largely absent from the discussion in this chapter is a consideration of the role of the judiciary in the early days of trade unionism in South Africa. This stands in contrast to the role played by the judiciary during the similar phase of development in both Britain and the US. This is indicative of a simple truth – while the courts were required to adjudicate on internal union disputes (such as the numerous MWU cases) and to interpret and apply industrial relations' legislation – the courts did not have a direct impact on the overall approach to, or direction of, the regulation of industrial relations and trade unionism in South Africa. *In general,* it can be reasoned that South African courts, by and large, did not interfere with the powers of Parliament to legislate and interpreted the law as they found it. To the extent that they did, or at least had occasion to do so, this will form part of the discussion in the two subsequent chapters.

CHAPTER 11: THE HISTORICAL DEVELOPMENT OF TRADE UNION REGULATION IN SOUTH AFRICA: THE READJUSTMENT TO THE INTERNAL REGULATION OF (WHITE) TRADE UNIONS AND A FURTHER READJUSTMENT TO RACIAL UNIFORMITY

> "It is partly because unions create an expectation that they function democratically and partly because unions, more so than other voluntary institutions, are bearers of power that societies across the world display such a keen interest in the democracy of trade unions. Various countries have passed legislation to compel or to coax trade unions to accept legal guarantees of democracy … Paradoxically our society cannot claim to be a true democracy …. Trade unions as we know them can only function in a society with a commitment toward democracy".[3615]

11 1 Introduction

This chapter continues the discussion of the historical development of the regulation of trade unions and their accountability in South Africa. In line with the earlier comparative chapters, this chapter focuses on the phase of readjustment towards trade unions (following on the assimilation phase). At the outset, however, it may be mentioned that the South African experience shows two distinct steps during its readjustment phase: an initial readjustment towards the internal regulation of white trade unions by means of legislative amendments in light of the Botha Commission's findings; and a *second* readjustment – unique to South Africa – towards a uniform system of regulation, based on the formal recognition of black trade unions in South Africa.

Specifically, the chapter will commence with an examination of the recommendations made by the Botha Commission (as discussed at the end chapter 10) as they were incorporated into the 1956 Act – that is, the first (white) union readjustment. This is done by comparing the internal union-management provisions found in the 1937 and 1956 Acts to emphasise the changes made in the wake of the Commission. This is followed by a brief consideration of the socio-political circumstances in South Africa in the period following on the 1956 Act, which serves as background to a discussion of the period from 1973 onwards, marked by the sudden increase in (black worker) industrial unrest. These events led to the second readjustment towards uniformity (the inclusion of black trade unions in the industrial

[3615] AA Landman "Trade Union Democracy and the Law in South Africa" (1987) *MBL* 92 93-94, [footnotes omitted].

relations regulatory regime). This phase was marked by the work of the Wiehahn Commission, its recommendations and the inclusion of those recommendations in statutory amendments in 1979. As far as legislative readjustment is concerned, the discussion then concludes with an examination of the "new" industrial relations system of South Africa into the 1980s in the context of broader socio-economic and political developments. As such, the chapter also sets the scene for the discussion of the new dispensation which follows in chapter 12.

As was the case with the approach to the discussion of the regulation of trade unions and their accountability in Britain and the USA, this chapter (on readjustment) also includes a discussion of the South African common law principles applicable to trade unions and their relationship with their members. Ultimately, the discussion will aim to show the different common law remedies available to trade union members in South Africa in those cases where the wishes of members and their union diverge or their union fails in its responsibilities. In general, it may already be said that South African common law shows a much more accommodating approach to trade unions (compared to Britain and the USA) as a result of the influence of Roman-Dutch law and the development of a strong set of common law principles (originating primarily from the law of voluntary associations and contract law) based on which the courts may exercise control over trade union accountability.

11 2 The readjustment towards (white) trade unions in South Africa

The previous chapter showed that the industrial turmoil in the early decades of the twentieth century resulted in (white) organised labour formally taking its seat at the table of the industrial relations system by 1924.[3616] A mere 32 years later saw ICA 1956 introduce a series of provisions (building on those enacted in 1937) that granted significant powers to the state over the *internal* regulation of those unions. This meant that the South African industrial relations system had transitioned to a stage of (racially-based selective) readjustment by virtue of the growing awareness that trade unions *did not* necessarily act in the best interests of their members.[3617]

[3616] Section 14 of the ICA 1924 regulated the creation of the "Registrar of Trade Unions and Employers' Organizations" [subs 14(1)], as well as the registration of said unions/organisations [subs 14(2)-(6)] – with subs 15(1) granting registered unions the status of a body corporate.

[3617] As evidenced above in chapter 10, first by the Van Reenen Commission, then by the Botha Commission, and finally by the various Reports issued following numerous Commissions of Enquiry

The discussion in the previous chapter was brought to a close with a brief discussion of the enactments in 1953 and 1956 that followed the Botha Commission, which clearly concerned itself with making a range of recommendations that focused on improving the internal management and administration of trade unions. The question to be considered relates to the extent these recommendations were adopted in the 1956 legislation. The short answer is that many of them were,[3618] a fact best illustrated by comparing the provisions of the 1937 ICA with the 1956 ICA.

11 2 1 A comparison between the 1937 and 1956 Acts

11 2 1 1 The registration of trade unions

Both Acts dealt with the registration of trade unions in section 4,[3619] and similarly, both dealt with the effect of such registration in section 5.[3620]

11 2 1 2 The requirements relating to trade union constitutions

Section 9 of ICA 1937 focused on the requirements of trade union constitutions – while the same topic was addressed by section 8 of the 1956 Act[3621] (and its various sub-provisions).[3622] Section 8 of ICA 1956 stated that the constitution of every

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into the internal functioning of, in particular, one of South Africa's most powerful and influential unions of the time, the MWU.

[3618] Except for the majority of those recommendations pertaining to black trade unions.

[3619] Subsection 4(6) of ICA 1956, introduced the requirements pertaining to separate trade unions for white and coloured workers, following the commencement of the Act.

[3620] Subsection 5(1) of the ICA 1956 stated:

> "Every trade union… which at the commencement of this Act is deemed to be registered under this Act, shall … become, a body corporate, and shall be capable in law of suing or being sued, and subject to the provisions of this Act … of purchasing or otherwise acquiring, holding and alienating property, movable or immovable, and of doing any other act which its constitution requires or permits it to do."

Subsection 5(2) of the ICA 1956 prescribed that "all assets, rights, liabilities and obligations of the unregistered trade union… as existing immediately prior to its registration shall vest in and devolve upon the registered union". Subsection 5(3) of the ICA 1956 further prescribed that "[u]nless it is otherwise provided by the constitution of a registered trade union … no person shall, by reason only of the fact that he is a member, office-bearer or official of that union or organization, be liable for any of the liabilities and obligations of that union". The latter two subsections were similarly regulated in terms of subss 6(1)-(2) of the ICA 1937.

[3621] Subsections 8(1)(a)-(r) of the ICA 1956.

[3622] These include, *inter alia*, the qualifications for membership (subs 8(1)(a) of the ICA 1956), the circumstances and manner in which membership may be terminated (subs 8(1)(b) of the ICA 1956), rights and procedures of appeal by members regarding decisions made by the union in this regard

registered trade union "shall contain provisions not inconsistent with this section".[3623]

The difference in detail between the two sections is significant. Whereas the overwhelming majority of requirements contained in section 9 of ICA 1937 were dealt with in the later section 8 of ICA 1956, the latter was significantly more expansive in its wording. For example, the eleven (fairly concise) subsections[3624] of section 9 of ICA 1937 grew to a much more comprehensive provision in section 8 ICA 1956: subsection 8(1) had eighteen sub-provisions,[3625] with subsections 8(3) to (6) ICA 1956 each having a series of additional sub-provisions.[3626] The increased requirements found in the various sub-provisions and subsections of section 8 stemmed primarily from the recommendations of the Botha Commission and focused on trade unions that were "open to both white persons and coloured persons".[3627] Section 8 contained specific topics that union constitutions *may* regulate[3628] (including "any other matter which in the opinion of registrar is suitable to be dealt with in the constitution");[3629] increased provisions pertaining to the members' register and accounting records, including auditing of a union's finances;[3630] requirements pertaining to the voting rights in respect of a trade union official,[3631] balloting[3632] and affiliation and involvement in political parties.[3633]

In general, the representative legislative framework created by ICA 1956, based as it was on a union's constitution, sees Landman state as his point of departure the fact that parliament considered a democratic union to be one where the members of

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(subs 8(1)(e) of the ICA 1956), the alteration of the constitution (subs 8(1)(g) of the ICA 1956), the calling and conduct of meetings (subs 8(1)(h) of the ICA 1956), acquisition and control of property (subs 8(1)(f) of the ICA 1956), purposes for which its funds may be used (subs 8(1)(j) of the ICA 1956), the powers and duties of office-bearers and officials (subs 8(1)(n) of the ICA 1956) and, the manner in which a ballot shall be conducted (subs 8(1)(p) of the ICA 1956).

[3623] Subsection 8(1).

[3624] Subsections 9(a)-(k) of the ICA 1937. The wording and content of these subsections, as relevant to the relationship between the union and members, are listed at § 10 3 5 above, in the discussion of the ICA 1937.

[3625] Subsection 8(1)(a)-(r) of the ICA 1956.

[3626] The exception being subs 8(2), which simply, *mutatis mutandis*, applied the requirements specified in subs 8(1) of the ICA 1956 to employers' organisations.

[3627] Subsections 8(3)(a)-(b).

[3628] Subsection 8(4).

[3629] Subsection 8(4)(iv).

[3630] Subsections 8(5)(a)-(b).

[3631] Subsection 8(6)(a).

[3632] Subsection 8(6)(b).

[3633] Subsections 8(6)(c)-(d) – read with subs 8(7).

the union were entitled to participate in the decision-making and internal governance of the association.[3634] Thus, in paraphrasing the court in *Gründling*,[3635] "[a]t the heart of this proposition lays the philosophy that the union should be run for and in the interests of the members by the members themselves".[3636]

In this regard, one of the key focus areas of section 8 of the 1956 ICA, was the regulation of matters pertaining to the election of officials and office bearers In spite of the Act expanding significantly on aspects pertaining to the contents of union constitutions, the particular manner in which section 8 was worded, did however mean that the drafters left trade unions with wide discretion as to how they regulated their own internal matters within the framework of Act's requirements.[3637] However, this is to be seen against the contrasting notions and merits of "representative democracy" and that of "direct democracy". The former, as pointed out by Landman, relate to those situations where parliament deemed it permissible to allow members to elect those officials who would make decisions on their behalf.[3638] The latter was to be implemented in those instances requiring "direct" input from the membership, such as in instances involving the election of key officials.[3639] However, instances were identified – such as the decision on whether or not to initiate strike action – where parliament "was not even prepared to entrust this decision to a plebiscite of all the members" [3640] and where a decision could only be taken by "those members of the union who would be directly affected by the decision."[3641] In examining this latter point,

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[3634] Landman (1987) *MBL* 94. Landman (1987) *MBL* 94 states further in this regard:

> "In passing the Act parliament intended to remedy certain malpractices which had been uncovered and to impose upon registered unions certain values and philosophies which it felt would promote democracy in unions."

See the discussion at § 10 3 6 3 2 above, regarding the witness accounts/evidence presented to the Botha Commission. Given that this article was written in 1987, Landman's focus was centred around the 1956 ICA/LRA, as duly amended by (and highlighted in the relevant sections to follow), *inter alia*, the Industrial Conciliation Amendment Acts of 1959, 1961 and 1966, the Industrial Conciliation Further Amendment Act of 1966, the Industrial Conciliation Amendment Act of 1979, and the Labour Relations Amendment Acts of 1981, 1982, 1983 and 1984.

[3635] *Gründling v Beyers* 1967 2 SA 131 (W) 151H-152A.

[3636] Landman (1987) *MBL* 94.

[3637] 94-95. Landman furthermore draws a comparison between this approach, and that of the USA – presumably in reference to the LMRDA – and makes the point that the latter is far more "exhaustive" in its regulation – Landman (1987) *MBL* 94 n40.

[3638] 94.

[3639] 95.

[3640] 95. Included herein, were "such activities as a sit-in, go-slow, and overtime ban".

[3641] 95.

Landman raises a number of additional factors that might explain parliament's underlying motivation for reverting to this so-called "classical democracy".[3642]

The first of these was a desire on the part of the state that the decision of whether or not a strike should be called, should not rest in the hands of the few – in other words, the elected officials "who may well be out of touch with or unresponsive to the wishes of the members."[3643] As such, a direct similarity to the position in Britain and arguments raised in that context by those opposing the power of the unions is demonstrated. Secondly, Landman reasons "that parliament hoped to curb the use of the strike weapon."[3644] The third factor is of particular interest. Landman states that "[d]irect democracy allows important decisions to be taken for irrational motives", and that it "allows for spontaneous, impulsive decision-making which may or may not result in reasonable, rational decisions".[3645] In contrast, representative democracy is described as "an attempt to make a virtue out of necessity and to combine an irrational process of decision making by the people with a maximum chance of achieving reasonable decisions".[3646] When viewed in this light, it is perhaps understandable for one to presume that parliament at the time would have preferred representative over direct democracy. This was not the case. Landman's explanation is of significance:

> "The most likely explanation for parliament's selective preference for direct democracy is that parliament was prepared to risk the negative, perhaps irrational, consequences of direct democracy rather than permit the concentration of power in the hands of a union oligarchy. The experience with the mine workers union must have sounded a warning of what could happen if those who possessed power abused it. The mine workers union had a tendency to be controlled by powerful leaders… These and other examples led parliament to believe that direct democracy should be retained in regard to some decisions in order to curb the power of national leaders."[3647]

[3642] Landman (1987) *MBL* 95 n53 uses this phrase as descriptive of the term "primitive democracy", as used (in turn) by the Webb's [Webb & Webb *History of Unionism* 36] in describing a situation where "everything which 'concerns all should be decided by all'".

[3643] 95.

[3644] 95. See the discussion of ballots at § 12 4 4 4 below, where is affirmed that this was indeed the case, with employers finding the balloting requirements in particular, to be a very successful area within which to prevent strike action.

[3645] 95.

[3646] 95 [quoting O Kahn-Freund *Labour Relations: Heritage and Adjustment* (1979) 24].

[3647] Landman (1987) *MBL* 95-96.

11 2 1 3 The provision of information to the Registrar

Sections 12 and 13 of ICA 1937 respectively regulated information[3648] to be provided by trade unions to the Registrar[3649] and the enquiries that could be made by the Registrar.[3650] The same topics were addressed by sections 11[3651] and 12[3652] of the 1956 Act. These sections are now explored in greater detail.

11 2 1 4 The Registrar's powers of investigation in terms of the 1937 Act

In terms of ICA 1937, the Registrar was empowered to do the following for purposes of investigating the internal affairs of a trade union:

(i) "[C]onduct an enquiry into the carrying out by that union … or its office-bearers or officials of its or their powers and duties under this [1937] Act or its [union] constitution";[3653]

(ii) "[S]ummons any person who in his opinion may be able to give material information concerning the subject of the inquiry … to appear before him … to be interrogated";[3654] and, finally

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[3648] The section prescribed the following: (i) A request for information, to be provided by the Secretary of the applicable union, to be received within 30 days of the written query being made by the Registrar, pertaining to the member's list or details pertaining to the election/appointment of officials, office-bearers, members of the executive committee/management of that union [Subsections 12(1)-(2) of the ICA 1937]; (ii) information pertaining to a union's change of address or details pertaining to the creation of a new union branch [Subsections 12(3)-(4) of the ICA 1937].

[3649] The office of the Registrar was introduced in terms of subs 3(1) of the ICA 1937.

[3650] Subsection 13(1)-(10).

[3651] Subsections 11(1)-(5) of the ICA 1956.

[3652] Subsections 12(1)-(15).

[3653] In terms of subs 13(1) of the ICA 1937, the abovementioned enquiry would be triggered where "[i]f at any time the registrar has reason to believe that a trade union… or any of its office-bearers or officials is not observing the provisions of its constitution or is otherwise acting unlawfully". Hereafter, again in terms of subs 13(1) of the ICA 1937, the Registrar would bring "the matter to the notice of that union", and if the former was not to "receive from it [the union] within a period specified by him [the Registrar] a satisfactory explanation", the Registrar could then launch the aforesaid enquiry. It was this provision that drew the Botha Commission in recommending that changes be brought about, to allow the Registrar to launch an enquiry without first informing the applicable union thereof.

[3654] The complete wording of subs 13(2) of the ICA 1937 read as follows:

> "For the purpose of any such enquiry the registrar or the authorized officer may summon any person who in his opinion may be able to give material information concerning the subject of the inquiry, or who he suspects or believes has in his possession or custody or under his control any book, document or thing which has any bearing upon the subject of the enquiry, to appear before him at a time and place specified in the summons, to be interrogated or to produce that book, document or

(iii) "On the completion of an enquiry, the registrar … shall submit a report to the Minister [of Labour], who *may* make such publication of the report or a portion thereof or of extracts therefrom as he may deem advisable".[3655] Importantly, the last provision was subject to a significant qualification – namely that *before* publication by the Minister, the report had to be submitted *to the executive committee/management* of the union involved[3656] and to "*afford that committee an opportunity of submitting to him representations as to the advisability* of such publication".[3657]

While the Registrar had seemingly far-reaching powers to investigate a union's internal affairs in terms of ICA 1937,[3658] two points must be highlighted: Firstly, the investigation could only be initiated *after* the Registrar approached the union and

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thing. If the trade union or employers' organization or office-bearer or official concerned satisfies the registrar that there is reasonable ground for supposing that any person is able to give such information or has in his possession or custody or under his control any such book, document or thing, he shall so summon that person. The registrar may retain for examination any book, document or thing so produced".

In addition, subs 13(3) of the ICA 1937 empowered the Registrar to administer an oath to any person called in terms of the enquiry, along with the Registrar's rights in terms of demanding the handover of any book, document or thing. Furthermore, subs 13(4) of the ICA 1937 determined that any person who does not comply with the aforementioned, would be guilty of an offence – whilst subs 13(5) of the ICA 1937 deemed that a "false answer" or "false statement" on the part of any witnesses, would amount to same being "guilty of perjury." Lastly, subss 13(6)-(8) of the ICA 1937 regulated further procedural aspects of the interrogation – whilst subs 13(10) of the ICA 1937, again in reference to subss 13(7)-(8) of the ICA 1937, served as a further offence clause for "[a]ny person who wilfully hinders or insults the registrar".

[3655] Subsection 13(9) of the ICA 1937, [my emphasis].

[3656] The relevant wording of the provision reads as follows:

"Provided that before any such publication is made the Minister *shall* submit the report or portion thereof ... which he proposes to publish to the executive committee ... of the trade union concerned" [my emphasis].

[3657] Subsection 13(9) of the ICA 1937, [my emphasis].

[3658] Regarding the rest of ICA 1937, it introduced a series of "firsts" into the South African industrial relations' system – care of the following sections: Ss 18-34 introduced the formation of Industrial Councils (involving employers' organisations and trade unions); ss 35-43 introduced a Conciliation Board; s 44 introduced a Mediation mechanism, and the circumstances under which it could be utilised; ss 45-46 introduced Voluntary and Compulsory Arbitration, respectively; s 65 focused on the prohibition of strikes and lock-outs (with the exception of particular circumstances), but (interestingly) made no mention of trade unions therein; and lastly, s 78 introduced the first "freedom of association" clause into South Africa's labour relations – closely followed (in s 79) with the protection of trade union members, officials and office-bearers against liability in terms of actions performed in furtherance of a strike or lockout, provided it was not in contravention of ICA 1937.

requested an explanation regarding his concerns (in terms of subsection 13(1)). It was only upon his not receiving a response or satisfactory explanation that the enquiry would then proceed. Secondly, subsection 13(9) merely allowed for a report to be submitted to the Minister, who then had the discretion to publish (in the Government Gazette) a part or the whole thereof, but *only* after (again) having approached the trade union for reasons *not* to publish the report. Viewed objectively, this does not appear to be particularly onerous and does not suggest a mechanism that trade unions would necessarily have deemed to be invasive, or worthy of concern.[3659] On two separate occasions during the process, the external regulators (that is, the Registrar and the Minister (in terms of subsections 13(1) and 13(9), respectively) *first* needed to approach the union in question for reasons not to launch the enquiry or/and then for reasons not to publish the report.

What remains to be seen, is how this provision compared with the expanded section 12 of ICA 1956.

11 2 1 5 The Registrar's powers of investigation in terms of the 1956 Act

At the outset, and in contrast to ICA 1937, section 12(1) of ICA 1956 commenced with the words "[i]f at any time the registrar has reason to believe" – as does subsection 12(3). Any reference to the Registrar *first* having to contact the union in question prior to the investigation was removed. It was therefore no longer a requirement for the Registrar to first notify the trade union and to await a satisfactory explanation from the latter.

Subsection 12(1) took a different approach to subsection 13(1) of ICA 1937 considering the recommendations of the Botha Commission, which recommendations, in turn, stemmed from the observation that (particularly smaller) unions can fall foul of their constitutions purely due to their lack of expertise or organisational capacity, as opposed to any ulterior reasons. In terms of subsection 12(1), where the Registrar has reason to believe that "any provision of the constitution of a trade union … has not been observed, and that as a result of such non-observance the union … is unable to function in accordance with its constitution", then the Registrar could take steps. In

[3659] That being said, much of this would (arguably) hinge on the nature of the approach taken by the Registrar – and the extent to which any such "interrogation" (and the concomitant processes) would have caused umbrage within union structures.

this regard, the Registrar was empowered to "issue such instructions as he may deem necessary in order to place the union … in the same position … as if the non-observance of the requirements of the constitution had not taken place", provided that he was of the "opinion [that] a substantial number of the members desire that such union … should continue to function".[3660]

Subsection 12(3) introduced the right of the Registrar to conduct an enquiry into the internal affairs of the union, firstly triggered by "any material irregularity in connection with any election held in terms of the constitution of a registered trade union"[3661] and, secondly in instances where "any official, office-bearer, committee or other body of a registered trade union … has failed to observe any provision of the constitution of such union … or has acted unlawfully, *or has acted in a manner which is unreasonable in relation to the members* and which has caused *serious dissatisfaction amongst a substantial number of the members* in good standing".[3662] The subsection concluded with the words "[the Registrar] may, without prejudice to any legal remedy any interested party may have, conduct an enquiry into such matter."[3663]

Subsections 12(4) to (9) contained similar procedural requirements and powers relating to the subpoena and interrogation of witnesses able to provide "material information concerning the subject of the enquiry"[3664] as was the case with ICA 1937.[3665] The point at which ICA 1937 and its 1956 successor diverged is to be found in subsections 12(10) to (14).

Subsection 12(10) ICA 1956 required the Registrar, upon completion of the enquiry, to submit "a report setting out the findings" to the Minister of Labour, but added the additional requirement that "his recommendations as to any action he considers necessary" should be included therein.[3666] The Act provided a discretion to the Registrar (in those instances involving either material irregularity in regards to union elections or where an official/office-bearer/committee of the union "has failed to

[3660] Subsection 12(1) of the ICA 1956. Subsection 12(2) referred back to subs 12(1) and served as a deeming provision – confirming the effect on the trade union in light of any instructions so issued by the Registrar.
[3661] Subsection 12(3)(a).
[3662] Subsection 12(3)(b), [my emphasis].
[3663] Subsection 12(3)(b).
[3664] Subsection 12(4)(a).
[3665] This included herein subs 12(15), which (like its predecessor) referred back to subss 12(8) and (13) and served as an offence clause.
[3666] Subsection 12(10).

observe any provision of the constitution" and the like[3667] to make a recommendation that further elections should be held, under whichever conditions the Registrar deemed necessary.[3668]

Subsection 12(12) outlined the actions of the Minister upon receipt of the report but introduced two crucial changes: Firstly, the Minister was now given the *discretion* to refer the report to the executive body of the union in question[3669] (as opposed to being compelled to do so in terms of subsection 13(9) of ICA 1937). Secondly, in case of a referral of the report to the trade union, the Minister would invite a written response (within 30 days) of "any representations that body desires to make as to the *advisability of giving effect to* any recommendations contained in the report".[3670] Subsection 12(13) provided that, upon receipt and consideration of the representations made by the union in terms of subsection 12(12), the Minister "may direct that effect be given to the whole or any portion of the said recommendations."[3671]

ICA 1937, therefore, saw the Registrar submit a report to the Minister, based on an enquiry that could only be launched after approaching the union in question. Thereafter, the Minister had a discretion to publish the report, *but subject to* the representations made by the union as to the advisability of such publication. ICA 1956, in contrast, saw the Registrar submit a report *and* recommendations (in terms of subsection 12(11)) to the Minister based upon an enquiry that the Registrar could instigate at his own discretion. The Minister, in turn, had the further *discretion* to request the union to provide representations as to the advisability (or not) of giving effect to the Registrar's recommendations. Importantly, the Minister also had a

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[3667] The wording of subs 12(3)(b) was repeated here again, the remainder of which reads:

"[O]r has acted unlawfully, or has acted in a manner which is unreasonable in relation to the members and which has caused serious dissatisfaction amongst a substantial number of the members in good standing".

[3668] The wording of this particular subsection was peculiar. Despite opening the subsection with reference to both instances of electoral irregularities or failure to observe provisions of the constitution/unreasonable behaviour towards the members (and the like) – the subsection concludes with Registrar recommendations that can be made, seemingly, only in response to electoral issues. Quite why this subsection was phrased in this manner is open to speculation but suffice it to say that the Botha Commission did focus much of its attention on issues surrounding union elections.

[3669] The relevant wording of the provision reads as follows:

"On the receipt of a report in terms of sub-section (10) the Minister *may* cause the report or any portion thereof ... to be submitted to the executive body of the union" [my emphasis].

[3670] Subsection 12(12) of the ICA 1956, [my emphasis].

[3671] Subsection 12(3). Subsection 12(14) regulated the validity of union elections held in terms of a direction issued by the Registrar/Minister in terms of subs 12(13).

discretion whether to take the union's representations into account. In summary, while the trade union in question was still involved at different stages of the 1956 process, the combined effect of the 1956 legislation arguably provided for a significantly more robust involvement by the state in the internal affairs of trade unions – particularly when considered in light of the additional statutory requirements relating to accounting/auditing records, union constitutions and voting procedures.

This discussion of ICA 1956 in comparison to ICA 1937 serves as an illustration of a growing awareness amongst lawmakers that it was distinctly possible that union democracy could be usurped by factions within the union structure and, specifically, union leaders.[3672] By the end of the 1950s, South Africa had accordingly reached a point in its (white) industrial relations of realising that a union's democratic foundations can be subverted and that this requires statutory protection. While there might be room for questioning the true motives of the government at this point,[3673] it is submitted that the underlying goal of the legislation largely was the pursuit of stable industrial relations (and to a lesser extent, white union member protection). A significant contrast then to what was seen to be the underlying motive of the British government at the turn of the 1980s and the increasingly anti-union motives of American employers and interest groups in the USA.

What was clear by 1956 (arguably, already evidenced as early as the 1937 ICA) and 1979, was a state-sponsored legislative approach that was quite prepared to regularise the interference, where necessary, with the internal controls and functions of organised labour. Simply put, this was not deemed unusual and speaks of an industrial relations system relatively comfortable with the notion of external control over internal union functioning.[3674]

[3672] Whilst it remains debatable as to what the true motive of parliament was – be it based on an obligation to protect union members, or a desire to protect the state from the adverse consequences of industrial action implemented, in their view, as a result of a powerful "few" – the fact remains that 1956 marked the culmination of a gradual realisation by government that the leadership of organised labour could present a credible economic threat if left uncontrolled. These aspects of control, as considered by Landman (1987) *MBL* 94-95, 98, revolved around sections 8 and 12 of the 1956 LRA. It will be recalled that ss 8 and 12 of the 1956 LRA, respectively regulate the constitutions of trade unions and the special powers of and enquiries by the Registrar. Furthermore, balloting (given its importance) was also of critical importance – Landman (1987) *MBL* 97-99.

[3673] Especially when viewed against the politicalisation of the MWU, and the broader underlying struggle between the Nationalist state, and certain leftist-influenced unions, as discussed at § 10 3 5 and § 10 3 6 4 above.

[3674] Again, the above becomes far less clear when the 1980s are considered, against the backdrop of

What remains to be examined, is the efficacy of these provisions and their impact on democracy in South Africa's trade unions. Various amendments were made to ICA 1956 during the course of the 1960s and 1970s, primarily due to the increased need to regulate organised labour in light of the myriad political and socio-economic changes that were taking place in South Africa during this period.

11 2 2 Post-1956

The years immediately following ICA 1956 saw minor amendments promulgated in 1959[3675] and 1961.[3676] During this time of intense political turmoil,[3677] the state's authority over black unions was extended even further[3678] and, while the period

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the Wiehahn Commission recommendations, the various legislative amendments of the time, and the broader socio-political context of South Africa – as is to be discussed below. Internal regulation of unions, in this environment, took on a noticeably different meaning. But certainly, given the democratic underpinnings so characteristic of the independent unions (and their federations) – and the rapidly diminishing influence of the remaining "white" labour unions during this time – broader conceptual notions surrounding union accountability and member democracy were not first and foremost on the mind of the legislator and Government of the day.

[3675] Industrial Conciliation Amendment Act 41 of 1959. Apart from further regulating matters pertaining to mixed race unions, and measures aimed at the safe-guarding of inter-racial competition (see s 77), Grey Coetzee *Event-Structure* 54 also refers to provisions which drastically restricted the situations where employers were allowed to automatically deduct (black) union membership dues from black employees' wages – it being subject to a discretionary order from the Minister of Labour.

[3676] Industrial Conciliation Amendment Act 18 of 1961. Of relevance were additional provisions further regulating matters pertaining to mixed race unions, see in this regard M Horrell *Race Relations as Regulated by Law in South Africa, 1948-1979* (1982) 106-107.

[3677] From a purely historical perspective, 1960 and 1961 saw several notable occurrences take place in South Africa, which RA Jones & HR Griffiths *Labour Legislation in South Africa* (1980) 133 list as including: The famous "Winds of change" speech, delivered by the British Prime Minister, Harold Macmillan; the Sharpeville shootings in Vereeniging; the banning of the black political parties, including the Pan-African Congress and the ANC; and, the unsuccessful assassination attempt on Prime Minister HF Verwoerd, who had assumed power in September 1958. 1961 also saw the holding of a referendum amongst the white population, the outcome of which was to see the country being declared a Republic, completely independent of Britain.

[3678] In providing some valuable background into the socio-political context underlying the South African labour relations system at the time, Hepple concludes his article on the role of trade unions in a democratic society, by quoting the words of his father, published in 1954:

> "Trade unions cannot be looked upon simply as organisations to defend their members against capitalist exploitation. In South Africa they must be seen as part of the movement to educate and advance all the peoples to a better life … Trade unions are as much a part of the movement towards democracy and freedom as Parliament institutions are, and the still older institutions of local self-government. It is not an exaggeration of the historical facts to say that the rise of trade unions coincided with the birth of parliamentary democracy. Organised labour has been the main source of the power which fostered the development of free citizenship and became the mainstay of

between 1963 and 1972 saw further statutory enactments,[3679] hardly any noteworthy trade union activity occurred.[3680]

11 2 3 The commencement of industrial action militancy

All of this was to change in 1973, a year which marked a dramatic shift in the course of labour relations in South Africa with the emergence of a "new wave of militancy" amongst black workers.[3681] January and February of that year saw more than 100 000 black workers in Durban and Pinetown embark on a succession of illegal strike action in protest against steadily worsening employment conditions.[3682] In describing the

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democratic government. Racial fears may make many white trade union leaders afraid to support that view. Yet it is the true answer to the future of democracy in South Africa … Workers should no longer allow themselves to be duped by cunning appeals to racial prejudice and cries of 'Communism'. They should stand together and help to create trade union unity. If they failed to do that, they will surrender themselves to slavery" – B Hepple "The Role of Trade Unions in a Democratic Society" (1990) 11 *ILJ* 645 654, quoting A Hepple [*Trade Unions in Travail: The Story of the Broederbond-Nationalist Plan to Control South African Trade Unions* (1954) 87-88].

[3679] It must be noted that whilst several amendments were made to the 1956 Act, only two are strictly relevant to this study, namely the Industrial Conciliation Amendment Act 43 of 1966 (which sought to further regulate matters pertaining to the compulsory deduction from the remuneration of certain employees of membership fees due to certain registered trade unions) and the Industrial Conciliation Further Amendment Act 61 of 1966 (which sought to amend the 1956 Act so as to prohibit strikes and lockouts for any purpose unconnected with the relationship between employer and employee).

[3680] M Finnemore *Introduction to Labour Relations in South Africa* 11 ed (2013) 35. According to PW Cunningham et al "The Historic Development of Industrial Relations" in JA Slabbert et al (eds) *Managing Industrial Relations in South Africa* (RS 1994) *Historic Development* 2–1 2–15, this period was also signified by a growing awareness amongst black organised labour that black worker satisfaction could no longer be effectively expressed through the means of mass industrial action. Consequently, the authors argue that "[r]acial prejudice had reduced union solidarity and militancy". The relative industrial peace prevalent during this period did not mean that no strikes were called at all, with notable industrial action occurring on the mines during 1965-1966. See in this regard MA Du Toit *South African Trade Unions: History, Legislation, Policy* (1976) 65-71, for a succinct account of developments during this time. However, with regards to black labour associations, Finnemore *Introduction* 35 states: "Black political and trade union activity virtually disappeared during the 1960s as the tentacles of apartheid tightened their stranglehold on black power. Government and employer controls, coupled with preferential treatment for white workers, ensured a period of industrial peace and economic growth, which in retrospect was deceptively calm."

[3681] See Cunningham et al "Historic Development" in *MIRSA* 2–16-2–17, who further describe the underlying reasons to the increased opposition exhibited by black workers.

[3682] E Webster & G Adler "Introduction: Consolidating Democracy in a Liberalizing World – Trade Unions and Democratization in South Africa" in G Adler & E Webster (eds) *Trade Unions and Democratization in South Africa, 1985-1997* (2000) 1. Whilst future industrial action would see more participation in terms of strikers, the importance of the 1973 uprising is that it broke a decade of relative (albeit deceptive) peace on the labour front. Thus, according to Webster & Adler "Introduction" in *Consolidating Democracy* 1, it "profoundly transformed the conditions under which [future] resistance was to take

nature of the industrial unrest, Finnemore states the following:

> "In 1973, widespread strikes by black workers erupted in Durban. Dissatisfaction over wages, which had been declining rapidly in the face of rising inflation, was the underlying cause. After a successful outcome from a strike in one Durban company… the news spread like wildfire and strikes spread to other areas. Industry was brought to a near standstill. For the first time, the real power of black workers was demonstrated and it was shown that even without the backing of any formal organisation, worker action was able to bring pressure to bear on a labour issue. No trade unions were involved. This resulted in a situation where employers were unable to identify with whom they could negotiate to resolve the problem".[3683]

The strikes showed a further dimension of labour relations that had never before been encountered on such a large scale, namely bargaining involving black workers at the enterprise or shop-floor level[3684] (as opposed to the customary industry-level negotiations).[3685]

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place". The relative tranquillity of labour relations experienced the previous decade, was not due to there being an improvement in labour conditions, or there being less reason for employee dissatisfaction. As indicated earlier, any such "peace" was deceptive in that the oppressive control measures imposed on black labour in South Africa had effectively quashed any organised dissent.

[3683] Finnemore *Introduction* 36 [quoting from Institute for Industrial Education *The Durban Strikes 1973* (1974)]. Incidentally, EC Webster "Prologue*"* in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) i xi-xii explains that as a direct result of the 1973 strikes, the Institute for Industrial Education (I.I.E.) was formed by "a group of sympathetic trade unionists, students and academics from the University of Natal (Durban)". It was the I.I.E. that was to eventually publish the first edition of the South African Labour Bulletin.

[3684] As mentioned above, this occurred simply because the workers involved in the strikes had no representation, since the enforced inactivity of black trade unions during the preceding decade had left a labour force devoid of tangible organisation. See Finnemore *Introduction* 35, 235. See further Webster & Adler "Introduction" in *Consolidating Democracy* 1 who state that "[t]he brutal crushing of popular resistance to apartheid in the 1960s had forced into exile the democratic movement led by the … (ANC) and its allies, the … (SACP) and the South African Congress of Trade Unions (SACTU). The Durban strikes signalled the possibility of the reemergence of a democratic movement within the country ...".

[3685] Finnemore *Introduction* 235. The "industry-level negotiations" mentioned here, were of course those regulated in terms of the 1953 Act, and its subsequent amendments. As discussed earlier, however, the very workers it was designed for largely ignored the 1953 Act and its mechanisms. However, compare the view of Finnemore with that of A Lichtenstein "Making Apartheid Work: African Trade Unions and the 1953 Native Labour (Settlement of Disputes) Act in South Africa" (2005) 46 *J Afr Hist* 293 298, who states the following regarding the situation prior to 1953 (and the then absence of any system pertaining to industrial relations for black workers):

> "[A]s of 1949, 12,000 Africans still belonged to 32 unions that had independently secured collective bargaining through direct negotiations with their employers …".

See further E Donnelly & S Dunn "Ten Years After: South African Employment Relations Since the Negotiated Revolution" (2006) 44 *BJIR* 1 6 who state of this period:

> "Before 1973, black and mixed-race unions had sustained themselves precariously, largely through

11 2 4 The Bantu Labour Relations Regulation Amendment Act of 1973

The response from government saw the promulgation of the Bantu Labour Relations Regulation Amendment Act 70 of 1973.[3686] The Act provided a statutorily imposed system that served to regulate representation of black workers through the amendment and expansion of the available legislative mechanisms previously introduced by the 1953 Native Labour (Settlement of Disputes) Act, as well as through the use of works or liaison committees[3687] Furthermore, the Act allowed for a process through which black employees could participate in legal strike action.[3688] Notwithstanding these measures,[3689] in many respects the new legislation was merely

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shop-floor resistance and informal social networks beyond the workplace. Afterwards, the movement was energized and radicalized. The launch of new unions of greater ambition led to sustained organization and militancy on the shop-floor, with the aim of rendering apartheid work relations ungovernable. To that end an increasingly robust shop steward system emerged. Perhaps more importantly, unions were increasingly able to develop and campaign beyond the workplace, to become, in short, a movement, 'oriented towards radical social change, the struggle for human rights, social justice and democracy'" [footnotes omitted].

[3686] The Act also amended the original 1953 Native Labour (Settlement of Disputes) Act, by re-designating it as the Bantu Labour Relations Regulation Act – see J Maree & D Budlender "Overview: State Policy and Labour Legislation" in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 116 117; Cunningham et al "Historic Development" in *MIRSA* 2–12.

[3687] These also operated at the shop or enterprise-level only. The new legislation combined elements of the limited recognition for black worker representation of the previous Act, with a marginal extension of such rights by means of works- or liaison-committees. For a discussion of the effects and nature of the mechanisms introduced by the Act, see Cunningham et al "Historic Development" in *MIRSA* 2–18-2–19; Horrell *Race Relations* 111-113; Du Toit *Trade Unions* 46-53.

[3688] Subsection 9(a) of the Act amended subs 18(1) of the 1953 Act, thereby allowing for strike action/lockouts, subject to the specifics of subs 18(1)(d), as amended. The latter scenario, as was the case with the 1924 Act, saw a complicated process with convoluted and intricate provisions (involving liaison-/works committees, a report to the Bantu labour officer, and related time-periods) which no doubt served as an attempt to restrict workers from exercising their newfound right to industrial action. See in this regard Horrell *Race Relations* 104-105, who, regarding the use of the processes introduced by the Act, stated that "[t]his cumbersome machinery has, in practice, been ignored by many workers and employers" [Horrell *Race Relations* 105].

[3689] Given that the 1973 Act was essentially implemented in response to the mass industrial action initiated in Durban, it was only natural that questions surrounding the issue of black labour associations would once again have required consideration – see Du Toit *Trade Unions* 45. With this in mind, Grey Coetzee *Event-Structure* 55 quotes the then Minister of Labour, during a debate in the General Assembly [House of Assembly Hansard col. 8779 1973], which sought to clarify the spirit of the new Act with regards to the position of black worker representation:

"If we had wanted to prohibit these trade unions, Minister Schoeman would already have done so in 1953. This has never been done, we have felt that they could simply struggle on like that. I think that

an extension of the 1953 Act.[3690] Ultimately, the industrial relations machinery created by the 1973 Act proved no more popular with black workers than previous legislation.[3691] As explained by Maree and Budlender:

> "Management, supported by the state, thereupon enthusiastically promoted liaison committees [as introduced by the 1973 Act]. But in the main African workers rejected the committee system and opted for trade unions instead. As a result independent African unions emerged throughout the country's major industrial centres. In cases where the independent unions made use of the works committees, it was a temporary strategy in order to gain shop-floor representation and advance their organisational strength. The legal status of works committees and the anti-victimisation clauses in the act also helped to give African workers confidence and potential legal protection while the trade union movement was still weak."[3692]

11 3 A second readjustment towards uniformity

11 3 1 The independent unions and union democracy

One year later – 1974 – the first recognition agreement between an employer and a trade union that was largely representative of black workers was concluded.[3693] This

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> the establishment of these Workers Committees will really deprive these Bantu trade unions of the Honourable Member [a reference to Mrs Helen Suzman] of their life's blood and any necessity for existence. I think, therefore, that such a prohibition is unnecessary."

[3690] Maree & Budlender "State Policy" in *Independent Unions* 117-118, in explaining the focus of this extension, state the following:

> "At the time of the 1973 Durban strikes the works committee system [implemented in terms of the 1953 Act] proved itself totally ineffective as a channel for communicating workers' grievances. The response of the government was to try and breathe life into the committee system instead of granting Africans trade union rights. It amended the 1953 act to introduce plant-based liaison committees and upgrade the works committees. Liaison committees could be composed of up to fifty percent management nominees, but were denied rights of negotiation. Works committees on the other hand were wholly elected by African workers, but could only be established in enterprises where no liaison committee existed."

[3691] For an insight into then prevalent views regarding the supposed failure of the Act, see the discussion of Du Toit *Trade Unions* 54-55. See further Finnemore *Introduction* 36 who in explaining the contempt with which the processes implemented by the Act were held, states that the various committees "were disparagingly referred to by black workers as 'toy telephones'", thereby making clear their obvious scepticism regarding whether or not their concerns would ever be probably dealt with.

[3692] Maree & Budlender "State Policy" in *Independent Unions* 118.

[3693] Finnemore *Introduction* 235 states that the formal recognition agreement was concluded in Pinetown between the National Union of Textile Workers and a British-owned textile company, Smith and Nephew. The agreement was adapted from a similar American agreement to suit the particular conditions and circumstances of South Africa's labour market. This served as a guide to numerous other trade unions, who realised that with proper organisation at enterprise level the combined power of like-minded labour might in fact have desired results.

preceded a period into the second half of the 1970s that was characterised by the formation of several "worker advice bureaus", which ultimately saw the emergence of various new, predominantly black, trade unions – commonly known as "independent trade unions" (independent in the sense of self-autonomy from any previous associations).[3694] These unions placed a strong emphasis on shop-floor organisation and successfully entrenched their position in the labour market despite strong opposition from the state.[3695]

Trade union democracy,[3696] marked by a pronounced involvement of the membership in the administration of the union was a significant characteristic of these "new" trade unions. Buhlungu, in explaining the historical background hereto, says:

> "[T]he South African unions that emerged in the aftermath of the 1973 strikes sought to prevent a concentration of power in the hands of officials by building a tradition that became known as "worker control" and the accountability of leadership to their members, particularly through a system of mandated decision making and regular report-backs. These unions deemphasized the role of full-time union officials and instead encouraged a tradition in which workers and worker leaders played a more prominent role in decision making within the unions."[3697]

This emerging tradition or "organizational culture" was "as a result of necessity and circumstance."[3698] It was as much a tactic to ensure the continued functioning of trade unions in the face of state oppression[3699] as it was a vehicle for increased member

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[3694] G Wood & JK Coetzee *Trade Union Recognition: Cornerstone of the New South African Employment Relations* (1998) 25. See also Webster & Adler "Introduction" in *Consolidating Democracy* 1, who explain the extent of development in black labour associations following the 1973 strikes, by stating:

> "In the years following the mass upsurge, activists succeeded in marshalling popular discontent, translating it into a strong, shopfloor-based union movement with the capacity to challenge management and – later – the state itself".

For a useful account of the initial formation and development of the independent trade union movement, see in general J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987).

[3695] Wood & Coetzee *Cornerstone* 25.

[3696] Sakhela Buhlungu, in his article focusing on democracy within black trade unions of the 1970s to 1990s, prefers rather to speak of "'democratic organizational culture' or 'democratic unionism'" than union democracy, given the fluid and contextual nature of the terms. See S Buhlungu "The Rise and Decline of the Democratic Organizational Culture in the South African Labor Movement, 1973 to 2000" (2009) 34 *Lab Stud J* 91 93.

[3697] 94.

[3698] 93.

[3699] As explained by Buhlungu at 94:

participation. While the underlying influences and continued prevalence of these democratic structures in black trade unions were varied and numerous,[3700] the broad approach taken by black trade unions provide an intriguing contrast with white trade unions at the time: The formal, statutory mechanisms applicable to (mostly) white trade unions, saw development of increased *external* regulation – ostensibly in response to incidences of *internal* democratic abuse[3701] – while black trade unions "sitting outside" of this system saw development of increased *internal* democratisation – ostensibly in response to incidences of *external* abuse. Put differently, white trade unions were subject to a system with increasing *external* controls designed to promote *internal* democracy, while black trade unions (who were on the verge of becoming part of that same system) were increasingly promoting *internal* democracy in order to minimise the effects of *external* controls. The ebb and flow of internal trade union democracy during this period (and later), particularly within the "independent" unions, has been the subject of extensive attention.[3702] Suffice it to say at this point that the discussion

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"Union activists learned that a union that relied on a few charismatic leaders was more vulnerable than one with layers of active members and democratically elected leaders".

See further S Buhlungu "The Building of the Democratic Tradition in South Africa's Trade Unions after 1973" (2004) 11 *Democ* 133 134-135.

[3700] Buhlungu (2009) *Lab Stud J* 96-97; Buhlungu (2004) *Democ* 138-143, 154.

[3701] As indicated within the various Commissions discussed above.

[3702] See in general: S Buhlungu "Democratising the Workplace: Worker Perspectives on Industrial Democracy" (1994) unpublished paper presented at a seminar on *Democracy, Popular Precedents, Practice, Culture* hosted by the School of Social Sciences, History Workshop at University of Witwatersrand, 13-07-1994 1 <http://wiredspace.wits.ac.za/bitstream/handle/10539/7724/HWS-39.pdf?sequence=1&isAllowed=y> (accessed 07-07-2015); J Maree "The COSATU Participatory Democracy Tradition and Worker Expectations from the New Parliament: Are they Reconcilable?" (1994) unpublished paper presented at a seminar on *Democracy, Popular Precedents, Practice, Culture History Workshop* hosted by the School of Social Sciences, History Workshop at University of Witwatersrand, 1 <http://wiredspace.wits.ac.za/bitstream/handle/10539/7932/HWS-266.pdf?sequence=1&isAllowed=y> (accessed 07-07-2015); S Buhlungu "Workplace Democratisation: Shopfloor Voices and Visions for Emancipation" (1997) unpublished paper presented at a seminar hosted by the Institute for Advanced Social Research at University of Witwatersrand, 21-04-1997 1 <http://wiredspace.wits.ac.za/bitstream/handle/10539/8518/ISS-60.pdf?sequence=2&isAllowed=y> (accessed 07-07-2015); Webster & Adler "Introduction" in *Consolidating Democracy* 1 1-19; G Wood "Solidarity, Representativity and Accountability: The Origins, State and Implications of Shopfloor Democracy within the Congress of South African Trade Unions" (2003) 45 *JIR* 326 326-343; Buhlungu (2004) *Democ* 133 133-158; Forrest KA *Power, Independence and Worker Democracy in the Development of the National Union of Metalworkers of South Africa (NUMSA) and its Predecessors: 1980 – 1995* D Phil thesis University of the Witwatersrand (2005); S Buhlungu "Rebels without a Cause of Their Own?: The Contradictory Location of White Officials in Black Unions in South Africa, 1973-94" (2006) 54 *Curr Socio* 427 427-451; J Maree "Rebels with Causes: White Officials in Black Trade Unions in South Africa, 1973-94: A Response to Sakhela Buhlungu" (2006) 54 *Curr Socio* 453 453467; S

provides an important insight into how complex and varied the different components of trade union structures were during this period – particularly of those unions who were born of the struggles symptomatic of South Africa in the 1970s.

The increased growth, popularity and potential influence of the black trade unions did not go unnoticed by the government,[3703] which saw one last attempt in 1977 to promote acceptance of the 1973 Act through a further statutory amendment.[3704] However, in the words of Maree and Budlender, "it offered too little too late",[3705] with the result that "[i]n spite of the still weak position of the independent unions at that time, African workers continued to demonstrate their strong support for unions."[3706]

11 3 2 The Wiehahn and Riekert Commissions

By the late 1970s,[3707] with black trade unions securely entrenched and with rapidly growing membership,[3708] government (realising "that more fundamental change was needed if it was to regain control")[3709] responded by appointing two investigative

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Buhlungu "Whose Cause and Whose History?: A Response to Maree" (2006) 54 *Curr Socio* 469 469-471; J Maree "Similarities and Differences Between Rebels With and Without a Cause" (2006) 54 *Curr Socio* 473 473-475; P Hirschsohn "Union Democracy and Shopfloor Mobilization: Social Movement Unionism in South African Auto and Clothing Plants" (2007) 28 *EID* 6 6-48; S Buhlungu et al "Trade Unions and Democracy in South Africa: Union Organizational Challenges and Solidarities in a Time of Transformation" (2008) 46 *BJIR* 439 439-468; Buhlungu (2009) *Lab Stud J* 91 91-111; P Hirschsohn "The 'Hollowing-Out' of Trade Union Democracy in COSATU? Members, Shop Stewards and the South African Communist Party" (2011) 15 *Law Dem Dev* 279 279-310.

[3703] Maree & Budlender "State Policy" in *Independent Unions* 118 describes the government's reaction as being "a last ditch stand to forestall the development of full-blooded [black] trade unions".

[3704] Bantu Labour Relations Regulation Amendment Act 84 of 1977. Apart from introducing a right to freedom of association for black workers, as against their employer in respect of the various works' committees (s 23 inserted s 24A into the 1953 Act), Maree & Budlender "State Policy" in *Independent Unions* 118 states that the Act strove to amend the original so as to "grant liaison committees the right to negotiate in-plant agreements on wages and working conditions" – this is terms of subss 7(2)(a)-(b) (inserted by s 5) of the 1977 Act.

[3705] Maree & Budlender "State Policy" in *Independent Unions* 118.

[3706] 118.

[3707] It would be prudent at this point, to draw the reader's attention to the earlier discussion pertaining to the Second Black Laws Amendment Act 102 of 1978, which was promulgated during this period. The Act was significant in that it substituted the term "Bantu" with "Black" – with the effect that the Native Labour (Settlement of Disputes) Act, amended in 1973 to be re-designated as the Bantu Labour Relations Regulation Act, and its subsequent amendments (the Bantu Labour Relations Regulation Amendment Acts of 1973 and 1977) – were now to be known as the Black Labour Relations Regulation Act, and the Black Labour Relations Regulation Amendment Act(s), respectively.

[3708] Maree & Budlender "State Policy" in *Independent Unions* 25.

[3709] 118.

committees[3710] – the Commission of Inquiry into Labour Legislation (known as the Wiehahn Commission)[3711] and the Commission of Inquiry into Legislation Affecting the Utilisation of Manpower (the Riekert Commission).[3712] The Wiehahn Commission proposals[3713] – while not focusing specifically on the internal relationship between trade union and member (unlike both the Van Reenen and Botha Commissions) – proved to be a watershed moment in South African labour history.[3714]

[3710] Maree & Budlender "State Policy" in *Independent Unions* 118, in discussing the reasons underlying the appointment of both Commissions, state:

> "The most important were the high levels of industrial and political conflict that erupted in the 1970s; the shortage of skilled manpower that threatened to put a stranglehold on the generation of economic wealth required to ensure the survival of capitalism and white political domination; and international pressure against racial domination in South Africa with the possibility that it could disrupt investment and trade with South Africa."

[3711] The first part of the Report was released in 1979: RSA Report of the Wiehahn Commission of Enquiry into Labour Legislation RP 47/1979. For the complete Report, see NE Wiehahn *Die Volledige Wiehahn-Verslag: Dele 1-6 en die Witskrif op Elke Deel* (1982). F Van Jaarsveld & S Van Eck *Principles of Labour Law* 2 ed (2002) 5 cite the following reasons as to why the government appointed the Commission in 1977: The country's isolated foreign position (both regarding labour and politics) as a result of apartheid; South Africa's economic progress of the preceding two decades; the influence and presence of multinational companies in South Africa; the dualistic system of collective bargaining (which was creating unnecessary administrative costs and difficulties); the shortage of sufficiently skilled workers; and finally, the "dubious labour practices" present within South Africa and its legislation. M Christianson et al (eds) *Essential Labour Law: Individual Labour Law 1* 3 ed (2002) 9, on the effects of the eventual proposals made by the Wiehahn Commission, state that "[the] recommendations… were to change the face of South African industrial relations and labour law for all time."

[3712] Maree & Budlender "State Policy" in *Independent Unions* 118 explain that the Riekert Commission "was to examine the pass system with respect to the regulation of movement and employment of African workers." For a detailed discussion of both Commissions, see in general WJ Vose "Wiehahn and Riekert Revisited: A Review of Prevailing Black Labour Conditions in South Africa" (1985) 124 *ILR* 447.

[3713] Maree & Budlender "State Policy" in *Independent Unions* 119 summarise them as follows:

> "The Wiehahn Commission proposed that African workers should be allowed to belong to registered unions and that union membership should be open to workers of all population groups. The registration of African unions, the Wiehahn Commission argued, would bring them under the same regulation and control exercised by the state over other unions. These controls placed obligations on the union to provide the state with the names and addresses of office bearers and officials, union membership figures and audited financial statements. In addition a registered union has to draw up its constitution in accordance with specifications laid down in the Industrial Conciliation Act. Other recommendations included the abolition of the legal reservation of specified occupations for whites only and the establishment of an industrial court that would interpret labour laws and adjudicate on issues such as unfair labour practices."

Finnemore *Introduction* 36, in listing the major recommendations, makes further mention of the fact that unions were to be granted the autonomy to freely determine membership criteria, with the consequence that mixed trade unions would no longer be prohibited. See in general Part V: Industrial Relations, paras 4.20-4.28 of the Commission Report, Wiehahn *Wiehahn-Verslag*.

[3714] For a particularly useful overview of the Wiehahan Commission, in retrospect, see C Thompson "Twenty-Five Years after Wiehahn – A Story of the Unexpected and the Not Quite Intended" (2004) 25

11 3 3 The Industrial Conciliation Amendment Act of 1979

The subsequent embodiment of the Wiehahn recommendations in the Industrial Conciliation Amendment Act of 1979,[3715] finally served to accommodate the majority of South African workers[3716] – and by implication, their trade unions[3717] – in the existing industrial relations system. The long struggle for black union recognition was over, while the struggle of how to effectively operate within the new system was only just beginning.[3718] Nonetheless, black trade unions in South Africa were able to register and participate in the collective bargaining structures, which had formerly been the sole domain of white trade unions.[3719] Importantly, the Act also established the Industrial Court (upon the recommendations of the Wiehahn Commission) which was the first purely judicial mechanism that concentrated strictly on matters pertaining to industrial relations disputes.[3720] Despite the existence of the Court (many disputes

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ILJ iv iii-1, as introduction to the Industrial Law Journal's Volume 25 Special Edition, entitled "The Unfolding of Modern South African Labour Law" – which focuses both on the Commission, and on similar developments in this very important period of South Africa's labour law development.

[3715] Industrial Conciliation Amendment Act 94 of 1979.

[3716] According to Maree & Budlender "State Policy" in *Independent Unions* 119, parliament initially redefined the term "employee" so as to include "African workers with permanent urban resident rights" – which meant that, *inter alia*, contract workers and foreign Africans were still excluded. However, "substantial criticism and solid opposition from the independent unions to register under such conditions" [Maree & Budlender "State Policy" in *Independent Unions* 119], resulted in the subsequent amendment of the term, which accordingly extended the definition to all African workers except those from internationally recognised countries. This last point is significant, in that South Africa was one of a very small minority of countries that recognised the so-called "homelands" (Bophuthatswana, Venda, Ciskei, Transkei and the like) as independent countries. The fact that they were not recognised internationally meant that workers from the homelands were included within the definition of "employee" and could thus participate in the central industrial relations machinery.

[3717] Maree & Budlender "State Policy" in *Independent Unions* 119 state that "for the first time in the country's history, the state recognised African trade unions by giving Africans the legal right to belong to registered unions and participate in the central industrial relations machinery", as regulated in terms of the 1956 Act.

[3718] For a useful discussion of this period, from an "outsider's" perspective, see DC Campbell "U.S. Firms and Black Labor in South Africa: Creating a Structure for Change" (1986) 7 *J Lab Res* 1.

[3719] This statement must be qualified by mentioning that the Act initially only allowed for provisional registration of unions, with the ultimate decision still resting with the Registrar, who according to Finnemore *Introduction* 37, "also had the power to withdraw registration without giving any reason." Furthermore, registration of mixed unions "was still forbidden except in specific cases allowed by the minister" of labour – see Finnemore *Introduction* 37, as regulated in terms of s 3 of the 1979 Act.

[3720] Finnemore *Introduction* 40, in discussing the functioning of the Industrial Court during the political turmoil that was to arise during the mid-1980s, states:

"The Industrial Court also developed into an important player and serious efforts were made to

were only referred after strike action had already commenced)[3721] and the various industrial councils, economic recession[3722] meant that industrial conflict in numerous workplaces throughout South Africa continued to increase.[3723] Another reason for this increase was the state's continued refusal to incorporate African workers into the broader political processes of the country. The growing discontent at disenfranchisement was channelled (constructively) into the only formal structure with limited access to governmental institutions known to the workers, namely the trade unions.[3724] In elaborating on this, Wood states:

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establish an industrial jurisprudence. Some guidelines emerged, for example, on dismissals and retrenchments, but inconsistencies remained. Judgments often depended on the situation, relying on very broad and sometimes contradictory concepts of fairness."

This view is tempered somewhat by Wood & Coetzee *Cornerstone* 31, who reasons: "[I]t can be argued that the Industrial Court contributed to the gradual ritualisation of industrial conflict and its binding in terms of a series of rules." Furthermore, Maree & Budlender "State Policy" in *Independent Unions* 121 state: "In its first few years of existence the court delivered hard blows against victimisation of union members, arbitrary dismissals and retrenchments of workers, and the nonrecognition of representative trade unions, regardless of whether the unions were registered or not". However, compare the aforementioned with the views of Vose (1985) *ILR* 454-455, who states: "In implementing the recommendation for setting up an Industrial Court, the Government placed the Court within the jurisdiction of the Department of Manpower … The emerging Black unions were at first very suspicious of the Court, but a number of early decisions in their favour encouraged them to make greater use of the new procedure. As a result, a clearer pattern of what constitutes an unfair labour practice seemed likely to evolve, but by 1983 employers and certain lawyers had begun to object to the Court's policies, claiming that it was establishing precedents that could erode employer's prerogatives and the control of labour which they had long exercised, particularly concerning dismissal. New, usually temporary, chairmen then began to be appointed to the Court, frequently with little knowledge of labour law and practice as defined in international labour Conventions and relying largely on their own notions of fairness. Inevitably, given the long history of well-known White attitudes to Blacks in South Africa, such decisions often conflicted with acceptable labour practices and even with earlier Court decisions. In addition, the Department of Manpower began to interfere with certain processes and impede access to the Court. As a result, the Court's credibility declined sharply". See further MSM Brassey "The New Industrial Court" (1980) 1 *ILJ* 75 for a succinct overview of the new Court, and its procedures.

[3721] Wood & Coetzee *Cornerstone* 30-31.

[3722] See Finnemore *Introduction* 41 for a list of the various contributory factors to the economic decline.

[3723] Wood & Coetzee *Cornerstone* 31 who, in this regard, states: "It should be noted that the de-racialisation of the Industrial Council system and the introduction of the Industrial Court failed to stem a rapid increase in strike action in South Africa in the 1970s and 1980s." See further Finnemore *Introduction* 41, who states: "Against all economic theory, rising unemployment did not curb strike activity as wage demands increased. This was partly because those who were employed were expected to also provide for increasing numbers who were not."

[3724] See further WB Gould IV "The Emergence of Black Unions in South Africa" (1987) 5 *J L & Rel* 495 499 who states:

"Members of the [black] trade unions see their unions, in the absence of political parties, as channels for the expression of their discontent over community problems as a whole. It is impossible to assess the role of the black trade union movement without reference to its protest role and involvement in

> "[T]his general failure to prevent increasing numbers of strikes from taking place was the result of the states' inability to politically incorporate the unions. In other words, workers and the unions which represented them were excluded from representation in wider political structures, fuelling union militancy within and outside the workplace. This meant that, no matter how well-thought out a localised recognition agreement may have been, and how well methods of dispute resolution may have advanced, many firms faced the spill over of community struggles, introducing an extraneous element of unpredictability into workplace relations."[3725]

In explaining their concept of "radical reform", Webster and Adler reason that the activity of the South African labour movement "pointed to an alternative understanding of the role of labour… in the democratization process".[3726] It consisted of labour uniting a "radical vision of a future society with a reformist, incrementalist strategy".[3727] Therefore, in the process of attempting to reach their ultimate objective of defeating apartheid, the trade unions highlighted the alternative of a "legal means of struggle".[3728] The unions, by means of their independent power base, had the ability to both marshal and restrain their member support, thereby creating a powerful weapon of negotiation with which to bargain with the state, commerce and industry, in order to "win and expand legal space in which to pursue its goals".[3729]

11 3 4 The early 1980s

The growing momentum of the black trade unions proceeded into the early 1980s.[3730] Simultaneously, the pressing question of union registration came to the fore – though in a guise never before experienced in South Africa.[3731] The prior industrial relations history of South Africa had repeatedly demonstrated that the issue of union registration revolved around race – whether or not black trade unions and their members should be permitted to participate within the labour relations system. By the

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the political struggle in South Africa."

[3725] Wood & Coetzee *Cornerstone* 31 [footnotes omitted].

[3726] Webster & Adler "Introduction" in *Consolidating Democracy* 1.

[3727] 2.

[3728] 2.

[3729] 2.

[3730] Wood & Coetzee *Cornerstone* 25; Maree & Budlender "State Policy" in *Independent Unions* 120.

[3731] It must be noted that this situation sees similarities to that of the non-registration by unions – who were also distrustful of a statutory scheme – which played itself out in the UK in response to the IRA 1971.

early 1980s, the issue was completely turned upside down: it now revolved around the question whether or not black trade unions *wanted* to participate in the existing industrial relations structures. Maree and Budlender state that "[t]he independent trade unions' response to the 1979 Act was not what the state intended or anticipated",[3732] since, "far from rushing headlong into registration, the independent unions viewed registration with suspicion".[3733] The independent union movement in South Africa was undecided as to what their approach should be – register and become part of the industrial relations bargaining process, or boycott the process completely.[3734] The unions who were in favour of registering were of the opinion that in spite of the Wiehahn Commission's recommendations (as applied in the new Act) appearing contradictory,[3735] it did contain "legitimate concessions"[3736] and potential benefits.[3737]

[3732] Maree & Budlender "State Policy" in *Independent Unions* 120.

[3733] 120.

[3734] For a useful overview of the debates underlying the registration question, see in particular the following editions of the South African Labour Bulletin: *South African Labour Bulletin* Vol 5 Iss 6-7 March 1980, entitled "Labour Organisation and Registration"; *South African Labour Bulletin* Vol 7 Iss 1-2 September 1981, entitled "State and Capital – Responses to Labour"; *South African Labour Bulletin* Vol 7 Iss 3 November 1981, entitled "Debating Union Principles and Strategy". Furthermore, Landman (1987) *MBL* 93 n27 lists a series of articles from the SALB that addressed the discourse, stating as follows: "Intellectuals active in the trade union movement debated publicly and at times acrimoniously the extent to which the registration of the emergent [independent] union in terms of the LRA would lead to control of those unions by the state". The question surrounding the registration debate, according to J Lewis "Overview: The Registration Debate and Industrial Councils*"* in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 170 170, "was to seriously divide the South African independent trade union movement." The underlying struggles between the various unions in attempting to garner support for positions against and for registration and participation in the system, lasted up and till the mid-1980s. The nature of the question, and the variance of issues that were considered during the process, are too complex and numerous to discuss adequately within this study. For further information regarding the aforementioned, see in general: Lewis "Registration Debate" in *Independent Unions* 170 170-175; Western Province General Workers' Union "Comments on the Question of Registration*"* in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 176 176-190; B Fine et al "Trade Unions and the State: The Question of Legality*"* in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 191 191-207.

[3735] An example of this being the fact that whilst the Act purported to allow black and mixed unions to register, the actual provisions of the Act left a far-reaching level of discretion with both the registrar and Minister of Labour. When viewed considering the initial approach taken by the Industrial Court, it remains understandable that what was seemingly promised in terms of the Wiehahn Commission, was not necessarily being implemented on the shop floor.

[3736] Wood & Coetzee *Cornerstone* 29-30.

[3737] At risk of stating the obvious, the single biggest benefit to be derived from registration in terms of the Act, was the complete participation in the industrial relations machinery of South Africa that, until this point, had been the sole domain of the minority of workers and their unions.

Nonetheless, the fear remained that registration and the subsequent information that would need to be provided could serve as a basis for future legislative restriction, or worse, increased governmental control. It was against this backdrop, together with further increases in strike activity brought about by a "resurgence of black worker militancy",[3738] that the Labour Relations Amendment Act[3739] was introduced in 1981. While extending various provisions in such a manner as to be applicable to unregistered unions and federations, Maree and Budlender highlight the importance of the enactment with reference to another aspect:

> "To some extent the Labour Relations Amendment Act of 1981 was also a continuation of the reforms proposed by the Wiehahn Commission in 1981. It finally abolished the dual system of industrial relations in South Africa by deleting all references to race in the act and repealing the Black Labour Relations Regulation Act."[3740]

Accordingly, the Act finally served to remove, as inherent basis, racial categorisation from the labour relations system and removed the dualistic character of that system. The repeal of the original 1953 Act and its subsequent amendments,[3741] effectively meant that the only labour relations system still operating in South Africa was the one introduced in 1956 by the then Industrial Conciliation Act.[3742] In effect, black workers and their unions were now part of this system.

[3738] Maree & Budlender "State Policy" in *Independent Unions* 120.

[3739] The Labour Relations Amendment Act 57 of 1981 re-designated the original 1956 Act as the Labour Relations Act 28 of 1956. Furthermore, according to Maree & Budlender "State Policy" in *Independent Unions* 120-121:

> "[T]he amendment extended the administrative controls previously imposed on registered unions to unregistered unions and federations as well. In addition, the restrictions with regards to political involvement and strikes already imposed on registered unions were tightened up and extended to unregistered unions."

In general, see also P Benjamin et al "A Guide to the Labour Relations Amendment Act of 1981*"* in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 158 158-169.

[3740] Maree & Budlender "State Policy" in *Independent Unions* 121.

[3741] These included, the Black Labour (Settlement of Disputes) Amendment Act 59 of 1955; the Black Labour Relations Regulation Amendment Act 70 of 1973; and, the Black Labour Relations Regulation Amendment Act 84 of 1977.

[3742] As it was then known, before the 1981 Act renamed it.

11 3 5 The trade union federations

The concerns of the various black trade unions pertaining to the question of registration and whether or not to boycott the system, gradually subsided. With larger unions joining their appropriate industrial councils, 1983 onwards saw the steady acceptance of the potential benefits to be offered by the industrial council bargaining concept.[3743] This period was also characterised by the gradual aspirations of local labour to achieve greater unity, which culminated in the formation of two "super" federations,[3744] the Congress of South African Trade Unions (hereafter COSATU) in 1985,[3745] and the National Council of Trade Unions ("NACTU") in 1986.[3746] Gradually, the attitudes of both management and workers started changing[3747] and it could be said that a view of reluctant inevitability regarding the use of industrial action by black unions and their members as a political weapon[3748] began to be held by

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[3743] Lewis "Registration Debate" in *Independent Unions* 173-174.

[3744] See in general Finnemore *Introduction* 38-39, for a succinct discussion of some of the other federations being formed during this period, such as the United Workers' Union of South Africa (UWUSA), which had strong ties to the Inkhata Freedom Party, and Zulu workers in general.

[3745] Finnemore *Introduction* 38 explains that COSATU, comprising of 33 unions which amalgamated, included "the old FOSATU [the Federation of South African Trade Unions, was founded in 1979 on the principles of non-racism and industrial unionism – Finnemore *Introduction* 37] affiliates and a large number of independent unions" – with a membership totalling about 450 000. Given the large amount of community-oriented unions which entered the federation, it "identified itself with the political problems which affected its members' lives from the outset", with the new unions bringing with them "a strong tradition of support for the African National Congress, albeit still banned at the time." According to Wood & Coetzee *Cornerstone* 25-26, this confluence of principles was eventually to lead to the formation of an alliance between COSATU and the ANC, who together began to assume a more central role in opposition to the then government.

[3746] Regarding NACTU, Finnemore *Introduction* 38 states that the federation was formed "when CUSA [the Council of Unions of South Africa was formed in 1981 and whilst being based upon non-racial principles, insisted that union leadership remain in black union members' control – Finnemore *Introduction* 37] amalgamated with the Azanian Confederation of Trade Unions (AZACTU) which had formed in 1984 from an alliance of unions strongly supporting the philosophy of black consciousness."

[3747] This is not to suggest that the various black unions and federations were being accepted without consequence, as indicated by Finnemore *Introduction* 39 who states: "[M]any trade unions, their officials and members were subjected to a variety of penal sanctions and police action", including torture and death in police detention. See in this regard South African Labour Bulletin "Critique of the Wiehahn Commission and the 1979 Amendments to the Industrial Conciliation Act" in J Maree (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) 138 153-157, for a disturbingly lengthy list of persons who were active in the labour movement, and had been banned or had died in police detention – and the discussion of control exercised by the State during this period by means of "security legislation" [South African Labour Bulletin "Critique" in *Independent Unions* 151-153].

[3748] Finnemore *Introduction* 38.

management.[3749] Indicative of this change in perception was the reaction to the widespread strike action that arose in 1987, most notably in the mining and railway industries.[3750] In this regard, Wood identifies what he terms an "important counter tendency",[3751] which allows him to reason as follows:

> "[E]mployment relations became increasingly formalised, ritualised, and bound by a series of formal and informal rules. Increasingly, management acceded to the inevitability of negotiations, without automatically firing all strikers, while increasingly fewer workers were prosecuted for striking illegally. In other words, the Wiehahn reforms may not have affected the incidence of strike action, but rather the form and outcome of individual instances of strike action, and, indeed of management-union relations on the shop-floor."[3752]

While amendments to the Labour Relations Act of varying relevance and significance continued to be enacted during the course of the 1980s,[3753] the end of the 1980s saw the industrial relations legislation of South Africa begin to show definite signs of decay.[3754]

11 3 6 The late 1980s and legislative intervention

In an attempt to remedy the situation, the government enacted what was to be the last major legislative instrument prior to the new dispensation, namely the Labour Relations Amendment Act 83 of 1988.[3755] It was once again an endeavour that

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[3749] Wood & Coetzee *Cornerstone* 31.

[3750] 31.

[3751] 31.

[3752] 31.

[3753] These included the Labour Relations Amendment Act 51 of 1982, the Labour Relations Amendment Act 2 of 1983 and finally, the Labour Relations Amendment Act 81 of 1984.

[3754] The labour relations system itself was certainly no longer effective. Finnemore *Introduction* 41 states that in the years between 1985 and 1990 there were more workdays lost to industrial action than during the entire previous 75 years. Furthermore, the Industrial Court was vociferous in its condemnation of the government and its failure to address this problem by means of introducing a completely new, redesigned law. Christianson et al *Individual Labour* 10 includes an excerpt from *Natal Die Casting Co (Pty) Ltd v President, Industrial Court* 1987 8 ILJ 245 (D) 253-254, per Kriek, J:

> "I have on previous occasion …expressed dismay at the fact that the legislature, in 1979, saw fit to cut, trim, stretch, adapt and generally doctor the old Act in order to accommodate…the recommendations of the Wiehahn Commission instead of scrapping the old Act and producing an intelligible piece of legislation which clearly and unequivocally expressed its intentions".

[3755] In briefly discussing certain of the more significant provisions of the Act, s 26 substituted s 79 of the 1956 Act, and provided for indemnification against certain losses suffered in furtherance of a strike or lock-out, as performed by either a registered trade union, any member, office-bearer or official of any

failed.[3756] Of significance was its establishment of a Labour Appeal Court under the auspices of the (then) Supreme Court of South Africa and its statutory definition of the different unfair labour practices.[3757] Initial criticism aimed at the newly formed court revolved around claims that it was constituted in an effort to compensate for the ostensible pro-union stance of the Industrial Court.[3758] In addition, trade unions and their members, officials or office bearers were now liable for damages that might result from any interference in the contractual relationship that existed between management and the employee that led to a breach of contract,[3759] a particularly

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such union, provided that the strike or lock-out is not forbidden in terms of the relevant provisions of the Act (specifically s 65). Furthermore, as mentioned by Wood & Coetzee *Cornerstone* 32, "[s]ympathy strikes and secondary stoppages were outlawed, and unregistered trade unions were forced to hold strike ballots prior to engaging in collective action" [footnotes omitted].

[3756] Wood & Coetzee *Cornerstone* 32 states that whilst the Act was initially successful in curbing the incidents of strike action in the year of its inception, it "failed to prevent an upsurge in strike action in 1989" – which, together with certain other factors, as below, resulted in the amendments being "effectively rescinded in the early 1990s, following mass stayaways and joint representations by business and organised labour" [footnotes omitted]. Donnelly & Dunn (2006) *BJIR* 7 reason that the 1988 Amendment Act owed its origins to the "state's response to the continued [industrial and political] turmoil", as being one of "backtrack[ing] on the Wiehahn policy." The result, as stated by Donnelly & Dunn (2006) *BJIR* 7-8, was far-reaching:

> "The 1988 Labour Relations Amendment Act sought, among other things, to curb union power by … making unions liable for unlawful striking by their members – echoes of the UK again. But the Act merely provided a focus for intensified dissent, including three COSATU-led national strikes in 1989. That same year, a National Defiance Campaign was mounted that endorsed civil unrest and mass protest against all unjust and discriminatory legislation. Once again, the authorities performed a volte face, striking an accord with the two biggest labour federations in 1990. Through this Laboria Minute, the government and employers' organizations not only agreed that the disputed aspects of the 1988 Act should be repealed, but also conceded further freedoms to the unions" [footnotes omitted].

Regarding the Laboria Minute, concluded in September 1990, see C O'Regan "1979-1997: Reflecting on 18 Years of Labour Law in South Africa" (1997) 18 *ILJ* 889 898-899. The wording of the Laboria Minute is to be found as Annexure II in the ILO Commission's Report (as below), Governing Body, International Labour Organization [ILO Director-General] *Prelude to Change: Industrial Relations Reform in South Africa – Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa (Report of the Director-General – First Supplementary Report)* (1992) 168-170.

[3757] Wood & Coetzee *Cornerstone* 31 – in terms of s 1 of the 1988 Act, which substituted subs 1(1) of the 1956 Act, with the new unfair labour practice definition.

[3758] Wood & Coetzee at 30-31 states:

> "Presumably, [the addition of the Labour Appeal Court] was intended to serve as a counter-balance to the Industrial Court which … had made a series of basically pro-union decisions. Indeed, it was argued that the amendments diluted the right to strike, with disputes over dismissals being branded an 'ULP' [unfair labour practice]" [footnotes omitted].

[3759] 32. The section in question, subs 79(2) [introduced into the 1956 Act by s 26 of the 1988 Amendment Act] stated:

> "Subject to the indemnity in subsection [s 79] (1) any member, office-bearer or official of a trade

onerous provision.[3760] It was therefore not surprising that the general dislike of the 1988 Amendment Act sparked a 3-day, well-supported "stay-away" campaign, organised by COSATU.[3761] Eventually, continued lobbying and industrial action by businesses and labour[3762] resulted in a labour relations system that was not to survive for long into the 1990s.

It was not long after these events that South Africa transitioned to a system of political democracy, a transition marked by the adoption of a supreme constitution and a re-evaluation of the institutional basis of South African society. The South African labour relations system was one of the areas that enjoyed attention in light of these new and true democratic values. Not surprisingly, it resulted in a complete overhaul of labour relations legislation with the adoption of the LRA. This Act (as amended) continues to regulate labour relations in general, and trade unions and their accountability in particular in South Africa. As such, this piece of legislation not only

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union, employers' organization or federation who interferes with the contractual relationship between an employer and an employee resulting in the breach of such a contract, shall be liable in delict and, *until proven otherwise*, be deemed to have been acting with due authority on behalf of the trade union, employers' organization or federation concerned" [my emphasis].

The subs 79(1) referred to above, confirmed that no "civil legal proceedings shall be brought in any court of law against any employee, employer, registered trade union … or against any member, office-bearer or official of any such union … in respect of breach of contract, breach of statutory duty or delict (other than defamation) committed by that employee, employer, union… member, office-bearer or official … in furtherance of a strike or lock-out: Provided that this indemnity shall not apply to any act committed in furtherance of any strike or lock-out in which … any employee, employer or other person is by section 65 forbidden to take part, or to any act the commission of which is a criminal offence". Section 65 of the 1956 Act in turn, was also amended by the 1988 Amendment Act, specifically in terms of s 24 [further minor amendments were introduced by both the Industrial Conciliation Further Amendment Act 61 of 1966, and the Labour Relations Amendment Act 57 of 1981] – and proscribed strikes or lock-outs where an agreement or notice in terms of the Act regulating working conditions and the like was already in place [subs 65(1)(a)-(b)], where employees or employer fell within essential services [subs 65(1)(c)], or where an industrial council or arbitration/conciliation board held jurisdiction over that industry field [subs 65(1)(d)(i)-(ii)].

[3760] The provision that defined, *inter alia*, union officials as the authorised agents of the union, was in no manner unique to South Africa – with similar clauses/judicial interpretations evidenced in the UK and USA. However, at risk of stating the obvious – the reverse-onus aspect of the South African version, placed it in a league all of its own.

[3761] O'Regan (1997) *ILJ* 898. The 1988 Act also gave rise to COSATU's complaint to the ILO in that year, which is discussed in greater detail at § 12 2 and § 12 3 below. For a succinct summary of the background to the 1988 Act, and the subsequent reaction thereto (including the effects of applying the Act in the various Court systems), see C Thompson "The Politics of the Judiciary" (1993) 14 *ILJ* 315, where is said [at 317] "The 1988 Amendment Act was, by any informed account, a retrogressive piece of legislation and the creature of a discredited and moribund state administration".

[3762] Wood & Coetzee *Cornerstone* 32; Finnemore *Introduction* 40-41.

signifies a final adjustment to trade unions and their accountability in light of fundamental democratic values but also constitutes the current approach to the regulation of trade unions and their accountability. This legislation is considered in detail in chapter 12.

11 4 The common law position in respect of unions in South Africa

11 4 1 Initial concepts

As will be recalled from the historical analysis in chapter 10 above,[3763] it was the Industrial Conciliation Act 11 of 1924, which served as the first uniform labour relations statute applicable to the entire (Union of) South Africa. In terms of the wording of subsection 15(1), registered trade unions were afforded corporate status within the law,[3764] while subsection 14(2) – read with subsection 14(5)[3765] – sought to bring about registration of all unions in South Africa.[3766] This approach (subject to expected revisions in wording and the like) has found its way through all subsequent legislative enactments, up to and including the current LRA – in section 97(1).[3767] In South Africa, given the development of its labour relations system and the role of organised labour, registered trade unions today are primarily regulated by the LRA. Even so, the common law's influence on trade union regulation remains important for at least two reasons: Firstly, it contributes to an improved understanding of the perspective from which trade unions are regulated in South Africa and, as such, serves as a building

[3763] See § 10 3 1 above.

[3764] Subsection 15(1) read as follows:

> "Every trade union… registered under this Act shall be a body corporate and shall be capable of suing and of being sued and, subject to the provisions of any other law prohibiting or restricting the acquisition or holding of land, of purchasing or otherwise acquiring, holding and alienating property, movable or immovable."

Furthermore, in terms of subs 15(2), the Act made further provision for the non-application of specific laws to any trade unions (thereby granting primacy to the Industrial Conciliation Act in regulating unions) – with specific reference being made to legislation which govern "the formation, registration and management of friendly or provident societies" [subs 15(2)(c)].

[3765] And furthermore, subject to the definition of the term "employee".

[3766] Subsection 14(2) reads:

> "Every trade union… existing at the commencement of this Act, and whether registered under any other law or not, shall within three months thereafter, and every trade union … coming into existence after such commencement, shall within three months of the date of its formation apply to the registrar for registration".

[3767] Subsection 97(1) states: "A certificate of registration is sufficient proof that a registered trade union … is a body corporate" – read further with the remainder of s 97, and s 96 of the LRA.

block for the further consideration of the current legislative regulation of unions (discussed in chapter 12). Secondly, legislation does not regulate *all* aspects of trade union functioning and procedures.[3768]

The point of departure of South African common law is that *all* trade unions originate from the "genus" of "voluntary associations". In similar fashion to other types of voluntary clubs or bodies, the underlying motive for the formation of trade unions is seen to be voluntary.[3769] Piron and Le Roux state (albeit writing in the context of the *previous* LRA) that "[c]ommon law principles regarding voluntary associations will regulate the relationship between a union … and its members".[3770] To this Landman adds (albeit again in the context of the previous LRA):

> "Although most of the law relating to trade union democracy is statutory in origin it would not do to overlook the role of the common law. The common law, of course, applies to registered and unregistered unions alike. *Our common law, unlike the law of many other countries including Great Britain and the United States of America, has been favourably disposed towards trade unions.* Our common law has not viewed unions as unlawful conspiracies or as unlawful or unreasonable restraints on trade. It has recognised their existence as voluntary associations conferring upon them legal personality".[3771]

[3768] Section 210 of the LRA, entitled "[a]pplication of [the] Act when in conflict with other laws" states the following:

> "If any conflict, relating to the matters dealt with in this Act, arises between this Act and the provisions of any other law save the Constitution or any act expressly amending this Act, the provisions of this Act will prevail".

The key phrase in the aforementioned section is "relating to matters dealt with in this Act", which serves to clarify the primacy of the LRA. As such, the common law holds sway in the areas that are then "not dealt with" in the LRA (or other Acts), and accordingly, can still be of importance – albeit only to the extent that an area of trade union regulation is *not* managed by statute. In this regard, and in the words of Collins et al *Labour Law* 525 as discussed at § 5 3 4 2 above, "the common law will supply the omission of the [union constitution/] rule-book". Nonetheless, a further point to be made is that the common law continues to play a role within the broader application of South Africa's labour relations system. See for instance Conradie (2016) *Fundamina* 196-198, for a discussion surrounding the common law in regards to the contract of employment, and how it serves as "one of the most important sources for the legal basis of the employment relationship".

[3769] See GJ Pienaar "Associations*"* in JA Faris (ed) *LAWSA* 3 ed (2014) para 616 para 619 where the following is stated:

> "An association is founded on a basis of mutual agreement. This entails that it will come into being if the individuals who propose forming it have the serious intention to associate and are in agreement on the essential characteristics and objectives of the universitas or unincorporated association. The latter aspect is usually manifested by the approval and adoption of a constitution".

[3770] J Piron & PAK Le Roux "South Africa*"* in R Blanpain (ed) *International Encyclopedia for Labour Law and Industrial Relations* (1993) 1 46.

[3771] Landman (1987) *MBL* 92 100, [my emphasis].

However, while this study focuses on *registered* trade unions, the dual-nature of our labour relations system in the past meant that courts were often faced with determining the consequences of union conduct (in light of the common law) where the association in question was *not* registered. Furthermore, depending on when a matter came before the courts, legislation at the time might not have provided clarity, or indeed sought to regulate, the particular dispute before the court.[3772]

11 4 2 The voluntary association

Bamford[3773] defines a voluntary association as "a legal relationship which arises from an agreement among three or more persons to achieve a common object, primarily other than the making or division of profits".[3774] Voluntary associations can be divided into three general categories:[3775] Firstly, those registered as companies in

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[3772] A case in point would be that of the *Garment Workers' Union v Smith* 1936 CPD 249 decision, as cited by Landman (1987) *MBL* 100 n134 – along with the *Gründling* decision. The former matter, heard on 10 and 24 December 1935, but on appeal from a single bench judgment in the Cape Provincial Division, required the consideration of ICA 1924 (as per *GWU v Smith* 254), as amended – inasmuch as it regulated the union's joining of an industrial council. However, a further area of contention was the interpretation of the union's constitution/rules, an aspect that saw very little regulation (content-wise) in the 1924 Act. Similarly, whilst the *Gründling* matter, decided in terms of the ICA 1956 (as it was then), *did* see certain provisions within the Act that dealt with what needed to be regulated within a trade unions' constitution – this too was a case of *what* must be regulated, and not *how* these must be regulated. Thus, the court found a distinction between a union's "powers" (measured against its constitution), and "its internal management" (measured against, *inter alia*, broader principles of natural justice) – as per Trollip J in *Gründling* 139H – and it was in examining the impact hereof, that guidance was predominantly sought in the common law (as opposed to only relying on the applicable statute).

[3773] B Bamford *Bamford on the Law of Partnership and Voluntary Association in South Africa* 3 ed (1982) 117-226, seeing the contents of its Part 2 entitled "Voluntary Associations", remains one of the most comprehensive sources on the intersection between the South African common law and unions as associations. Whilst no longer in print, there remains very little in the form of a comprehensive study on the common law nature of associations in South Africa – and as such, Bamford is drawn from almost exclusively during this section. Regarding examples of the South African courts having cited Bamford, see for instance *Bantu Callies Football Club* (also known as *Pretoria Callies Football Club*) *v Motlhamme* 1978 4 SA 486 (T) 489 [albeit the second edition]; *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 855 (C) 861; *African National Congress v Lombo* 1997 3 SA 187 (A) 188; *McCarthy v Constantia Property Owners' Association* 1999 4 SA 847 (C) 858; *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 6 SA 66 (T) 74 and *Ex-TRTC United Workers Front v Premier, Eastern Cape Province* 2010 2 SA 114 (E) 130.

[3774] Bamford *Voluntary Association* 117. See further Pienaar "Associations" in *LAWSA* para 618.

[3775] Pienaar "Associations" in *LAWSA* para 616.

terms of relevant legislation;[3776] secondly, those "which are corporate bodies under the common law, known as *universitates*";[3777] and, lastly, "those which remain unincorporated at common law … termed non-corporate associations".[3778] Regarding the distinction between the last two categories and the implications of being classified as a *universitas*, Bamford[3779] quotes from *Webb & Co Ltd v Northern Rifles*,[3780] where the following was stated:

> "An *universitas personarum* in Roman-Dutch law is a legal fiction, an aggregation of individuals forming a persona or entity, having the capacity of acquiring rights and incurring obligations to a great extent as a human being. An universitas is distinguished from a mere association of individuals by the fact that it is an entity distinct from the individuals forming it, that its capacity to acquire rights or incur obligations is distinct from that of its members, which are acquired or incurred for the body as a whole, and not for the individual members."[3781]

In discussing the impact of the above on the relationship between the association and its members, Bamford states:[3782] "[I]n many respects the relationship of [a *universitas*] to its members resembles that of principal and agent though in other respects it is a contractual relationship which … [arises from] a contract *sui generis*."[3783] Therefore, in South Africa an association does not require the "special sanction of the State" in order to become an *universitas* – this will depend primarily on the rules developed in terms of the common law.[3784] The concept of *universitas* is of crucial importance in understanding the nature of trade unions at common law.

[3776] Described by Pienaar "Associations" in *LAWSA* para 616 as being "statutory associations (normally legal persons)". Pienaar "Associations" in *LAWSA* para 616 n1 lists examples of the latter, as including *inter alia* banks, building societies and certain professional societies. As indicated above, in terms of subs 97(1), a trade union's status is impacted upon by virtue of registering, and thereby being deemed a "body corporate", as a distinct legal subject with legal personality – in effect therefore, a type of statutory association.

[3777] Traditionally, this is the category under which registered trade unions in South Africa are grouped, despite their incorporation into the mainstream labour relations system by means of statute.

[3778] Bamford *Voluntary Association* 126.

[3779] 126.

[3780] *Webb & Co Ltd v Northern Rifles* 1908 TS 462.

[3781] *Northern Rifles* 464, [their emphasis]. See further Pienaar "Associations" in *LAWSA* para 616 for a discussion of the peculiar direction that South Africa's case law has taken the *universitas* concept, as one being based on contract, and in apparent contradiction to the original Roman-Dutch law principles.

[3782] Bamford *Voluntary Association* 126, [their emphasis].

[3783] *Lewis & Co (Pty) Ltd v Pietersburg Ko-Operatieve Boere Vereeniging* 1936 AD 344 353.

[3784] Bamford *Voluntary Association* 127.

11 4 3 The universitas personarum

In the initial stages of their development, trade unions were seen as *un*incorporated associations – or rather, that was the default position – and judicial development was required to move past this point. It was only as their functions expanded and they became influential in the realm of labour relations that their status had to be reassessed. As a result, legal systems in countries such as Britain were eventually required – due in no small part to the myriad of external pressures discussed above – to grant a quasi-legal status upon labour associations.[3785] In South Africa, however, with its Roman-Dutch origins, classification as a *universitas personarum* was vital for trade unions to benefit from corporate status. It was the concept of *universitas personarum* that was to become the vehicle through which unregistered trade unions could obtain rights and benefits on account of their increased legal status.[3786] Of particular significance is that a "universitas must sue and be sued in its own name".[3787]

In *African National Congress v Lombo*,[3788] Corbett CJ defined the concept of *universitas personarum* as "an artificial or juristic person constituting a legal entity apart from the natural persons (members) composing it, having the capacity to acquire

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[3785] As per chapter 4 – in particular the historical development of unions, and § 5 3 2 above. In this regard, Bamford *Voluntary Association* 127-128 explains that given that English law lacks the mechanism for judicial recognition of voluntary associations, it "devised a typical compromise" namely that the property "which is to be employed for the association's purposes is vested in trustees for the benefit of the members". The result is a "quasi-incorporation", "on the same basis in effect, as the South African doctrine of judicial recognition, with its tests of perpetual succession and separate holding, which are characteristics of the trust". Bamford *Voluntary Association* 128 n14 therefore reasons that this "is an interesting example of how two different systems of law produce a similar result under the same pressure".

[3786] Bamford *Voluntary Association* 129 states [their emphasis]: "In accordance with the above … the following have been held, or stated *obiter*, to have been *universitates*: …a trade union…". Bamford cites *Amalgamated Engineering Union of SA v Minister of Labour* 1965 4 SA 94 (W) [at 96] as authority for this point, before quoting from Eloff J in *P E Bosman Transport Works Committee v Piet Bosman Transport (Pty) Ltd* 1980 4 SA 801 (T) [at 803D], where is said: "[A]n unregistered trade union 'is in reality an ordinary voluntary association'…" [Bamford *Voluntary Association* 129 n39]. Bamford *Voluntary Association* 129 n39 further cites *Heaton's Transport* 1233, in confirmation of the voluntary association status. In addition, see SR Van Jaarsveld et al "Labour Law*"* in JA Faris (ed) *LAWSA* 2 ed (2014) para 1 para 340, where is stated under the heading "Legal position of unregistered trade unions", that "an unregistered trade union may at common law obtain legal personality as a voluntary organisation."

[3787] Bamford *Voluntary Association* 126.

[3788] *African National Congress v Lombo* 1997 3 SA 187 (A).

rights and incur obligations and to own property apart from its members and to sue and be sued, and having perpetual succession".[3789] As can be expected, with the role and influence of these various bodies becoming more pronounced within the broader South African society, the courts have been tasked with determining their legal status in order to clarify the actions that they can perform and the consequences thereof.

In this regard, the *Muslim Judicial Council*[3790] case illustrates the judiciary's use of an entity's constitution as a means of determining whether or not that association complies with the common law requirements of a *universitas*.[3791] The South African courts have found that "[i]t is quite clear that in order to determine whether an

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[3789] 195J-196A. Regarding the right to sue and be sued, in *Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk* 1997 4 SA 635 (O), Gihwala AJ states the following:

> "Volgens die gemenereg, moet 'n oningelyfde assosiasie, 'n universitas wees voordat dit regspersoonlikheid kan bekom wat dit toelaat om of te dagvaar of gedagvaar te word in naam van daardie assosiasie. Om 'n universitas te wees, moet die assosiasie ewigdurende opvolging hê en ook die nodige hoedanigheid besit om regte apart van sy lede te bekom" [643D-E].

The court referred [at 643F] to *Morrison Appellant v Standard Building Society Respondent* 1932 AD 229 238, where it was ruled that the right to sue and be sued in the unincorporated body's own name is dependent upon the purpose and nature of the body, its constitution and whether it can sufficiently prove that the body holds similar characteristics to that of a legal person, or *universitas*. See further the reasoning of Kruger AJ in *Highveldridge* 72B-D, where the court considers the constitutional provisions of the applicant in light of the common law requirements, before measuring same against s 38 of the Constitution [at 75I-77J]. See further Pienaar "Associations" in *LAWSA* para 653, where it is stated:

> "Since an universitas is recognised as a legal entity apart from its members, there has never been any doubt that it could sue and be sued in its own name".

[3790] *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 855 (C) 861C-G.

[3791] Compare this reasoning with Bamford *Voluntary Association* 128 who in citing from two cases respectively, states:

> "While an expression of intention in the constitution that an association shall be an corporate body having a separate legal persona with perpetual succession is important, [*Committee of the Johannesburg Library v Spence* (1898) 5 OR 84 87] it is not decisive; it must in addition be clear that no member has any rights by reason of his membership to the property of the association" [Neser J in *Klerksdorp & District Muslim Merchants Association v Mahomed* 1948 4 SA 731 (T) 738 – see Bamford *Voluntary Association* 128 n19-20].

Regarding the requirement of "perpetual succession", Van Zyl J in *United Workers Front* 128C-F, in considering the question of whether the Plaintiff had *locus standi* to proceed with its action, states the following:

> "Whether the first plaintiff is a *universitas* must consequently be decided by having regard to its nature, object and activities … The conclusion is inescapable that the first plaintiff was formed for a very limited purpose and that, once that purpose was achieved, there would be no further need for it and it would cease to exist. The very object of the association negates an intention that it would have perpetual succession and hold property separate from its members. It is clearly not necessary for the achievement of its purpose to possess these characteristics. The first plaintiff consequently lacks the requisites for a *universitas*" [their emphasis].

association possesses the characteristics of a *universitas* the Court has to consider the nature and objects of the association as well as the constitution",[3792] of which "[t]he constitution is clearly the most important".[3793] Furthermore, both the *Highveldridge*[3794] and *Muslim Judicial Council*[3795] decisions cite the *Callies Football Club* case,[3796] in which King AJ states:

> "The rights and powers of a voluntary association are limited by the terms of its charter or constitution. The constitution defines whether an association is or is not a *universitas* and confines its activities to what is expressly or impliedly contained therein."[3797]

It is submitted that this echoes the approach followed by the US Supreme Court in the *White* decision[3798] – where the factors deemed important in determining a union's "separate" existence from that of its members included, *inter alia*, perpetual succession independent from that of the members and its operation in terms of "its own constitution".[3799] This brings the discussion neatly to the examination of the constitutions of voluntary association and the important role they fulfil.

11 4 4 The imperative of the associations' constitution

Like all associations or clubs in society,[3800] be it golf clubs, charity or skills-

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[3792] *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 6 SA 66 (T) 74H.

[3793] 74H, citing in turn the *Muslim Judicial Council* 861C-G decision. Kruger AJ continues at 74H-I to cite extensively from the *Muslim Judicial Council* case [861C-D], where the following passage of Bamford *The Law of Partnership and Voluntary Associations in South Africa* 2 ed (1971) 173] is quoted in full:

> "Most legal proceedings involving associations will be brought not by or against the association as such, but by or against particular members or office bearers. This follows from the rules as to the incidence of liability. Moreover, regard must always be had to the constitution of an association insofar as it expressly or impliedly deals with the institution or defence of legal proceedings" [Bamford *Voluntary Association* 207, footnotes omitted].

[3794] *Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council* 2002 6 SA 66 (T) 75A-B

[3795] *Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) v Muslim Judicial Council (Cape)* 1983 4 SA 855 (C) 861F.

[3796] *Bantu Callies Football Club* (also known as *Pretoria Callies Football Club) v Motlhamme* 1978 4 SA 486 (T).

[3797] 489B-C, [their emphasis].

[3798] *United States v White* 322 US 694 (1944) – see § 8 5 2 above.

[3799] *White* 701.

[3800] Bamford *Voluntary Association* 130 states: "A club, a typical and 'the most usual form of voluntary

improvement associations, or local sporting bodies (who control, for instance, a clubhouse and sporting grounds), a constitution becomes necessary to organise and regulate the association in order to prevent both misuse and abuse.[3801] Given the purposes, size and potential impact of the associations that were to become trade unions, it was not long before members realised that their "worker's-clubs" had to be formally controlled in some manner, with an agreement in the shape of a constitution being the obvious solution.[3802] A voluntary association's constitution thus became the key document with which to control the functioning of that body and to facilitate the resolution of disputes, given that all prospective members are bound to the procedures contained therein.[3803] In this regard, and in consideration of the role of the constitution in regulating the internal functioning of the union, Leon J held in *National Union of Textile Workers v Ndlovu*[3804] that the constitution "is the crucial feature in the existence

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association', is [in terms of the decision in *Cape Indian Congress v Transvaal Indian Congress* 1948 2 SA 595 (A) 597 – Bamford *Voluntary Association* 130 n47] [a body] of persons associated together for a social intercourse for the promotion of politics, sport, art, science or literature, or for any purpose except the acquisition of gain".

[3801] Bamford *Voluntary Association* 132, states: "All questions involving a voluntary association turn ultimately and essentially on the terms of its constitution". And further, that "[a] constitution is subject to the ordinary rules of construction of contracts" [Bamford *Voluntary Association* 132.

[3802] Bamford *Voluntary Association* 117 quotes the English Court of Session case of *In re: Caledonian Employees' Benefit Society* 1928 SLT 412 865, where Clyde LP states:

> "[T]he fundamental and essential characteristic of… associations… is that they are bodies constituted by some species of the contract of 'society' and founded on the contractual obligations thus undertaken by the members… *inter se*…" [their emphasis].

[3803] Pienaar "Associations" in *LAWSA* para 629 states:

> "When a person becomes a member of an association he or she subjects him or herself to the terms of the constitution and rules".

See further Bamford *Voluntary Association* 132, in quoting respectively from *Kahn v Louw NO* 1951 2 SA 194 (C) 211 and *Rowles v Jockey Club of SA* 1954 1 SA 363 (A) 364, where is stated of a union/club's constitution: "'[[F]or this is] the charter of the organization, expressing and regulating the rights and obligations of each member thereof'; [and] 'The Club's Rules are the domestic statutes of a voluntary association'." In this regard, the use of the phrase "domestic statutes" in the *Rowles* decision elicits noticeable similarities to the reasoning espoused by Denning LJ in the *Cheall v APEX* ("bylaws of the union", at 555-556) and *Breen v AEU* ("legislative code", at 190) – as per the discussion at § 5 3 3 3 above. Furthermore, recall the discussion thereafter in chapter 5, as reasoned by Grunfeld, of the "quasi-legislative code" that sees the union-member contract more closely resemble a "contract of adherence". Finally, equally apparent is the similarities to the position in the US, where Murphy J in the *White* decision, states of a union: "It normally operates under its own constitution, rules and by-laws which, in controversies between member and union, are often enforced by the courts" [*White* 701]. See further WW Osborne et al (eds) *Labor Union Law and Regulation* (2003) 5, where is stated of the position in America: "[L]abor unions adopt rules of internal governance in the form of a constitution and bylaws".

[3804] *National Union of Textile Workers v Ndlovu* 1987 3 SA 149 (D).

of an association for it not only determines the nature and scope of the association's existence and activities, but also, where necessary to do so, prescribes and demarcates the powers of, *inter alia*, the executive committee, the secretary and general meeting, and it also expresses and regulates the rights of members and provides for procedural matters".[3805]

The constitution thus is important for the purposes of internal organisation and regulation and in determining the status of labour associations and concomitant rights and obligations.[3806] Focusing on the effect of the constitution on the relationship between member and club or association,[3807] a key decision remains that of *Gründling*.[3808] The court held that the relationship a trade union's constitution creates "is legally binding on the Union and its members in their capacity as such".[3809] The court continued by stating that "[i]t is unnecessary to determine whether such legal relationship is contractual or statutory or both, but it is clear that if the union acts or proposes to act contrary to its constitution, the law affords the member as such certain limited remedies".[3810] The constitution is therefore key to clarifying the nature of the relationship between union and members, particularly as it determines the actual

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[3805] 153D-F, [their emphasis].

[3806] Pienaar "Associations" in *LAWSA* para 620 states:

> "The constitution of an association together with all rules or regulations collectively constitute the agreement which is entered into by its members. This agreement is the crucial factor in the existence of an association. It not only determines the nature and scope of the association's existence and activities but also, where necessary, prescribes and demarcates the powers of, *inter alia*, the executive committee, secretary and general meeting, expresses and regulates the rights of members and provides for certain procedural aspects" [their emphasis].

[3807] See in this regard the discussion by SB Gericke "Revisiting the Liability of Trade Unions and/or Their Members During Strikes: Lessons to be Learnt from Case Law" (2012) 75 *THRHR* 566 580-581, where is stated (albeit by means of additional reference to the LRA):

> "As a voluntary association not for gain, and independent trade union's relationship with its members is governed by its constitution, to which each member voluntarily submits when taking up membership" [footnotes omitted].

[3808] *Gründling v Beyers* 1967 2 SA 131 (W). The *Gründling* decision is still cited with authority in the contemporary South African labour relations' context – see *ABSA Bank Ltd v South African Commercial Catering & Allied Workers Union National Provident Fund (Under Curatorship)* 2012 3 SA 585 (SCA) 598H-J, with the majority applying *Gründling* 139H-140B.

[3809] 139D.

[3810] 139D. Trollip J states [139E-G] that the reason the remedies are limited, is by virtue of the fact that the "wellknown rule" espoused in the leading English decision of *Foss v Harbottle* "is as applicable to incorporated trade unions as it is to companies". See the discussion at § 5 3 3 3 above regarding this significant judgment, along with the further discussion of its place in South African law at § 11 4 5 4 1 below.

content of the membership contract. In expanding on this point, the court distinguished between the powers of a trade union and its internal management:

> "Now, the constitution does specify certain acts which the Union is required or permitted to do; it often specifies too the manner in which those acts are to be done. The former are the Union's powers, the latter, its internal management … If it exceeds the former powers, that is, does an act that the constitution does not require or permit it to do, that act is *ultra vires*, and null and void. Such an act cannot be validated by ratification or estoppel, and the Union, any outsider affected by it, or a member may, if necessary, have it set aside or declared null and void. On the other hand, if the act is within its powers, but the manner of doing it deviates from or is contrary to the constitution, it is not null and void; at most, it is voidable, but it can be validated by ratification or estoppel."[3811]

In a more recent (unreported) decision involving a prominent dispute between, *inter alia*, NUMSA and COSATU (and the latter's former General Secretary), the court stated:

> "The basic foundation of a trade union or indeed a federation of trade unions, like the first respondent, is the mutual agreement among its members and between the members and itself … The contract among its members and between the members and the trade union is embodied in the constitution together with whatever rules, regulations or policy documents that might govern the relationship *inter se* … The constitution manifests the members' agreement to the essential characteristics, objects and purpose of the union, and it constitutes a contract concluded by way of offer and acceptance, expressing, *inter alia*, the intention of the members to associate with one another … The constitution determines the nature and scope of the union's existence and activities, while also prescribing and demarcating the powers of its various functionaries … Accordingly, as a matter of basic principle, the normal rules of contract, and the construction of contracts, apply to the constitution of a trade union and of a federation of trade unions".[3812]

An important aspect of a trade union's constitution – *vis-à-vis* the membership – is the common law presumption relating to awareness of its content. As explained by Bamford, "[a] member is presumed to be acquainted with the constitution [of the association], at least if it is contained in an accessible document".[3813] It would appear

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[3811] *Gründling* 139H-140A, [their emphasis; references omitted].
[3812] *National Union of Metal Workers of South Africa v Congress of South African Trade Unions* 2014 JOL 31585 (GJ) paras 34-38; 2014 JDR 0766 (GSJ).
[3813] Bamford *Voluntary Association* 141.

that this presumption is not unwarranted.[3814] Firstly, section 110 of the LRA[3815] requires copies of a registered union's constitution (which is required to be submitted to the Registrar) to be made available by the Registrar to "any person" subject to the appropriate procedures. In addition, there is an increasing tendency for unions to have copies of their constitutions available digitally through a union's website.[3816]

With regard to the interpretation of constitutions, the court in *Textile Workers*[3817] quotes the former Appellate Division ruling in *Cape United Sick Fund*[3818] (which, in turn, confirmed an earlier Appellate Division decision),[3819] that in addressing a legal question involving a voluntary association, a court need only "to solve the question submitted to [it] by ascertaining the meaning of a written document [namely the constitution] according to the well-established rules of construction".[3820] As such, Leon J concludes that "[w]here a contract or constitution is clear and unambiguous [then] considerations of equity cannot affect the interpretation to be placed upon it".[3821] Bamford states that "a constitution is subject to the ordinary rules of construction of contracts",[3822] before reasoning that "[a] constitution will, however, normally be

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[3814] Nevertheless, procedures and custom would obviously vary between unions – as would a union's membership. Regarding the latter, can it be assumed that in South Africa's diverse society, all union members would be equally able and comfortable with accessing their union's documentation online? Would it for instance be fair to presume that all new members to a union are provided with a physical copy of that union's constitution, as part of the process of joining? And what of *un*registered unions? In the absence of a requirement to lodge any documentation with the Registrar, or a visible digital presence, could it be presumed that these members are also "acquainted" with their constitution? It is therefore submitted that the requirement of the constitution being available in an "accessible document", should at best be treated as an *ad hoc* provision that would need to be considered by the relevant tribunal (as the case may be) in order to assess whether or not the membership could be deemed as having been aware of the contents of their union constitutions, should the question be central to the dispute.

[3815] Specifically subs 110(1)-(2) of the LRA.

[3816] See for instance the AMCU constitution, available at <http://amcu.co.za/amcu-constitution/> (accessed 05-08-2019).

[3817] *National Union of Textile Workers v Ndlovu* 1987 3 SA 149 (D) 153F-G.

[3818] *Cape United Sick Fund Society v Forrest* 1956 4 SA 519 (A) 527H-528A.

[3819] Stratford JA's concurring ruling in *Wilken Appellant v Brebner* 1935 AD 175 187.

[3820] *National Union of Textile Workers v Ndlovu* 1987 3 SA 149 (D) 153G, citing Centlivres CJ (in the *Cape United Sick Fund* case), citing Stratford JA in *Wilken v Brebner*.

[3821] *National Union of Textile Workers v Ndlovu* 1987 3 SA 149 (D) 153H. For a useful example of how a court needs to measure the actual wording of the constitution, against that which a union might wish were imputed therein, see the reasoning of Millin J in *Fouche v Building Workers Industrial Union of SA* 1947 1 SA 266 (T) 271.

[3822] Bamford *Voluntary Association* 132. Bamford [at 132] quotes as follows from the *Constantinides v Jockey Club of South Africa* 1954 3 SA 35 (C) decision:

construed benevolently".[3823] At the same time, "[w]hile a constitution must be benevolently construed, a power may not be exercised – for example by a committee – which has not expressly or impliedly been granted by the constitution."[3824]

A further important qualifier is added with regard to the impact of an associations' rules and procedures – inasmuch as their effect might operate beyond the immediate confines of the association-member relationship: "A constitution will be restrictively construed where the exercise of a disputed power would prevent or curtail the earning of a livelihood or where a member's right of resort to the courts would be barred or limited".[3825] With regard to possible recourse to the courts, Bamford states that the "constitution cannot exclude courts of law from examining and interpreting its provisions",[3826] before quoting from the *Lee v Showmen's Guild* decision: "If parties should seek, by agreement, to take the law out of the hands of the courts and into the hands of a private tribunal, without any recourse at all to the courts in case of error of law, then the agreement is to that extent contrary to public policy and void".[3827]

With the basic concepts surrounding the common law regulation of associations

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"[T]he relationship between the parties is contractual … This contract falls to be construed by the court according to the ordinary rules of construction; the court cannot, because it considers the contract unreasonable from the point of view of one of the parties, depart from the language used and attempt to make it a reasonable one according to its standards. It cannot, because it might disapprove of some of its terms, disregard them or give them meaning other that arises from the ordinary and natural meaning of the language involved" [*Jockey Club* 44C-D].

[3823] Bamford *Voluntary Association* 133. See further *Garment Workers' Union v De Vries* 1949 1 SA 1110 (W) 1129, where Price J states:

"In considering questions concerning the administration of a lay society governed by rules, it seems to me that a Court must look at the matter broadly and benevolently and not in a carping, critical and narrow way."

[3824] Bamford *Voluntary Association* 133. In this regard, the *Jockey Club* decision (as cited by Bamford) saw Herbstein J state as follows regarding the extent to which the court was prepared to get involved in the internal disputes of an association:

"[T]his Court cannot and does not function as a Court of Appeal from the decisions of any of the bodies of Stewards [that is, club-officials] created by the Rules [of the club]. Its powers of interference are limited to two grounds, namely: (a) where there has been a failure to comply with the Rules, and (b) where there had been a violation of the principles of natural justice… In order to obtain an interdict, the applicant has to satisfy the Court at least, that in the action he contemplates bringing, the balance of probabilities is in favour of his succeeding on one or other of these grounds" [*Jockey Club* 44D-F, references omitted].

[3825] Bamford *Voluntary Association* 133, citing *Winter v Medical Council, Southern Rhodesia* 1949 1 SA 685 (SRS) 689-690 and *Lewis v Lyons* 1958 2 PH M19 61 (N) 63, respectively [Bamford *Voluntary Association* 133 n18-19].

[3826] Bamford *Voluntary Association* 138.

[3827] *Lee* 1175 – Bamford *Voluntary Association* 138 n52.

such as trade unions so outlined – along with the approach applicable to their constitutions – the attention now turns to a consideration of some of the specific common law issues relating to associations (and to the extent addressed, trade unions). Again, as was the case with the earlier discussion of the general common law approach, the work of Bamford is the primary guide in this regard.[3828]

11 4 5 Specific common law issues relating to associations

11 4 5 1 A duty of care between officials and unions?

In considering the functions of members holding office within voluntary associations and the broader question of whether or not a "duty of care" is owing to the association and the membership, Bamford states as follows:

> "There is no reason in principle why the duty applicable in partnership should not also apply to voluntary association. It has been held that persons who accept responsibility for the management of the affairs of an association are under a duty of care to the association and the other members, the existence of a duty of care in such circumstances being 'in accord with the fundamental principles of responsibility for negligence'. The nature, degree and extent of the duty will depend upon all the circumstances of the association; in particular, a committee will normally be 'entitled to place implicit trust in the honesty of the committee member appointed to act as honorary treasurer'."[3829]

It is submitted that in instances where office bearers and the like are providing a service to a trade union and its members – and in the absence of an ordinary employment relationship in place between the trade union and individual (as would be the case with full-time paid union officials) – then such a common law duty of care would need to be kept in consideration.

11 4 5 2 Disciplinary procedures and the common law

11 4 5 2 1 Grounds for review by the courts

Bamford explains that "[c]onstitutions usually empower a body to frame charges of alleged misconduct against members, to inquire into the charges, and to take disciplinary steps such as fines, suspension and expulsion", before stating that

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[3828] Bamford *Voluntary Association* 145-213.

[3829] 145, citing as authority the Rhodesian Appellate Division's ruling involving the Gleaneagles Golf Club, in *Mkhando v Mangwende NO* 1977 1 SA 851 (RAD), [footnotes omitted].

"[d]ifficult questions arise as to the relief to which an accused is entitled in a court of law".[3830] However, the point of departure remains that while a court "cannot enquire into the merits" of a decision taken by the internal tribunal of an association,[3831] with the "general rule" being that "an accused has no right of appeal from [such] a tribunal",[3832] the courts maintain "a power of review" over those decisions.[3833]

The extent to which this approach is still followed in the present-day labour relations' system by South African courts is discussed in more detail in the chapter to follow. Nonetheless, the individual review-grounds identified by Bamford, include, firstly, an "excess of power", that is, where an association's functionaries "exceeded its power or jurisdiction".[3834] Bamford states further that "[t]here is no inherent power in an association to hold proceedings and to punish a member" – "[a] disciplinary power must be stated expressly in the constitution or appear therefrom by necessary implication".[3835] In addition, such an expression of power "must also be clearly and

[3830] Bamford *Voluntary Association* 157.

[3831] 157.

[3832] 157.

[3833] 158. The author states further regarding the so-called "formal standard" that is to be applied:

> "[A] court of law should not, however, view the matter as if under a strong magnifying glass and should not carpingly ferret out and unduly enlarge every minor deviation from the strict letter of the [association's] constitutional provision being examined. Much rather it should adopt a practical, common-sense approach to the matter, constantly bearing in mind that the persons called upon to administer such a constitution are usually laymen in the ways of the law" [Bamford *Voluntary Association* 158 – citing from *Motaung v Mukubela NNO* 1975 1 SA 618 (O) 626H-627A, in a matter dealing with a dispute between members in regards the constitution of the Ethiopian Church of South Africa].

As such, the similarities in approach between the aforementioned, and the point of departure in Britain, is plain to see.

[3834] Bamford *Voluntary Association* 158.

[3835] 158.

unambiguously granted".[3836] The second ground for review is that of "*mala fides*".[3837] Where any actions taken by the associations functionaries were "instituted or conducted fraudulently or maliciously or [with] mala fide[s]",[3838] the courts would (understandably) exercise their right to interfere if petitioned by the affected party. The third ground is that of "gross unreasonableness".[3839] However, "[a] court will not interfere unless the unreasonableness is so gross that it can be said on a balance of probabilities that the tribunal acted *mala fide* or arbitrarily".[3840] Fourthly, a "constitutional irregularity" may also constitute a ground for review.[3841] This relates to instances where the association's functionaries did not comply with whatever constitutional procedures were expected of them in their interaction with the complainant/member(s). Bamford discusses a variety of examples from the case law that were considered as requirements, *inter alia*, that:

[3836] 158-159, citing, *inter alia*, *Fouche* 269 – where Millin J also states as follows:

> "I was asked, therefore, to allow words to be read into this clause … Well, it seems to me that that is not possible. I would simply be striking out the rule that exists and introducing a rule which is to be found in most constitutions. I would simply be legislating for this Union if I gave this clause that meaning. I do not think one is entitled to supply words not present by necessary implication. *One has to look for clear and unambiguous power to expel* for the kind of conduct of which the applicant has been found guilty and I can only say that I do not find it. He has not broken any rule of the constitution to which my attention has been directed, in fact it was admitted that no rule was broken by him" [*Fouche* 271, my emphasis].

Finally, in quoting from the 1940 decision of *Fisher v S.A. Bookmakers' Association* 1940 WLD 88 93, Bamford *Voluntary Association* 159 provides a succinct example of what the Court's expectation is in this regard, holding of the power of a functionary to "deal with a member 'as they deem fit'", to be void for vagueness and uncertainty:

> "I am not prepared to enforce a rule purporting to confer an unfettered discretion to inflict undefined and unlimited punishment upon members of an association. Such power should be contained in absolutely clear and unambiguous language".

A last point to make, is how the aforementioned echoes the position in the British law, as discussed at § 5 3 3 4 above – where Grunfeld is quoted as saying "[i]f there is no rule [in the union constitution], there is no power" [C Grunfeld "British Report" (1964) 18 *Rut L Rev* 343 357].

[3837] Bamford *Voluntary Association* 160, [my emphasis].

[3838] 160. See further Bamford *Voluntary Association* 160 n31 for several cases cited as authority in this regard, including, *inter alia*, *Du Plessis v Building Workers' Industrial Union* 1948 3 SA 1059 (W) 1062 – emphasising again that unions' have no inherent right to expel a member, but that such can "only arise out of the constitution" of the association.

[3839] Bamford *Voluntary Association* 161.

[3840] 161, [my emphasis]. Regarding the term "arbitrarily", echoes of the English approach as espoused by Denning LJ in the *Edwards v SOGAT* decision (see § 5 3 3 2 above) are again present:

> "The courts of this country will not allow so great a power to be exercised arbitrarily or capriciously or with unfair discrimination, neither in the making of rules, nor in the enforcement of them" [*Edwards v SOGAT* 376].

[3841] Bamford *Voluntary Association* 161.

(i) The relevant party made the initial complaint being acted upon;[3842]

(ii) The member was heard before a properly constituted committee;[3843]

(iii) That the applicable notice requirements for the disciplinary committee were complied with;[3844]

(iv) That any requirements pertaining to the form of the charge (such as it having to be in writing) were complied with;[3845]

(v) That if the representation of the member before the committee is permitted, that this was allowed;[3846] and finally,

(vi) That any timeframes between when the action complained of was committed, and the disciplinary procedures/hearing being implemented, are complied with.[3847]

The fifth and final ground for review is a "violation of the principles of natural justice".[3848] In quoting from the *Kimmelman* decision,[3849] Bamford describes natural justice as follows:

> "[It is] no more than the fundamental rules of fair play, which, according to the principles of the English law and the Roman-Dutch law, are the minimum required of all persons purporting to exercise judicial or quasi-judicial functions. It means no more than this, that a person whose rights are going to be dealt with by such a body is entitled to a fair and impartial consideration of his case … Further than that there are no rights except rights conferred specially by the rules of a society of this kind".[3850]

Further to this, Bamford states that the courts have crystallised "three principles" which must be observed by associations or their functionaries, namely that "proper

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[3842] 161-162.

[3843] 162.

[3844] 162.

[3845] 162.

[3846] 163.

[3847] 163.

[3848] 163. See in particular the discussion at § 5 3 3 2 above, surrounding the development of the "doctrine of natural justice" in the English law, initially through Denning LJ in the *Lee v Showmen's* case.

[3849] *Kimmelman v Amalgamated Society of Woodworkers of S.A.* 1941 WLD 212.

[3850] 219 – Bamford *Voluntary Association* 163. See further § 5 3 4 2 above, regarding Collins et al *Labour Law* 525 speaking to the "judicially recognised principles of fairness" – in their framing of the natural justice concept in British labour law.

notice of the charge" is provided,[3851] that the common law *audi alteram partem* rule is observed,[3852] and that there must be "an absence of bias" in whatever actions are taken by the functionaries.[3853]

11 4 5 2 2 Internal remedies and the exclusion of judicial interference

Two related aspects are deserving of brief mention under this heading. Firstly, similar to that raised before the British courts, there is the question of whether a member may approach the courts if there still are internal remedies (such as an internal appeal) available in terms of that union's internal procedures?

Bamford states that the point of departure in the South African common law is that the member is "in general obliged to prosecute that appeal before seeking relief in a court of law",[3854] primarily due to the internal union tribunal option usually being "cheaper and more expeditious than the remedies at law".[3855] Bamford makes specific reference to the British *White v Kuzych* decision,[3856] before concluding that "apart from the question of appeal to a domestic [union] appellate tribunal, the court has the power to intervene… in unterminated proceedings, but only where grave injustice might otherwise result, or where justice might not by other means be obtained".[3857] Thus,

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[3851] Bamford *Voluntary Association* 163. In regards to specific details surrounding this principle, Bamford explains that, *inter alia*, whilst the notice need not be in writing, it should set out the details of the complaint along with the specific date and location of the hearing "in such a manner as will leave the person charged under no misapprehension as to the specific act or conduct proposed to be investigated" [Bamford *Voluntary Association* 164 – citing from *S.A. Bookmakers* 91]. Furthermore, the accused should be provided enough time by the notice of the charge so as to allow an opportunity to refute any allegation(s), and "may not be convicted of an offence or serious than that with which he was charged" – Bamford *Voluntary Association* 164.

[3852] Bamford *Voluntary Association* 165. See further the *Radford v NATSOPA* decision, as above at § 5 3 4 3, and the similar approach being followed in Britain.

[3853] Bamford *Voluntary Association* 165. The "free from bias" principle is demonstrated in the British law by means of the *Roebuck* decision, as discussed at § 5 3 4 3 above.

[3854] Bamford *Voluntary Association* 173, citing as authority *Jockey Club of South Africa v Feldman Respondent* 1942 AD 340 362, as per the minority judgment of Centlivres JA.

[3855] Bamford *Voluntary Association* 173, citing as authority Smit J in *Strydom v Administrator of the Orange Free State* 1953 2 SA 133 (O) 140, which in turn sees that court cite *Jockey Club of South Africa v Feldman Respondent* 1942 AD 362.

[3856] As discussed at § 5 3 4 3 above.

[3857] Bamford *Voluntary Association* 173 n164, citing as authority Banks AJ in *Brock v SA Medical & Dental Council* 1961 1 SA 319 (C) 324B-D, where the aforesaid quote [at 324C], whilst pertaining to a criminal matter before a magistrate's court, was reasoned to be of equal application to that of "review proceedings of a body such as a disciplinary committee" [324D]. Bamford *Voluntary Association* 173 n164 also offers as a source to consider, *inter alia*, J Taitz "The Audi Alteram Partem Rule & the

exceptions do exist where internal remedies need not be exhausted – but only in those instances where "natural justice" is clearly at risk. Bamford gives the example where the initial tribunal reached a decision by exceeding its powers (which cannot be validated by the appeal tribunal), in which case the aggrieved member would have recourse to the courts prior to proceeding with the internal remedy.[3858] A further example is where "the machinery provided… for the decision of disputes has broken down and the only course open to the applicants is… to come to the courts of law".[3859]

The second question is whether the constitution can prevent the external intervention of the judiciary. In this regard, Bamford makes a clear distinction between the "principles of natural justice" and considerations of "public policy".[3860] The principles of natural justice are only to be implied in the association's constitution *in the absence* of anything contrary. Put differently, unless specifically imported into the association constitution/membership contract,[3861] the approach to be followed is that "the principles of natural justice shall apply [if it] is not the result of a conscious intention that they should apply but something which, by reason of the absence of the provisions excluding the principles of natural justice, is deemed to have been the intention of the parties".[3862]

As to the effect of "public policy", Bamford states as follows:

> "It has, however, been left open whether considerations of public policy would entitle a court to interfere where a constitution denies an inquiry or conflicts with natural justice. It is submitted that these considerations may well arise – for example, where a member with unequal bargaining power is compelled to join a powerful trade … association".[3863]

11 4 5 2 3 Disciplinary procedures and associated remedies

The final aspect of the common law's approach to the internal disciplinary

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Obligation to Exhaust Domestic Remedies" (1979) 96 *SALJ* 552 552-559, where a useful overview is provided of South African cases of the time that consider the question surrounding the exhaustion of internal remedies as requirement.

[3858] Bamford *Voluntary Association* 174.

[3859] 174, quoting from Milne J in *Jamile v African Congregational Church* 1971 3 SA 836 (D) 843H.

[3860] Bamford *Voluntary Association* 175-176.

[3861] Bamford *Voluntary Association* citing Broome JP in *Thandroyen v Sister Annuncia* 1959 4 SA 632 (N) 639H.

[3862] Bamford *Voluntary Association* 176, quoting from Milne JP in *African Congregational* 846F.

[3863] Bamford *Voluntary Association* 176-177 [footnotes omitted].

procedures of South Africa's trade unions relates to the remedies available to members who have successfully challenged the validity of their union's actions. On the assumption that the action taken has resulted in the member being expelled from the association, Bamford states that "the usual claim by an aggrieved member is an order declaring the domestic procedures null and void, and reinstating him as a member"[3864] – before offering a broad selection of scenarios between associations and their members.[3865]

For the first of these, Bamford provides examples of how a member can "obtain an interdict restraining a tribunal from proceeding with its inquiry until it has complied with the constitutional provisions or the principles of natural justice"[3866] or "from carrying out a decision already made".[3867]

Secondly, Bamford states that "[d]amages, which may be claimed in the alternative to reinstatement, may be recovered in delict from the members of the [association's] tribunal only if they acted mala fide".[3868] Closely related hereto, however, is the following point:

> "The question arises as to whether a member wrongfully expelled may recover damages from the association for breach of contract. This question may be vital, particularly where the member has been expelled from a trade or professional association and so barred from earning his livelihood. While there are great logical difficulties in allowing a contractual action, particularly in the case of an unincorporated association, cases of real hardship would occur if it were refused.[3869] Contractual damages have been disallowed in English law, but the decision proceeded narrowly on the terms of the particular contract of association. On the other hand, where contractual damages were awarded,

[3864] 177.

[3865] 177-179.

[3866] 177 citing as authority, *inter alia*, Dove Wilson JP in *Van Rooyen v Dutch Reformed Church, Utrecht* 1915 36 NPD 323 331.

[3867] Bamford *Voluntary Association* 177 citing as authority, *inter alia*, *Nakwanya v South African Bantu Football Association* 1972 4 SA 309 (D), and the decision made by Muller J in regards to the rule *nisi* following the decision to suspend the executive committee of the Natal Bantu Football Association. Bamford *Voluntary Association* 177 adds further that were an association not to comply with any of these, that such action would amount to contempt of court, and that "a court may grant an interdict against an association if there is a prospect that it will not obey the court order".

[3868] Bamford *Voluntary Association* 178 [footnotes omitted], but citing Duncan AJ in *Williams v De Wet* 1946 CPD 206 214, who states the following:

> "[I]n the absence of *mala fides* (and it was not suggested in the present case that the defendants had acted *mala fide*) no damages can be awarded against the members of a committee who, while purporting to act under the rules of a society wrongly expel a member of the society" [their emphasis].

[3869] Bamford *Voluntary Association* 178 n205 offers the *Bonsor* case as example, as discussed at § 5 2 2 above.

the association involved, although unincorporated, was treated as being a distinct legal entity.[3870] In South African law, the following has been said: 'As to damages according to English cases there seems to be a difference where there is property and where there is no property belonging to the lodge or club; but in either case there seems to be no reason on principle why wrongful expulsion should not give rise to a claim for damages'.[3871] It is submitted that no distinction should be made between *universitates* and non-corporate associations, and that in both cases, but dependent on the express and implied terms of the constitution and on the nature of that association,[3872] a claim for contractual damages will lie. There seems, in any event, no objection to a contractual claim against the members of the tribunal".[3873]

As such, the argument put forward above is that – in instances of wrongful expulsion – a member's claim can very well also lie against the trade union on the basis of breach of contract. Again, the extent to which these principles have been applied by the South African courts in more recent times is explored in greater detail below.

A final point made by Bamford is that, despite the usual approach of the association paying legal costs where it was unsuccessful in opposing the action, this changes where it is found that the members of that tribunal acted *mala fide*, unreasonably or negligently.[3874] In that case, "the members of the tribunal may be ordered to pay costs *de bonis propriis*".[3875]

11 4 5 3 Management of an association's affairs and the liability to members

Bamford makes the point, with regard to the internal management of associations, that "there is an implied power in the majority of members… to make administrative and executive decisions".[3876] As a result of this, "[t]he general rule is that a court will

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[3870] Bamford *Voluntary Association* 178 n207 again offers the *Bonsor* case, along with the English *Buckley* and *Edwards v SOGAT* decisions as authority for this view.

[3871] Bamford *Voluntary Association* 178 quoting from Buchanan J in *Solomon v The Alfred Lodge* 1917 CPD 177 180.

[3872] Says Bamford *Voluntary Association* 179 n209 here: "A recurrent consideration in *Bonsor v Musicians' Union*… was that the accused's right to work was involved."

[3873] Bamford *Voluntary Association* 178-179 [footnotes omitted, notwithstanding those included; their emphasis].

[3874] 179.

[3875] 179, citing as authority *Nugent v Morgan* 1932 CPD 181 184 and *Williams v De Wet* 215.

[3876] Bamford *Voluntary Association* 180. In furtherance hereof, Bamford quotes from Williamson J in *Ex Parte Gill* 1955 2 SA 418 (W) 424A-B, 424D-E, where is stated:

"In the absence of any special rule to the contrary, for instance in a constitution, it would seem that, today in any event, common sense would demand that where a number of people join together for some purpose and for the execution of such purpose decisions are from time to time necessary, the only way decisions can practically be made on any matter where there is a divergence of opinion is

not interfere with the internal management of an association".[3877] The constitution of the association – to which all members are bound – would in most instances in any event "provide for the validity or validation of an act or course so taken by the majority",[3878] albeit implemented through the functionaries of the union.

This notwithstanding, Bamford adds an important proviso to the above:

> "A court of law will, however, interfere if a member or a group of members acts fraudulently or oppressively or flouts the rules of the constitution, express or implied, if the non-compliance cannot be validated or prejudices an individual".[3879]

Echoing the approach of the British courts when deciding to what extent functionaries were in compliance with their constitution in administering the association, Bamford quotes as follows from *Garment Workers v De Vries*:[3880] "[O]ne should approach such inquiries as the present in a reasonable common-sense way, and not in the fault-finding spirit that would seek to exact the uttermost farthing of meticulous compliance with every trifling detail, however unimportant and unnecessary, of the constitution".[3881]

> by a majority vote … There may nevertheless be cases where from the very nature of the association, an implication arises that there is contractually between the members no power vested in a majority to bind a minority at all or on certain matters."

Bamford *Voluntary Association* 180 provides three immediate exceptions to this state of majority rule – given his earlier discussions (as above) – in regards to "amendment of the [association's] constitution, alienation of [association] property, and expulsion of members" [footnotes omitted].

[3877] Bamford *Voluntary Association* 181.

[3878] 181.

[3879] 181. As authority for the preceding statements, Bamford offers *Gründling* 153, and the decision by Watermeyer AJP in *GWU v Smith* 255. Furthermore, *Sorenson v Executive Committee, Tramway & Omnibus Workers Union (Cape)* 1974 2 SA 545 (C) is cited, given that it provides an example of how "the court interdicted the holding of irregular ballots", courtesy of Friedman AJ – along with *Maxwell v Amalgamated Bricklayers Union & Other* 1939 TPD 300, with Millin J dealing with the improper closing (and later, re-opening) of a local branch by the central executive committee in efforts to remove objectionable members of the local branch – see Bamford *Voluntary Association* 181 n9.

[3880] *Garment Workers' Union v De Vries* 1949 1 SA 1110 (W) 1129.

[3881] Bamford *Voluntary Association* 181. Price J continued by stating the following, quoted here given its relevance to the topic at hand:

> "If such a narrow and close attention to the rules of the constitution are demanded, a very large number of administrative acts done by lay bodies could be upset by the Courts. Such a state of affairs would be in the highest degree calamitous – for every disappointed member would be encouraged to drag his society into Court for every trifling failure to observe the exact letter of every regulation" – *Garment Workers' Union v De Vries* 1949 1 SA 1110 (W) 1129.

Concerning the question of an association's liability to members,[3882] Bamford brings the point full circle again:

> "The question arises whether a person may sue an association of which he is a member. There is no difficulty in the cases of the *universitas* ...,[3883] since he would be suing a distinct *persona*; in the case of an unincorporated association, however, he would – at least where he is suing all the members of the common fund – in a sense also be suing himself. It would seem that the courts are prepared to overcome this".[3884]

This confirms, unlike the far more laboured development of the separate status of trade unions in Britain and the USA, that the South African approach has been far more pragmatic.

Bamford also explores instances where members have sought claims against associations for damages arising from personal injury. However, these types of claims mostly arose in contexts far removed from that of trade unions (for example, sports or entertainment clubs). Even so, in at least one case[3885] important remarks are made about the nature of the duty of the steward in question:

> "He, in addition to being a member of the club, a member of the committee, and one of the freeholders of the building, was the steward of the club, and I think that that relationship places him in a different position towards the plaintiff from that in which the other defendants are found. *He was appointed by all the members, operating through the committee, and, in my judgment, he there-upon became the agent of each member to do reasonably carefully all those things which he was appointed to do, and in that way he came to owe a duty to each of the members to take reasonable care and to carry out his duties without negligence.*"[3886]

[3882] Chapter 33 – Bamford *Voluntary Association* 190.

[3883] Bamford *Voluntary Association* 190 n1 cites as authority here, *inter alia*, the English decision of *Cross v British Iron, Steel & Kindred Trades Association* – as discussed at § 5 3 5 above (dealing with a member alleging the union had not processed their claim timeously/not providing correct advice).

[3884] Bamford *Voluntary Association* 190, [their emphasis]. Bamford *Voluntary Association* 190 proceeds to then point to a series of cases [at 190 n2] involving a variety of unincorporated associations, and how the courts were prepared to assist plaintiffs in actions against them.

[3885] The English decision referred to by Bamford, is that of *Prole v Allen* [1950] 1 All ER 476 477 [Bamford *Voluntary Association* 191 n4-5], which is still frequently cited in matters involving the liability of unincorporated associations. It involves a claim for injury suffered by a member after falling down an unlit stairwell at the premises of a club during a New Year's social function, and the negligent actions – in turning the light of – of the steward (as holding an elevated office relative to the other members) herein.

[3886] Bamford *Voluntary Association* 191, quoting from *Prole v Allen* 477, as per Pritchard J [my emphasis].

These remarks were written at the start of the 1980s.[3887] Regardless, it is submitted that they remain interesting in that it speaks of persons who, by virtue of their office, are deemed to be acting as an agent for each member and accordingly held to owe a duty to each of the members to take reasonable care and to carry out their duties without negligence. This, of course, raises many questions in the context of modern-day trade unions: whether a modern-day union official, presumably well-versed in the everyday requirements of the South African labour relations system, owes such a duty to the union's members; would such a duty include the multitude of services and functions increasingly offered (or expected to be offered by unions), and should modern-day trade unions be measured against common law constructs designed for voluntary associations in general? Again, these questions will be considered in more detail in the chapter to follow.

11 4 5 4 Contract, delict, and legal proceedings

The final section of the discussion of specific common law issues considers the interplay between proceedings based on contract and proceedings based on delict as they involve associations in general and trade unions in particular.

11 4 5 4 1 Contract, Turquand and Harbottle

Bamford reiterates the legal status of associations as follows:

> "Few difficulties arise where it is sought to enforce a right acquired or an obligation incurred by a *universitas*. It is true that the *universitas* can act only through an agent or servant so that there will always be a primary question of agency or employment. But once this has been established, it is the *universitas*, as *persona* recognized by the law, which will sue or be sued."[3888]

Bamford points out that proceedings will be instituted against the assets of the *universitas*, in those instances where a third/external party institutes the action. However, should the assets be insufficient, no further recourse is available against the members (with the exception that they would be "liable *in solidum* [but only] if they

[3887] And, for that matter, citing an English decision from the 1950s.
[3888] Bamford *Voluntary Association* 192 [footnotes omitted].

have so agreed").[3889] The situation is far more complex in the case of an unincorporated association. The common law would be front and centre in determining the dividing line, if any, between the claim sought against the association/union and the potential liability of the members of that association/union.[3890]

The next aspect to consider in the context of contract law and associations revolves around the so-called "Turquand rule". The latter takes its name from the English case of *Royal British Bank v Turquand*[3891] and, as will become apparent below, is of particular importance for examining the common law applicable to associations and trade unions. Bamford explains the rule by quoting from Millin J in the *MWU v Greyling* case[3892] (concerning sale agreements entered into by the trade union's General Secretary which the union wanted to void):

> "If the constitution of an association empowers a committee to delegate to an official authority to do an act and he purports to do it, then (a) if the act is one which would ordinarily be beyond the powers of such a person, the contracting party cannot assume that the committee has delegated the power to do the act, and if they have not in fact done so, the contracting party acquires no rights; but (b) if the act is one which is ordinarily within the powers of such a person, then the association cannot dispute his authority to do the act, whether the committee have or have not [actually] invested him with the authority to do it."[3893]

On appeal,[3894] it was found that the MWU was indeed "a body corporate capable in

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[3889] 192 [their emphasis]. Therefore, in the absence of such agreement – which would, it is submitted, be extremely unlikely in the instance of a modern-day registered trade union – "a member is not even proportionately liable" for any debts/liabilities accrued by the association to others.

[3890] See in this regard, Bamford *Voluntary Association* 193-198, regarding the circumstances under which a claim would be permitted (and the procedures associated with such) against either the "common fund" of the non-corporate association, or against the members (and the varying degrees of liability of the membership-classes).

[3891] *Royal British Bank v Turquand* 1856 6 E&B 327 – Bamford *Voluntary Association* 199 n53.

[3892] *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1947 4 SA 690 (T) – Bamford *Voluntary Association* 199 n52. [Note to reader: Attention must be drawn to the fact that Bamford does not quote the Court verbatim, despite the direct-quotation inference – rather, minor changes are reflected, which replace references to company/director, with that of references to association/official. Regardless, as will be apparent from the below, these changes are editorial in nature, and have no effect on the underlying point being made by the quotation.]

[3893] *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1947 4 SA 690 (T) 705.

[3894] *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1948 3 SA 831 (A). Brief mention must be made of the background to the cases: chapter 10 refers to the various cases involving the MWU, and the Commissions of Enquiry that were launched during the late 1940s and early 1950s, into allegations of corruption and mismanagement

law of suing and being sued and of purchasing, holding and acquiring property"[3895] (it was registered in terms of the ICA 1937)[3896] and that its constitution "is at all times available to the public for inspection at the office of [the Industrial Registrar] in the same way as the memorandum and articles of association of a company is available for inspection at the office of the Registrar of Companies".[3897] The Court agreed that the actions of the General Secretary of the MWU fell within the protection afforded a third party by the *Turquand* rule.[3898] In reaching this conclusion, the court ruled against the argument that *Turquand* could not be extended to trade unions, by finding that the union's status in South Africa as a "body corporate, capable *inter alia* of purchasing and holding immovable property", specifically allowed for this very extension.[3899] After reasoning that the particular wording of the MWU constitution allowed for a justifiable assumption on the part of the third parties that the General Secretary was indeed acting within his scope of (ostensible) authority,[3900] the Court stated that "the true position [of the Turquand rule] is that the necessary acts of internal management are presumed to have been performed and not that a particular person is entitled to assume that they have" – and that the presumption does not apply "when the other

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within the MWU – in particular, the 1946 Report under the chairmanship of Williamson [see § 10 3 6 4 above – Report of the Mine Workers' Union Commission of Enquiry UG 36/1946]. A significant portion of the Report, and for that matter, the claim brought before the Appellate Division in 1948 (involving the General Secretary challenging his dismissal from the MWU) – see *Mine Workers' Union v Brodrick* 1948 4 SA 959 (A) – focused on the purchasing of farms on behalf of the union by the General Secretary. See for instance paras 165-197 UG 36/1946, outlining the provision of significant funding by the Chamber of Mines (primarily intended to be distributed to the MWU's membership) – and paras 208-258 UG 36/1946, outlining the purchasing of agricultural land/farms by the General Secretary (Brodrick) of the MWU, ostensibly for the establishment of an agricultural school for MWU members and their dependants, and for MWU income generated by the sale of produce so produced on the farms. The *Greyling* and *Prinsloo* cases, accordingly saw the attempts by the MWU to have the purchase agreements in terms of those farms, as initiated by Brodrick, the General Secretary, cancelled – as they were argued to have been instigated at the individual folly of the General Secretary, and not in the best interest of the union as a whole [*Brodrick* 963]. Amongst the allegations levelled against Brodrick, was that he had arranged to have the recordal of certain meetings changed, in order to provide ostensible authority to purchase certain of the properties in question – see *Brodrick* 963-965.

[3895] *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1947 4 SA 690 (T)843.

[3896] 843-844.

[3897] 844.

[3898] 844.

[3899] 847 [their emphasis].

[3900] 846-847.

contracting party knows that the acts have not been performed".[3901]

Bamford also points to the *Gründling* decision,[3902] where the court confirmed that the *Turquand* rule could be applied to a trade union (coincidentally the MWU again)[3903] as a means to "defeat" – under the appropriate circumstances – a union's attempt to set aside a decision taken by functionaries of the union that were within their powers, but where "the manner of doing it deviates from or is contrary to the [union] constitution".[3904] *Prinsloo* and *Gründling* are still good law in the context of South Africa.[3905] Similarly, the *Turquand* rule is still finding application in South African law.[3906]

This discussion shows the judiciary's willingness to apply a corporate-law principle to an association (in the form of a trade union), given its status in South Africa (and in contrast to the UK) in order to protect the sanctity of contract. Furthermore, it again emphasises the primacy of the association's (trade union's) constitution. At the same time, it lays bare the realities of internal strife within a prominent trade union in South Africa's past – and it is this point that brings the discussion to the final aspect considered under the broader guise of contract law and associations, namely the so-

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[3901] 849. The words of the Greenberg JA, in the relevant section, reads as follows:

"I do not think that the validity of a transaction such as the one in question in *Turquand's* case is to be decided on a subjective basis, depending on whether the other party does or does not know of the constitution or whether – as would follow if the basis were subjective – even though he knew of the constitution, he did or did not apply his mind to the question whether the internal acts of management had been performed. It seems to me that the true position is that the necessary acts of internal management are presumed to have been performed and not that a particular person is entitled to assume that they have ... I have already said that this presumption does not arise when the other contracting party knows that the acts have not been performed… I agree therefore with the decision of Millin, J [in the court a quo], that the appellant was bound by the deeds of sale and this disposes entirely of the attack on the judgment in the first case" – *MWU v Prinsloo* 849 [their emphasis, references omitted].

[3902] Bamford *Voluntary Association* 199-200 n53 – *Gründling* 140.

[3903] Trollip J does indeed refer back to the *MWU v Prinsloo* decision as authority – see *Gründling* 140B.

[3904] *Gründling* 140A. These same words of the court are comprehensively quoted in the section on the "imperative of constitution" at § 11 4 4 above.

[3905] See the recent *ABSA Bank Ltd v South African Commercial Catering & Allied Workers Union National Provident Fund (Under Curatorship)* 2012 3 SA 585 (SCA) decision, for the most recent example of the principles of both cases being applied in the context of a trade union.

[3906] See *One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd* 2015 4 SA 623 (WCC) as but one example – albeit from the perspective of a company, and the effect of the Companies Act 71 of 2008 (specifically subs 20(7)) on *Turquand* – inasmuch as it speaks to the concept of "ostensible authority". See further the Constitutional Court decision in *Makate v Vodacom (Pty) Ltd* 2016 4 SA 121 (CC), which also delves into ostensible authority, and the inter-relationship between the *Turquand* rule and estoppel, in the context of contemporary South African corporate law.

called "*Foss v Harbottle* rule".

The *Foss v Harbottle* rule[3907] (which saw its application in South African law through a variety of decisions that referred to the original English decision), is a mercantile law principle that has been applied to trade unions.[3908] It has as its point of departure the principles, firstly, that an individual member (or minority grouping of members) should not have a claim against their own union where the complaint can be "remedied" by a simple majority vote by the membership and, secondly, that where a union is wronged, the claim is to be instituted by the union itself.[3909] The principle first saw its application in South Africa in a trade union matter in the 1936 case of *GWU v Smith*.[3910] The court remarked:

> "It must not be forgotten that a trade union is a body corporate and the ultimate control of its actions lies with the majority of members. The executive committee may take unconstitutional action, but the majority of members may approve and regularise what the executive committee may have done. If so, upon what ground can the Court interdict the executive from doing unconstitutional acts which may have the approval of a majority of members and which the majority intend to ratify?"[3911]

In this case, the executive committee had reached a decision to allow for "the wages and conditions of employment in the industry" to be determined in terms of an Industrial Council to be formed in terms of ICA 1924[3912] – a decision which was opposed by some members.[3913] The court disagreed with the claimants (the aggrieved members), restated the *Foss v Harbottle* rule and outlined the exceptions where it will not apply. These exceptions entail, firstly, where the acts complained of were *ultra vires*; or, secondly, where those who committed the acts complained of are in control of the association ("control the majority of… the company") and are accordingly able

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[3907] *Foss v Harbottle* [1843] 2 Hare 461.

[3908] See for instance *Gründling* 139E-F, as quoted above.

[3909] This paraphrasing the wording of IT Smith & A Baker *Smith & Wood's Employment Law* 10 ed (2010) 607, as cited at § 5 3 3 3 above.

[3910] *Garment Workers' Union v Smith* 1936 CPD 249.

[3911] 255-256.

[3912] 251. [Note to reader: The LexisNexis text of the case, incorrectly refers to Act 11 of *1934*, as opposed to Act 11 of 1924. The former, being the Irrigation Districts Adjustment (Amendment) Act, is certainly not the intended reference here.]

[3913] 252. In terms of the claim, it was alleged that procedures followed by the Executive Committee, both at arriving at their decision, and in terms of subsequent attempts at testing the decision with the union's shop stewards (as opposed to arranging a special general meeting for all the members) was not in compliance with the union's constitution. See *Garment Workers' Union v Smith* 253.

to refuse to "permit an action to be brought in the name" of the company/association.[3914] Under those circumstances, the court will allow the minority to bring an action "in their own names" (as opposed to it having to be instituted by the association as an entity).[3915]

The rule (in the context of trade unions) was again raised eighteen years later in the *Gründling* decision and another seven years later in the *Sorenson Tramway* matter.[3916] In *Gründling*, the court held that the actions complained of – these being, *inter alia*, the irregular appointments of persons to serve in management capacities within the MWU – were not a "mere matter of internal management", were neither required nor permitted in terms of the union's constitution and were accordingly "*ultra vires* and void".[3917] Therefore, the *Harbottle* rule was not of application and the applicant, as a member, was entitled to approach the court for relief.[3918] In *Sorenson Tramway* the court reasoned as follows:

> "There is, however, in my view, a distinction between the case where an act is threatened against a company, on the one hand, and the case where the directors of that company are acting illegally or contrary to the articles. In the former case only the company can approach the Court for relief. In the latter case different considerations apply and there are numerous exceptions to the general rule that it is the company, or in this case the trade union, that must approach the Court, and not the individual members. One of these exceptions is where the company is acting or threatening to act *ultra vires*… Applying these principles to the present case, one finds that the executive is purporting to do what I have held to be an unconstitutional act. There is no other remedy for the applicants, since the persons who are perpetrating this act are the only persons who could bring an action to this Court

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[3914] 257.

[3915] 257. Watermeyer AJP states further at 257-258 regarding the action in the names of the minority: "This, however, is mere matter of procedure in order to give a remedy for a wrong which would otherwise escape redress, and it is obvious that in such an action the plaintiffs cannot have a larger right to relief than the company itself would have if it were plaintiff, and cannot complain of acts which are valid if done with the approval of the majority of the shareholders, or are capable of being confirmed by the majority. The cases in which the minority can maintain such an action are, therefore, confined to those in which the acts complained of are of a fraudulent character or beyond the powers of the company. A familiar example is where the majority are endeavouring directly or indirectly to appropriate to themselves money, property or advantages which belong to the company, or in which the other shareholders are entitled to participate … It should be added that no mere formality or irregularity which can be remedied by the majority will entitle the minority to sue, if the act when done regularly would be within the powers of the company and the intention of the majority of the shareholders is clear".

[3916] *Sorenson v Executive Committee, Tramway & Omnibus Workers Union (Cape)* 1974 2 SA 545 (C).

[3917] *Gründling* 151B-C.

[3918] 151C-D.

> in the name of the trade union. In these circumstances, and having regard to the fact that in terms of the constitution there is no means whereby what the executive has done could be ratified by a majority of votes at a meeting, I hold that the applicants are entitled in law to approach this Court for relief."[3919]

As such, both the *Gründling* and *Sorenson Tramway* decisions serve to outline the application of the *Foss v Harbottle* rule in South Africa. In matters where a member (or minority group of members) approaches a court in an effort to undo a particular act or decision, of key importance would be whether or not such an action/decision was at all permissible in terms of the union's constitution. If not and the action/decision is found to be *ultra vires* then, in the absence of a mechanism to allow for majority ratification, the members would indeed be permitted to rely on the assistance of the judiciary to right the wrong.

11 4 5 4 2 Delict and legal proceedings

As far as the interplay between the law of delict and associations is concerned, Bamford states as follows:

> "A *universitas* will itself be directly liable for delicts committed by its representatives, such as servants and agents, once the primary questions of the relationship between the association and its representative and the scope of the latter's authority have been decided, and will be entitled to remedies in its own name in respect of delicts committed against it."[3920]

In support of this statement, Bamford cites *Heaton's Transport*[3921] before making the important point that the "*ultra vires* doctrine, which is of great importance in the field of contract, does not protect an association in a delictual action against it for fraud".[3922]

[3919] *Sorenson v Executive Committee, Tramway & Omnibus Workers Union (Cape)* 1974 2 SA 545 (C) 551E-G, 552E-G.

[3920] Bamford *Voluntary Association* 204, [their emphasis].

[3921] Bamford *Voluntary Association* 204 n1 explains therewith that the English decision held "that shop stewards of trade union had been acting within the scope of their authority."

[3922] Bamford *Voluntary Association* 204, [their emphasis]. Bamford *Voluntary Association* 204 bases the aforesaid on the conclusion reached by Holmes JA in *Oranje Benefit Society v Central Merchant Bank Ltd* 1976 4 SA 659 (A) 674C-E, where is reasoned that the "fraudulent nondisclosure of knowledge" that the act/decision performed by the representative is *ultra vires* the constitution – and which induced the other party to so contract with the association – cannot now serve as a defence against a claim in terms of that contract. In other words, the act/decision being *ultra vires* will not be

In considering the different causes of action that might give rise to a delictual claim involving associations ("and/or their members")[3923] – which include negligence and nuisance – Bamford proceeds to cite as authority a series of English decisions which were referred to in chapter 5 above, namely: *Rookes v Barnard* and *Stratford v Lindley*, pertaining to "intimidation"; and *Torquay Hotel v Cousins*, pertaining to "inducement to commit breach of contract".[3924] Lastly, Bamford addresses the question of "indemnification" and to what extent this affects the liability of a member (if at all):

> "As in contract, a member who has incurred liability to a third party as a result of an act committed on behalf of his association has no recourse against the common fund or against individual co-members for indemnification or reimbursement. Claims by committee members who sought to recover from their association's funds for their costs incurred in defending an action for defamation brought against them personally have been rejected, although the defamatory statements had been made in the course of their duties".[3925]

What is of immediate interest in considering these remarks, is section 97 of the LRA, which provides – in respect of a *registered* trade union – for the indemnification of members,[3926] or members, office bearers or officials,[3927] for the obligations/liabilities of the union,[3928] or for any losses suffered by external parties[3929] under certain, specific, circumstances. This particular aspect will be considered in more detail § 12 4 5 2 2 below.

It should also be noted, as far as participation in legal proceedings is concerned, "regard must always be had to the constitution of an association in so far as it expressly or impliedly deals with the institution or defence of legal proceedings" – and that "[t]here is no inherent power in an association to institute or defend proceedings".[3930]

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able to shield the association against the claim, since the contract would not have been entered into but for the fraudulent misrepresentation on the part of the representative(s).

[3923] Bamford *Voluntary Association* 205.

[3924] 205 n11-12. Whilst claims involving defamation and *iniuria*, involving a voluntary association/*universitas* (or their representatives) and third parties, is discussed by Bamford *Voluntary Association* 205-206 – since such does not directly involve the union-member relationship, such falls outside the immediate scope of this study.

[3925] Bamford *Voluntary Association* 206.

[3926] Subsection 97(2) of the LRA.

[3927] Subsection 97(3).

[3928] Subsection 97(2).

[3929] Subsection 97(3).

[3930] Bamford *Voluntary Association* 207.

Regarding the capacity of a *universitas*, the latter "must sue or be sued in its own name".[3931] An important addition to this point is, however, that "[c]ertain bodies have legal personality by virtue of statutes" – with Bamford making reference to, in this regard, section 5 of the 1956 LRA (that is, registered trade unions).[3932]

The remainder of the discussion by Bamford, focusing as it does on the correct method of procedural citation before the court (for the purposes of instituting action against associations),[3933] along with the related approach to "non-corporate associations",[3934] falls outside the immediate scope of this study.

11 5 Recent judicial perspectives on the potential liability of trade unions to their members

11 5 1 Delictual liability

In *South African Municipal Workers Union v Jada,*[3935] a case that was considered in light of the previous LRA,[3936] the court heard an appeal from the Springs Magistrate Court, where trade union members had successfully instituted a delictual claim for damages against their union (SAMWU)[3937] based on their dismissal resulting from their participation in an illegal strike called by the union.[3938] Hakime and Steynberg describe the Magistrate Court's decision as "the first case of its kind in South Africa, that is, the first time that a union has been held delictually liable".[3939]

[3931] 207.

[3932] 207 n5. Section 5 of the 1956 LRA is entitled "Effect of registration of trade union and employers' organization" and is now contained within s 97 of the current LRA. In terms of both the original subs 5(1), and the current subs 97(1), a registered trade union is a "body corporate". The original went further by also specifying that it is "capable in law of suing or being sued" – a phrase that is no longer contained specifically within the LRA, but is implicitly accepted. In this latter regard, see for instance Van Jaarsveld et al "Labour Law" in *LAWSA* para 342.

[3933] Bamford *Voluntary Association* 208-209.

[3934] 209-211.

[3935] *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W).

[3936] At the outset, Horwitz AJ confirmed that the matter was to see consideration of the 1956 LRA, on account of the fact that "it was still in force at the time that the events to which this appeal relate occurred" – *Jada* 1347D.

[3937] SA Hakime & L Steynberg "The Delictual Liability of a Union for Advice Given to its Members" (2002) 65 *THRHR* 446 446-447 confirm that the Magistrate's Court, at the hearing on 23 November 1999, ordered SAMWU "to pay five million Rand to its members who were dismissed after embarking on an illegal strike called by the Union."

[3938] *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1347E.

[3939] Hakime & Steynberg (2002) *THRHR* 447. The authors reason that the case is worth exploring further, especially when taking into account that the decision affects the entire trade union movement

The background facts were that negotiations were initiated between SAMWU and the Springs Town Council to attempt to broker a deal to reinstate four shop stewards that had been dismissed.[3940] This attempt failed. The members went on strike, which was unprotected.[3941] An ultimatum was issued (Friday 6 June 1993), requiring their return to work on Monday 9 June. This did not happen and they were dismissed.[3942] The members alleged that a SAMWU official had instigated the strike action at a meeting held with the members on 1 June and that SAMWU "owed the [members] a duty of care to ensure they that they did not do anything that would result in their being dismissed, a duty which it breached".[3943] On the facts the court found – correctly, it is submitted – that the SAMWU official was *not* directly linked to the members' dismissal.[3944] The appeal was accordingly upheld and the Magistrates Court decision set aside.[3945] The court did suggest that it "may well be, in a particular case, that a party in the position of the [union] might employ a person specifically to give advice to members and the employees might render the employer delictually liable for furnishing incorrect advice",[3946] but this did not apply to the matter before the court.[3947] A further

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and could open the floodgates for a number of claims on this basis".

[3940] *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1348-D-G.

[3941] This in terms of subs 55(1) read with subs 65(1)(c) and subs 46(1)(a) of the 1956 of the LRA – *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1348H-I.

[3942] See AA Landman "A Trade Union's Delictual Liability Regarding its Members: Jada v SA Municipal Workers Union" (2000) 21 *ILJ* 101 101 for a succinct overview of the facts of the case.

[3943] *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1349C. The court, in quoting from the lower court's pre-trial conference, states as follows regarding the legal nature of the relationship between the members and the union.

> "The response was that there was a contractual relationship embodied in the [union's] constitution and that it was a special relationship because in terms of the constitution the [union] was legally obliged to see to the needs of its members in the field of their employment" – *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1349H.

[3944] 1352F. The court did make further comments on the point that the meeting that took place, where the decision to go on strike was taken, would have seen the members make the decision themselves. In other words, the membership, collectively, made the choice to embark on the strike action – and that, merely by virtue of the official being a paid employee of the union was not reason enough to broaden the scope of his ability to make the decision *for* the membership – *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1352G-I. However, the crux of the matter was that, on the morning in question, the members *elected* not to return to work (and chose to wait for the official to address them) – this when the official had every reasonable reason to believe that the matter had been resolved, and the workers would accordingly be returning to work as required – *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1355C-E.

[3945] 1357D-F.

[3946] 1352I.

[3947] 1352J-1353A.

key consideration was that the trade union members had been warned by the union official in question and their employer[3948] that they would be embarking on illegal strike action and chose to proceed.[3949] In relying on the principles outlined by the Appellate Division in *Parity Insurance Ltd v Marescia*,[3950] the court reasoned that had the members not participated in an illegal strike they would not have been dismissed.[3951]

These conclusions were reached after consideration of the delictual nature of the claim before the court[3952] and as it had been pleaded in the court *a quo*.[3953] It remains unclear why there was no reliance on any statutory measures in terms of the previous LRA, such as subsection 79(2), read with subsection 79(1) of the 1956 LRA.[3954] At the same time, several particularly interesting points (for the purposes of this study) were raised by the court (despite the fact that the case was decided in the context of previous legislation and despite the court not considering that legislation). The first of

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[3948] 1353J.

[3949] 1353C-D.

[3950] *Parity Insurance Ltd v Marescia* 1965 3 SA 435 (A). Hakime & Steynberg (2002) *THRHR* 449 make reference here to the common law maxim "*nemo ex suo delicta meliorem conditionem facere potest*", which is described in *Parity Insurance* by Steyn, CJ as the general principle that "an offender … in our law [is] not entitled or allowed to derive any benefit from his own criminal conduct" – *Parity Insurance Ltd v Marescia* 1965 3 SA 435 (A) 435A-C.

[3951] *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1348A-C – where is stated further: "[B]y embarking on this illegal strike in the circumstances in which they did, the plaintiffs consented to the risk of harm and the maxim *volenti non fit iniuria* is in itself a complete defence to the plaintiffs' claim. I cannot accept, given what the workers were told about their proposed strike and intention of the [union] to distance itself from it, that they did not realize that drastic consequences could flow therefrom" – *Jada* 1353G-H.

[3952] R Lagrange "SAMWU v S Jada (Witwatersrand Local Division, Case A3038/00)" (2003) 24 *ILJ* 1314 1314 states as follows: "The judgment is important as, for the first time, it delineates the principles that determine when a union can be exposed to a delictual claim by its members."

[3953] *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1349D-G.

[3954] As was highlighted above (see § 11 3 6), s 79 was controversial in that it initially introduced (in 1988) the "reversed onus" provision, that saw unions, their officialdom and members, being presumed to have acted with due authority in those instances that resulted in losses being suffered as a result of interference with the contractual relationship between employer and employee – with subsequent breach of that contract. With its subsequent revision, subs 79(1) nonetheless provided indemnification against civil proceedings seeking to recover losses as a result of the furtherance of a strike or lock-out, but provided that same was in compliance with s 65 – in other words, was not industrial action that was prohibited by s 65. In terms of subs 79(2), and subject to the indemnity of subs 79(1), any union officialdom or member who interfered in the contractual relationship, would then be liable in delict. *In casu*, the *Jada* workers were not permitted to participate in strike action, as they were deemed to fall under municipal/local government workers that were regarded as essential services – and accordingly, their industrial action fell outside the protection afforded by s 65. They could therefore – along with the SAMWU officials – have faced a claim in terms of s 79. See *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1348H-I.

these – the difficulty of founding a delictual claim in the context of the relationship between a trade union and its member – is contained in the following remarks made by the court:

> "Whilst I can conceive of a contractual relationship between two unrelated parties (such as an attorney and his client) bringing into being a situation in which the one becomes obliged to display a duty of care towards the other, I have difficulty contemplating how that occurs in a situation in which one party (in casu, the [union]) comes into existence at the behest of other parties (employees), who are responsible for chartering the course which it takes, or is a party to whom others (future employees) ally themselves and take part in its decision-making process. *In most cases in which a special relationship between two parties is alleged to exist, the party claiming that the other owed the former a duty of care would usually have no control over how the latter acted, for otherwise it would be inappropriate to speak of a breach of duty.* In a case such as the present, in which a trade union exists as the medium through which its members can bargain and negotiate with their employer, I fail to perceive how it can be said that the defendant owed the plaintiffs a duty of care".[3955]

Other related remarks made by the court that are worth highlighting, given the nature of this study, include: (i) That the court has "notional difficulty" in "conceptualizing a trade union in the same light" as a company – given that there "is a clear identity of interest between a trade union and its members". However, "[the court] will … accept that there were no legal impediments which stood in the way of the [members] suing the [the union] for the relief for which they did sue";[3956] (ii) That to determine the presence of a duty obliging the union to act positively to prevent damages being suffered by its members, the nature of the relationship that exists between the parties must be identified;[3957] (iii) That this relationship "cannot be equated … to the relationship between a client and his attorney whom he consults for advice and whom he pays for that advice";[3958] (iv) That the mere fact that the members might have been entirely dependent on the union official for his advice,[3959] does not

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[3955] 1352B-D, [my emphasis].

[3956] 1348A-C. To this, was added the following at 1348A-C:

> "Members of a trade union are not 'members' in the same sense as shareholders in a company are 'members' of the latter. Trade union members do not merely hold a financial stake in the trade union of which they are members. They have a collective interest which they pursue via the medium of the trade union structure but not in the same way as members of a company incorporated under the Companies Act".

[3957] 1351I.

[3958] 1351I.

[3959] See in this regard the discussion of *Chavez v United Food & Commercial Workers International*

elevate that official (or the advice) to the point where a claim may arise;[3960] and, finally, (v) That the preferred question to pose is not whether there was reliance on that advice, but rather whether (in law) the members were entitled to rely on the official to the extent that they did and whether (in law) there was an obligation on the official to "ensure that nothing could possibly go wrong with the illegal strike".[3961] These remarks remain the basic framework for the potential delictual liability of trade unions to their members.

In *Ndlovu v South African Commercial Catering & Allied Workers Union*[3962] the Labour Court again ruled against union members seeking to hold their union accountable on the basis of delict – this time for reaching a settlement with their employer that was to result in unfavourable wage terms for the applicants (despite a broader benefit accruing to the majority of affected workers/members). Briefly stated, the employer had unilaterally changed its remuneration and commission structure which negatively affected the trade union's members.[3963] The union was requested to negotiate with the employer, which it did prior to the hearing of the CCMA dispute which had been referred.[3964] A settlement was reached,[3965] which was rejected by the applicant members.[3966] On this basis, the members alleged the trade union had acted contrary to their instructions and mandate, breached that mandate, acted contrary to the applicant members best interests and "breached its duty of care towards them"[3967] with the result that the trade union members "suffered damages in the form of past

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Union, AFL-CIO-CLC 779 F.2d 1353 (1985), as above (under the section on the DFR and the processing of grievances at § 9 4 5) – in regards to union members (unsuccessfully) attempting to hold their union accountable for their participation in an unprotected strike – ostensibly at the instigation of the union.

[3960] *South African Municipal Workers Union v Jada* (2003) 6 SA 294 (W) 1353A.

[3961] 1353B. Says Lagrange (2003) *ILJ* 1317 in this regard:

> "The independent acts of members as decision makers on matters affecting them is crucial in this respect. The decision importantly also makes it clear that employees' membership of a union in the belief that it will protect their interests, as stated in the union constitution, is not equivalent to a guarantee in an insurance policy. The extent of that duty depends on what the resources of the union are and the competing demands placed on those resources at the time they are needed."

[3962] *Ndlovu v SA Commercial Catering & Allied Workers Union* 2011 32 ILJ 697 (LC).

[3963] 699H.

[3964] 700A.

[3965] 700C-D.

[3966] 700D.

[3967] 700E-F.

and future loss of earnings".[3968] In short, the trade union members instituted a delictual claim based for damages "arising from a breach of the duty of care".[3969] This somewhat confusing judgment[3970] concerned two preliminary points raised by the trade union (SACCAWU),[3971] namely that the court lacked jurisdiction to preside over the matter in terms of subsection 157(1) of the LRA (given that a claim for "damages arising out of delict does not fall within" the LC's jurisdiction) and that no cause of action had been disclosed.[3972]

In dealing with these preliminary points, the court considered and distinguished the various decisions of the courts relied on by the trade union members (and distinguished them from the facts *in casu*)[3973] and concluded that the Labour Court "has no jurisdiction in a delictual claim".[3974] With regard to the no cause of action argument, the court referred to one argument raised by the trade union members, namely that the "duty owed by the [trade union] can only be exercised on the mandate and instructions of its membership"[3975] and that this "separate leg of the claim, founded in contract … should be permitted to proceed if this court should find that it lacked jurisdiction in the delictual claim".[3976] The court did not accept this argument – it was raised for the first time in argument (as opposed to the original cause of action) and sought to introduce liability through the back door (of a contractual claim) where the court was not clothed with jurisdiction to hear the delictual claim.[3977] The court also

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[3968] 700G.

[3969] 704A.

[3970] With respect, the court presents the bulk of its judgment by means of highlighting the various arguments put forward by the respective counsel under each legal point, without always being clear on which view the court agrees with, and to what extent. It is furthermore difficult at times to properly assess if what is stated is the view of counsel, or that of the court.

[3971] 707D.

[3972] 699C-D.

[3973] 702D-F.

[3974] 702F-I. The court reasoned further that this would, in effect, apply to "any delictual claim" – *Ndlovu* 702G.

[3975] 704B.

[3976] 704C.

[3977] See the comment of the court in regard to a separate argument – albeit still pertaining to a contractual claim:

> "[Applicant's counsel] conceded that the claim is not a contractual claim per se in that it does not contain the typical averments necessary to establish such a claim, and that the essence of the applicants' assertion is that the Labour Court has jurisdiction in a delictual claim arising out of employment and labour relations. It would appear that [applicant's counsel] was constrained to attempt to make this submission in order to rescue the fatal flaw in the pleadings" – *Ndlovu v SA*

considered the *Jada* decision[3978] and, while suggesting that *Jada* could be distinguished from the matter before it (*Jada* involved an unprotected strike as opposed to a settlement agreement), declined to make any finding in the absence of jurisdiction.[3979] In short, therefore, the trade union members had based their claim in delict over which the Labour Court does not have jurisdiction and had not done enough to establish (either from the union constitution or a specific LRA provision) grounds for a contractual claim either.[3980] As such, the court states:

> "It is a claim pleaded squarely in delict based on the wrongful breach of a duty of care in the collective bargaining process in concluding an agreement without the knowledge and consent of the applicants. Even if it were, however, to be pleaded in terms relating to the lack of implied or explicit authority of the respondent to contract on behalf of the applicants provided it acted bona fide and in terms of its constitution, this would in my view *lend itself to a civil remedy outside the ambit of labour relations*. The alleged factual dispute regarding the mandate would then become relevant."[3981]

This brief overview confirms the difficulty for trade union members relying on delict to hold their trade union accountable, a difficulty arising from a combination of a number of factors: Firstly, the courts' view of the relationship between trade unions and their members; Secondly, the doubt whether and to what extent a duty of care arises in this relationship; Thirdly, the difficulty in itself of proving the existence of a delictual claim (especially causation); Fourthly, the fact that the Labour Court does not have jurisdiction over delictual claims and trade union members are forced to use the civil courts.[3982]

Commercial Catering & Allied Workers Union 2011 32 ILJ 697 (LC) 706E-F.

The aforementioned argument was raised by the applicants in response to, *inter alia*, SACCAWU arguing that subs 157(2) of the LRA was to be interpreted as only permitting disputes involving employers and employees before the LC – *Ndlovu* 705I-706A.

[3978] 705A-F.

[3979] 705G-H.

[3980] 706H-I.

[3981] 706G-H, [my emphasis].

[3982] The shadow of *Jada*, is still long. In this regard, Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 249 state, *inter alia*, that what was decided in *Jada* "suggests that a union is unlikely to be held liable in delict where members engage in an unprotected strike, provided the union does not knowingly mislead those members or neglects to intervene in circumstances where it is reasonably able to do so and has reason to believe that members without knowledge of their rights might put themselves at risk of dismissal".

11 5 2 Contractual liability

In a matter that originated in the Durban High Court,[3983] was heard on appeal in the SCA[3984] and ended up before the Constitutional Court,[3985] ("*Ngcobo*") two members successfully held the trade union FAWU liable based on breach of contract for the failure by the trade union to properly prosecute their unfair dismissal claim. In effect, this matter served as South Africa's equivalent to a DFR claim.[3986]

The two employees (both members of FAWU) were dismissed by their employer (Nestlé SA (Pty) Ltd) and approached their union (FAWU) for assistance in contesting their dismissal for operational requirements. This never transpired to the full extent that was expected and the employees' claim against the employer lapsed.[3987] The employees then approached their own attorneys to put FAWU on terms and "[w]hen the union did not respond, summons was issued" in the High Court against the union – "more than 27 months after the dismissal".[3988]

There are several notable aspects of the High Court decision in *Ngcobo*. One was the consideration given to FAWU's constitution to determine whether it provided the basis for the alleged representative mandate owing to its members.[3989] In this regard, the court ruled it was unnecessary to decide on the existence of the mandate (in light of the union constitution), simply because FAWU had explicitly indicated its willingness to represent the members.[3990] The second noteworthy aspect is how the court dealt

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[3983] *Ngcobo v Food & Allied Workers Union* 2012 33 ILJ 1337 (KZD).

[3984] *Food & Allied Workers Union v Ngcobo* 2013 34 ILJ 1383 (SCA).

[3985] *Food & Allied Workers Union v Ngcobo NO* 2013 34 ILJ 3061 (CC).

[3986] As per the discussion under the section on the "duty of fair representation" at § 9 4 above.

[3987] Initially, assistance was promised. After referral to the CCMA, and representing the members at this forum, no further action was taken. The matter had to be referred to the LC within the 90 days limit – and despite informing the employees it would do this, that did not happen. As a notable aside, part of the dispute in the court *a quo* revolved around whether or not the employees were members of the union, following their dismissal – and the implication of this in regards to their claim. This aspect is touched on below. The claim accordingly lapsed, and could only be reinstituted by means of a condonation application. A period of almost a year lapsed, and upon the employees then becoming aware that nothing had transpired – they approached FAWU again. A failed CCMA application ensued, still nothing further at the LC. In the interim, FAWU had received legal advice that the employees' claim would have been unsuccessful. See *Food & Allied Workers Union v Ngcobo NO* 2013 34 ILJ 3061 (CC) 3064-3065 paras 3-7. Hereafter, as explained by the court: "Armed with this, the union washed its hands of the employees and their case" – telling them "it would not proceed with their claims before the Labour Court" – para 7.

[3988] 3065 para 8.

[3989] *Ngcobo v Food & Allied Workers Union* 2012 33 ILJ 1337 (KZD) 1350B-G.

[3990] 1352A-C.

with the special plea entered by FAWU. In reliance on the *Jada* decision[3991] the union argued that the members lacked *locus standi* to sue FAWU because "as members of the defendant, the plaintiffs and the defendants *have an identity of interest*, with the result that the plaintiffs cannot in law sue the defendant unless this is expressly provided for in the constitution governing their relationship".[3992] The court considered (and quoted extensively from) *Jada*, in particular the comments made in that case regarding the status of a union (in light of section 5 of the 1956 LRA), before finding, as was done in *Jada*,[3993] that there is no reason why members could not sue their own union.[3994] Finally, the argument that considerations of "public policy" should preclude this possibility[3995] (especially the concomitant need for indemnity insurance by trade unions and its effect on membership dues) was rejected by the court (especially since there was no evidence on this point).[3996] The court then considered the merits of the members claim for unfair dismissal against their employer and found that Nestlé did dismiss them unfairly. This, in turn, meant that had the matter been referred to the Labour Court as the trade union was supposed to do, the members would have been successful. The court ordered the trade union to pay the members an amount of R107 232.[3997]

[3991] 1362B-C.

[3992] 1360J-1361A.

[3993] 1363I-J.

[3994] The court's reasoning was as follows:

> "What is immediately apparent is that the learned acting judge [in *Jada*] was solely concerned with the issue of whether a duty of care could be found to exist in the relationship between a union and its members. The concerns expressed with regard to the implication of a duty of care in a contractual setting, where the parties are related and the one party has a degree of control over the other, do not arise in the present case. The defendant is a body corporate and has legal personality in terms of s 97(1) of the LRA. As pointed out above, it is an independent legal subject, distinct in law from its members and officials. In addition, the constitution of the defendant determines the nature of the relationship between the defendant and its members, as well as their rights and obligations inter se. The constitution also accords to the defendant the power to provide legal assistance to its members and/or officials when it deems to be in the interests of the union to do so" – 1364G-1365A.

[3995] See *Ngcobo v Food & Allied Workers Union* 2012 33 ILJ 1337 (KZD) 1366A-E for the six grounds proffered by FAWU, that would trigger the public policy consideration – including, *inter alia*, that "would place trade unions at huge financial risk, which in turn would require trade unions to carry professional indemnity insurance" (which would then raise membership dues) and "[i]t is against public policy for the defendant as a trade union to be compelled, against the possible claim for damages from the plaintiffs as the members concerned, to pursue a claim on their behalf which it has been advised [in reference to its independent legal advice] has poor prospects, irrespective of whether the advice is sound or not".

[3996] 1367C-D.

[3997] 1380E-H.

On appeal to the SCA, the majority[3998] commenced their decision by confirming that the "claim of the respondents is based not on delict, but on a breach of contract" and what was alleged was that "there was a contract between the parties which imposed an obligation on FAWU that it failed to perform in the manner contemplated by that contract."[3999] From here, the SCA reasoned that their first duty was to "determine the nature of the obligation imposed upon FAWU by the contract".[4000] Importantly, the judges indicated that FAWU's constitution might well have not obliged them to assist the employees/members[4001] but that this did not factor into the equation simply because of the presence of the mandate. In short, FAWU had "in fact undertaken to represent the respondents in their dispute".[4002] Once this was accepted, FAWU "was obliged to perform its functions faithfully, honestly, and with care and diligence".[4003] The court found that FAWU did not meet this standard.[4004] The court also rejected FAWU's argument that, being "a trade union and not an attorney", "a less exacting standard should be expected of them".[4005] The majority judgment also specifically rejected the argument put forward that the members' "failure to themselves apply for condonation somehow operates as a bar to the institution of the civil action against it".[4006] Instead, the court reasoned that "all that the respondents had to establish to succeed in this action as against FAWU is that: had their dispute been referred to the LC by it in accordance with the terms of the mandate it would have been resolved in their favour".[4007] The SCA then proceeded to consider whether the dismissals were fair or unfair as a precondition for the success or otherwise of the claim.[4008] In this regard, the court stated:

[3998] Malan JA and Tshiqi JA concurred.

[3999] *Food & Allied Workers Union v Ngcobo* 2013 34 ILJ 1383 (SCA) 1396F-G.

[4000] 1396G-H.

[4001] 1396H.

[4002] 1396H.

[4003] 1397A.

[4004] The breaches of the mandate committed by FAWU were described as follows:

"It did so in the first place by failing to timeously refer the respondents' dispute with Nestlé to the Labour Court (LC) and in the second place by failing to secure condonation for that failure. In both instances it failed to act honestly or diligently" – 1397E-F.

[4005] 1397A-B.

[4006] 1398G.

[4007] 1398G-H.

[4008] 1400D-E.

> "Swain J's conclusion [in the court *a quo*] that the retrenchments were both procedurally and substantively unfair cannot be faulted. Nor, bearing in mind that the onus would have been on Nestlé to prove that the dismissals were fair (s 191(2)), can his conclusion that had the dispute been referred to the LC it would have been resolved in the respondents' favour".[4009]

Considering the above, the SCA dismissed the appeal.

In contrast, the minority of the SCA ruled in favour of FAWU[4010] with its reasoning premised on finding that the employees did not mitigate their losses by means of instituting the condonation proceedings for a late referral themselves – and if this proved to be unsuccessful, to then appeal the adverse condonation ruling to the Labour Appeal Court.[4011] The minority was of the view that had the employees/ members approached the Labour Court for condonation, they would have been successful.[4012] As such, and until such time, "absent an unsuccessful application for condonation, [the respondents/members] did not yet have a complete cause of action".[4013]

By the time the matter came before the Constitutional Court, there was agreement that the employees were members of FAWU; their employer had dismissed them unfairly; FAWU had agreed to represent them in pursuing their claim; it acted improperly in doing so; that had their claims been properly pursued, the Labour Court would have awarded compensation against their employer in the amount of damages that the earlier courts granted against the union; under the common law contract of mandate the union would have been liable for breach of mandate both by failing to

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[4009] 1401B-C.

[4010] 1396D-E.

[4011] 1394D-F.

[4012] 1396A-D. As an aside, reference can be made to a LC case before Lagrange, J, which required consideration of a condonation application on account of the late filing by a union (NEHAWU): *National Education Health & Allied Workers Union v Vanderbijlpark Society for the Aged* 2011 32 ILJ 1959 (LC). It serves as an instructive example of what the courts consider – and also sees the court state as follows:

> "The LRA has been in existence for more than 15 years, and the time-limits governing referrals have not changed in that time. It is reasonable to expect that trade unions ought to be well aware of the need to act timeously in the interests of their members and to adapt their internal procedures to accommodate those time-limits, not vice versa … Where handling such disputes is a core function of the organization, this should go without saying" – *National Education Health & Allied Workers Union v Vanderbijlpark Society for the Aged* 1962H-1963A.

[4013] *Food & Allied Workers Union v Ngcobo* 2013 34 ILJ 1383 (SCA) 1392H.

lodge the claim timeously and by failing to apply thereafter for condonation; and that the employees were themselves free to apply for condonation at any time.[4014] This meant that there was a shift in emphasis of the arguments advanced on behalf of the trade union. The core of FAWU's argument now was that "it enjoys special constitutional protection from damages claims by members it undertakes to represent".[4015] In addition, the union relied on its own constitution's provisions read in light of the guarantee of union internal autonomy in section 23(4)(a) of the Constitution,[4016] and how this is manifested in the LRA.[4017] As such, FAWU argued, it was entitled to "withdraw from the contract at any time if it deems it in its interest to do so, especially if it has been advised that the claim has no prospects of success, and even if the withdrawal causes prejudice".[4018] Furthermore, while accepting the common law principle that withdrawing from a mandate in such instances where prejudice is caused would render that party liable for damages (on account of it amounting to a repudiation of the mandate), FAWU nonetheless sought reliance on the minority judgment in the SCA and argued that the "employees would have obtained condonation had they applied for it" and therefore, "it did not matter that the union failed to institute proceedings … timeously ... [since the] business of the mandate … could still be performed."[4019]

The court considered the constitutional grounds raised and while agreeing that unions do enjoy a constitutional right to autonomy,[4020] pointed out that this right is not

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[4014] As paraphrased from *Food & Allied Workers Union v Ngcobo NO* 2013 34 ILJ 3061 (CC) 3067 para 17.

[4015] 3064 para 2. The basis of this argument, in the words of the court, was as follows:

> "It centred on a provision in its constitution, clause 5.11, that provides that the aims and objectives of the union include providing 'legal assistance to members and/or officials where it deems it in the interest of the union to do so'. This provision, it contended, must be read together with its constitutional right to determine its own administration, programmes and activities, enshrined in the Constitution and the LRA. Its right to determine its own administration had thus been exercised, through clause 5.11, so as to limit the extent of its contractual liability to those it undertook to represent" – 3067 para 18, [footnotes omitted].

[4016] 3069 para 24.

[4017] 3069 paras 26-27.

[4018] 3068 para 21.

[4019] 3068 para 22.

[4020] The court explained the origins of the principles, stemming from the interim Constitution – before stating:

> "These principles arose in response to a half-century of legislated racial oppression during which, until 1979, discriminatory laws prohibited the majority of this country's people, under criminal penalty, from forming and joining trade unions. The right not only to organize through unions, but for unions

unfettered.[4021] Ultimately, the CC found against FAWU,[4022] based primarily on two points. Firstly, the court identified how the drafters of the trade union constitution "foresaw that those working for the union might be negligent in performing their duties" by means of only providing "a limited indemnity from its consequences". This, the constitution made dependent on whether or not the conduct of the officials in question "constitute misconduct".[4023] Importantly however, the "provision does not say that the union itself is exempt from those consequences" – on the contrary, the union took responsibility for those who acted on behalf of the union, albeit negligently.[4024] Secondly, the court summarised what was at the heart of FAWU's conduct as follows:

> "Even if the union could withdraw, it nonetheless had a duty to take that decision in good faith and to notify the employees promptly. These qualifications underlie the law of mandate: a mandatary must act in good faith, and may withdraw only if there is still time for the mandator to fulfil the mandate. The union did not do this. Rather, it seems to have cut the employees loose to protect itself from the unpalatable consequences of its failure to represent them properly."[4025]

This decision is now widely cited as authority for the potential of union members instituting action against their unions.[4026] But where does that leave members? As

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to have organizational autonomy in pursuing their members' rights, was thus an integral part of the constitutional vision that sought to replace that repressive history" – 3070 para 28, [footnotes omitted].

[4021] The court considered the FAWU constitution [*Food & Allied Workers Union v Ngcobo NO* 2013 34 ILJ 3061 (CC) 3072 paras 32-34], and further rejected FAWU's arguments of a "tacit term" being read into the mandate between them and the employees, that provided that FAWU would, *at some point*, make the referral to the LC, and that same did not necessarily have to happen prior to the 90-day limitation – 3072-3073 paras 36-37.

[4022] 3075 para 47.

[4023] 3072 para 33.

[4024] 3072 para 33.

[4025] 3072 paras 35, [footnotes omitted].

[4026] See for instance Du Toit et al *Comprehensive Guide* 248-249. Similarly, Grogan's twelfth edition of *Workplace Law*, no longer mentions the *Jada* decision – with *Fawu v Ncgobo* (understandably) being cited in its place – Grogan *Workplace* 351. At this juncture, mention must be made of the Constituional Court decision of *National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd and Others* 2015 2 BCLR 182 (CC). In the majority judgment, handed down by Cameron J, the following is stated [202F-G] in the final paragraph in respect of the options available to employees where NUMSA had failed to review a refusal for condonation by a bargaining council: "Nor is condonation the only recourse for the employees who, through no fault of their own, will be unable to join the action against [the employer]. NUMSA failed to act promptly at various points during the litigation. That may make it possible for the employees of [the employer companies] to seek recompense from [their union] on the basis of negligent mismanagement of their claim". A footnote [n 80] to this passage refers to the *Ngcobo* decision before the Constitutional Court, where Cameron J also penned the judgment. The footnote ends with the

cautioned by Du Toit et al, while *Ngcobo* "confirmed that the union was liable for contractual damages",[4027] a "delictual claim against a union for failure to comply with an alleged duty of care towards its members will not be easy to prove".[4028] Their point of reference is the *Jada* decision.[4029] Furthermore, the existence of an express mandate in *Ngcobo* may not be present in future cases and the success or otherwise of a contractual claim may well depend on (a perhaps contested) construction of the union constitution.

Earlier, the remark was also made that *Ngcobo* may serve as South Africa's equivalent of the DFR in the USA (discussed in chapter 9). It is submitted that there is at least one valuable lesson to be learnt from the USA example. In *Ngcobo* – and in the absence of the employer being a party to proceedings – the dismissals were found to be unfair as a precondition for the success of the action against the trade union. Only the trade union was party to the claim, but the courts nonetheless considered the merits of the case against the employer to uphold the merits and quantum of the claim. Would it not perhaps be a fairer approach – in line with the USA experience – to decide on the apportionment of damages, with the court deciding (in the interests of the member), which damages lay at the feet of the employer and which lay at the feet of the union? After all, the union could not have been liable for not "fairly representing" its members had the unfair dismissal not taken place. Why should *only* the union bear the costs thereof?

What the discussion above shows is that as yet, a delictual claim by a member against a trade union before the civil courts has not been successful (and the Labour Court does not have jurisdiction over such a claim). In contrast, a claim based on breach of contract in case of a mandate (not necessarily a union constitutional provision) has been successful in the civil court. However, in the absence of an express mandate, the outcome of a contractual case is much more uncertain. Furthermore, it is unlikely that a claim based on contract (also arising from the

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statement that *Ngcobo* serves as "countenancing a *delictual claim* by dismissed employees against their union for its negligent failure to prosecute their unfair dismissal claim" [my emphasis]. With respect, given the examination in the text of all three decisions as the *Ngcobo* matter made its way from KwaZulu-Natal through the SCA to the Constitutional Court, this seems incorrect. The *Ngcobo* decisions focus on the contract of mandate that was found to be in place between the plaintiffs and their union – the matter was never decided on the basis of a delictual claim.

[4027] Du Toit et al *Comprehensive Guide* 248.

[4028] 248.

[4029] 248.

constitution of a trade union) could form the basis of a claim before the Labour Court. In this regard, it is true that subsection 158(1)(e) of the LRA (discussed in chapter 12) clothes the Labour Court with the power to remedy a dispute between members and a union based on non-compliance with a trade union constitution, experience (also discussed in chapter 12) has shown that this section is relied on mostly in disputes between unions and their own officials, office bearers or shop stewards. These disputes do not involve the ordinary representative functions of a trade union and do not involve a breach of contract. Rather, they typically relate to underlying, factional internecine power-struggles. They do *not* relate to the underlying focus of this study. As such, the increase in litigation around section 158 of the LRA speaks more of the increasing internal strife within many of South Africa's (former) powerful unions rather than to increased awareness of trade union member rights. And, on top of all this, the courts, in general, are reluctant to get involved in internal trade union affairs.[4030] In some cases, [4031] however, they have no choice:

> "It is with great reluctance that it has to be stated that the applications before the Court as is evident from the pleadings, are symptomatic of the deep fissures within SAMWU. This is indeed a sad state of affairs for a large union with a rich history in local government circles, and an important partner in the Main Collective Agreement entered into with all local municipalities. In the end, the old African proverb that; 'When elephants fight, it is the grass that suffers' is even more apposite in this case. The 'elephants' in this case are SAMWU national office bearers in the one corner, and the Eastern Cape PEC/region of SAMWU in the other corner. The 'grass' is unfortunately the long-suffering membership of SAMWU, who diligently pay their monthly subscriptions, with an expectation that their interests as workers will be dutifully served, instead of being casualties in an internal fight which

[4030] See for instance *Mphage v SA Municipal Workers Union* 2013 34 ILJ 1764 (LC) 1768E-F, this being a dispute between shop stewards and SAMWU (based on s 157 of the LRA), where Molahlehi states:

> "In my view, on the facts and the circumstances of this case, assuming jurisdiction will amount to interfering in the domestic affairs of a trade union. This would in a sense undermine the fundamental principle of the autonomy of the government of trade unions. The fundamental aspects of the autonomy of trade union government is that internal decisions are taken on the basis of the democratic principle of majority rule."

[4031] See by way of example the following cases involving disputes between unions and their officialdom or representatives: *Apollis v General Industries Workers Union of South Africa* (J423/15) 2015 ZALCJHB 93 (15-03-2015) *SAFLII* <http://www.saflii.org/za/cases/ZALCJHB/2015/93.pdf> (accessed on 10-09-2018); *SA Transport & Allied Workers Union v Zondo* 2015 36 ILJ 2348 (LC); *Zondo v SA Transport & Allied Workers Union* 2015 36 ILJ 2916 (LC); *Chauke v Food And Allied Workers Union* (J702/15) 2015 ZALCJHB 273 (26-08-2015) *SAFLII* <http://www.saflii.org/za/cases/ZALCJHB/2015/273.html> (accessed on 02-03-2019); *City of Johannesburg v SA Municipal Workers Union* 2017 38 ILJ 1342 (LC) and *Tshililo v City of Johannesburg* 2018 12 BLLR 1180 (LAC).

they never bargained for. In a nutshell, the internal squabbles within SAMWU are not in anyone's interests, more specifically its members."[4032]

The irony is therefore that while this study attempts to garner clarity on remedies available to trade union members who might have legitimate grievances with their unions, existing mechanisms often provide the ammunition to unions and their officials or other representatives to fight each other at the expense of the general membership. However, in this irony is an important insight for this study, namely that legislative intent in the regulation of trade unions does not necessarily translate into improved accountability to trade union members. At the very least, it also serves to explain the importance of legislation to augment the gaps and difficulties associated with the common law principles in protecting trade union members discussed above.

11 6 Conclusion

In this chapter, two broad topics were addressed. Firstly, the chapter discussed the period of legislative readjustment to the regulation of trade unions and their accountability. This process was marked by two distinct events – the readjustment to internal (white) trade union accountability in the 1956 Act and the readjustment to a uniform system of regulation of trade unions (inclusive of black trade unions) following on the recommendations of the Wiehahn Commission. Secondly, the chapter considered the common law approach to trade unions in South Africa, a discussion, as was done in respect of Britain and the USA, included in the chapter on readjustment.

As far as legislation is concerned, and in considering the first readjustment brought about by the 1956 Act (external power over internal union affairs) what is noteworthy is the fairly rapid transition between the various phases in the regulation of trade unions in South Africa – from prohibition and proscription commencing towards the late nineteenth century to acknowledgement and assimilation by 1924, through the first indicator of readjustment in the ICA 1937, to the full realisation of readjustment in ICA 1956. While both the 1937 and 1956 Acts regulated union constitution requirements, the 1956 Act noticeably expanded the extent of this regulation. So too

[4032] *South African Municipal Workers Union v Qina* (J965/18) 2018 ZALCJHB 185 (25-05-2018) *SAFLII* <http://www.saflii.org/za/cases/ZALCJHB/2018/185.pdf> (accessed on 02-03-2019) 12 para 30.

did both Acts regulate the nature of the information that needed to be provided to the Registrar. However, and of particular interest to this study, were the increased powers afforded the Registrar (and Minister) in terms of the 1956 Act, including that the Registrar could:

(i) Institute – at his own behest – (subject to, *inter alia*, non-compliance with the union constitution or the officialdom having acted in a manner which is unreasonable in relation to the members) an enquiry into the internal affairs of the union;
(ii) Subpoena and interrogate witnesses and documentation as required;
(iii) Submit a report to the Minister, including recommendations as to what should be done. The Minister would then exercise his discretion as to afford the union the opportunity to respond with reasons why the Registrar's recommendations should *not* be implemented and, thereafter, act accordingly.

What is clearly seen is the diminished ability of unions to influence external regulators. The approach of the 1956 Act serves as an illustration of a mechanism utilised in South Africa's past to promote trade union democracy and accountability to its membership. The merits of this approach will be considered further in the remaining chapter of this study.

Even so, the discussion showed that this was still a system of racial segregation. The events of 1973 triggered a growing realisation amongst employers (and the government) that the denial of formal recognition of black trade unions was unsustainable. Initial amendments to legislation focusing on black worker representation, ostensibly in an endeavour to nullify the need for black trade unions, in fact, assisted in the initial formation of what was to become the so-called "independent" unions. It did not take long for the Wiehahn Commission and subsequent legislation to provide for the second clear readjustment towards uniformity in the regulation of both white and black trade unions.

Interestingly, these independent black trade unions of the mid-1970s were characterised by their internal democracy. As discussed, this brings to light the noteworthy contrast between white unions, compelled by external controls (legislation/the Registrar) to promote internal democracy and black trade unions,

promoting internal democracy in order to escape external control (state political interference). Importantly, therefore, the black unions that became part of the industrial relations system in the mid-1980s had a developmental history already grounded in internal democracy – and were now joining (initially reluctantly) an established apparatus grounded on the notion that unions require legislative coercion to ensure internal democracy.

A further interesting note of comparison is that Britain saw its "Winter of Discontent" in 1979, brought about by its unions at the height of their powers, before a change in government (and associated legislation) brought about the complete (negative) change in their fortunes. In the same year, South Africa saw the Wiehahn Commission (and subsequent legislation) bringing about a complete change to the industrial relations system, so as to incorporate *into* that system the increasingly powerful black trade unions. Both countries saw a legislative response to powerful trade unions, but for very different purposes. And it has to be mentioned that the independent trade unions in South Africa were not necessarily fearful of employer or judicial oversight (unlike the early position in Britain and the USA) – their legitimate concerns stemmed from participating in a system controlled by a politically-opposed state with all its machinery arguably at the height of its powers.

In this regard, the discussion also showed that the socio-economic and political turmoil in South Africa during the late-1970s and early 1980s provided the platform for the broader role of black independent trade unions as an alternative, legal means of continuation of the political struggle against disenfranchisement and oppression. All of this meant that by the late 1980s the industrial, economic, and political power wielded by black workers, their unions and their federations, was undeniable. The labour relations platform for a comprehensive legislative intervention in the form of the Labour Relations Act, 66 of 1995, formulated in light of constitutional democratic values established in the first part of the 1990s, was set. This legislation and its subsequent amendments are discussed in chapter 12.

The years under consideration in chapters 10 and 11 also saw the development of the principles of the common law in regulating trade unions and their accountability in South Africa. Noteworthy takeaways from this discussion are the following. Firstly, in contrast to the experience in Britain and the USA and mainly due to the influence of Roman-Dutch law, our courts found it quite easy to accommodate trade unions under the law applicable to voluntary associations, to recognise the separate status of trade

unions, to elevate the union constitution (benevolently interpreted) to a binding contract enforceable as such (admittedly dependent on its interpretation), to express themselves on the duty owing by trade union officials and office bearers to their members (based on the concepts of *mala fides*, gross unreasonableness and the principles of natural justice) and to use this approach as a basis for potential trade union liability to its members based on principles of contract (and, where needed, delict). At the same time, our courts have shown themselves to be pragmatic in adapting principles from other spheres of law (such as corporate law) and apply them to trade unions. What this means, is that South Africa developed an apparently solid set of common law principles on which trade union members may rely should a trade union (through its officials and office bearers) not act as expected of it. At the same time, the discussion of recent case law in which union members tried to hold their unions liable on the basis of delict or contract shows the limitations of relying on the common law to hold trade unions accountable. In contrast to the administrative machinery provided by legislation, the common law, in the first instance, requires court proceedings. Furthermore, it requires (for the most part)[4033] the involvement of the civil courts. In addition, in cases based on delict, there are any number of obstacles militating against a successful claim. In case of a claim based on contract, and in the absence of an express mandate, the ability to sue the union based on breach of contract may also be a tenuous option, as it is dependent on the interpretation of the union constitution. What all of this means, is that legislation understandably remains the most important mechanism to promote trade union accountability. This in mind, the chapter to follow provides a comprehensive discussion of the current legislative framework for the regulation of trade unions and their accountability to their members.

[4033] Earlier in the text reference was made to subs 158(1)(e) of the LRA 1995. While any proceedings brought on the basis of this section is not done in terms of the common law, it is conceivable that the Labour Court will use principles of the common law to resolve disputes envisaged by this section. This is discussed in more detail in chapter 12.

CHAPTER 12: THE CURRENT DISPENSATION: THE LEGISLATIVE REGULATION OF TRADE UNIONS AND THEIR ACCOUNTABILITY IN SOUTH AFRICA

"Trade unions are public institutions, not private businesses"[4034]

12 1 Introduction

This chapter is the third and final chapter addressing the regulation of trade unions and their accountability in South Africa. It builds on the discussion of the phases of assimilation of and readjustment to trade unions as well as the common law in chapters 10 and 11 and examines the current legislative framework for the regulation of trade unions and their accountability in South Africa. Those chapters showed the complexity of South African's trade union past, in the first instance predicated upon the underlying (but all-encompassing) system of Apartheid, before considering the significant political upheaval – both in broader society and within organised labour – that provided the basis for the current industrial relations system. These chapters also showed a much more accommodating common law approach to trade unions (compared to Britain and the USA) as a result of the influence of Roman-Dutch law and the development of a strong set of common law principles (originating primarily from the law of voluntary associations and contract law) based on which the courts may exercise control over trade union accountability. The discussion also showed that the potential of the common law to contribute to trade union regulation is limited. It is not surprising, then, that trade union accountability was seen as an appropriate target for legislative intervention. Building on a system of the registration of trade unions (and advantages associated with it) the degree of legislative intervention fluctuated over the years and, as the discussion will show, settled on a relatively non-interventionist approach in the LRA 1995.

By means of introduction, the chapter will first examine the immediate context of South Africa's new labour law dispensation (commencing with the LRA 1995), including the influences and negotiations that served as a backdrop to the 1995 legislation. As the chapter will show, this transition to the current dispensation in effect may be considered to constitute a third readjustment to trade unions and their

[4034] *United People's Union of SA v Registrar of Labour Relations* 2010 31 ILJ 198 (LC) at 203I, in the ruling of Van Niekerk, J.

regulation in South Africa.

This will be followed by a broad examination of the current legislative regulation of trade unions and their accountability. To a large extent, this requires a focus on the provisions of the LRA 1995 – specifically how the Act regulates the activities of trade unions through three mechanisms: the promotion of collective bargaining (and, as such, entrenching the institutional role of trade unions in the labour relations system); regulation of the representative role of trade unions – both within the workplace and in the external (to the workplace) dispute resolution system; and the direct regulation of trade unions, their internal functioning and their external accountability. In doing so, attention will also be paid to developments since 1995, especially the three rounds of amendment of the LRA 1995 – in 2002, 2015 and 2019, the introduction of a Code of Good Practice on Collective Bargaining and the Guidelines the Registrar uses to determine new or continued registration of trade unions. Throughout the discussion, case law interpreting the different legislative provisions will also be considered.

12 2 The third readjustment – the background to the LRA 1995

The previous chapter described legislative development towards the end of the 1980s and concluded with a discussion of the ill-fated Labour Relations Amendment Act of 1988. South Africa – to put it mildly – was soon to see significant political, economic and social transformation, with the early 1990s a particularly complex period in the country's history.[4035] The immense transformation that occurred in South Africa during this period – including the promulgation of the Interim Constitution Act 200 of 1993 – required a serious re-evaluation of South Africa's legislation.[4036] This included

[4035] Included herein would be the rapid move towards the new political dispensation that was to culminate in South Africa's first free and fair election in 1994. This was preceded by events such as the release of Nelson Mandela in 1990, the unbanning of various political parties, and the Convention for a Democratic South Africa (CODESA). For a succinct chronological representation of occurrences during this period, see M Finnemore *Introduction to Labour Relations in South Africa* 11 ed (2013) 41-43.

[4036] As stated by M Christianson et al (eds) *Essential Labour Law: Collective Labour Law 2* 3 ed (2002) 15, part of the underlying need to re-evaluate South Africa's industrial relations system, owed much to its fragmented nature – particularly with regards to industrial legislation. The early part of the 1990s had seen several Acts designed to remedy certain gaps left as a result of the focused nature of preceding labour legislation, by incorporating certain sectors of the labour market, such as agriculture and the public service, into the mainstream industrial relations system. A further factor that no doubt pressed for legislative reform, was the increasing prevalence of strike action during the initial stages of the 1990s, and the impact hereof on South Africa's economy. As stated by E Donnelly & S Dunn "Ten Years After: South African Employment Relations Since the Negotiated Revolution" (2006) 44 *BJIR* 1 8:

South African labour legislation, which by no stretch of the imagination would be able to comply with a new constitutional dispensation.[4037]

12 2 1 The Cheadle Commission and the new LRA

1994 saw the Department of Labour appoint a Ministerial Legal Task Team (the so-called Cheadle Commission) with the mandate to review, reform and draft new labour legislation.[4038] Following negotiations between organised labour, business and the state,[4039] the new LRA came into operation on 11 November 1996.[4040] As a point of departure, the new Act made no distinctions based on race – thereby ensuring that the former dualist system remained a relic of the past.[4041]

12 2 2 The influence of the International Labour Organisation

While the full extent of the 1995 Act, as it applies to trade unions and their members, will be discussed in greater detail during the course of this chapter – one important aspect already deserves mention. In their discussion of the drafting process of the new Act, Du Toit et al address the "considerable influence" exerted by the International

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"[T]he incidence of violence and intimidation progressively worsened as strike activity intensified during the transition from confrontation to dialogue. Nor were racially fractured workplace relations repaired. Without even allowing for under-reporting, strike activity reached a peak between 1990 and 1994 at over 4 million days lost per year. Indeed, the country's reputation for strike proneness prompted Anstey to call South African's 'world class strikers'" [footnotes omitted].

[4037] M Christianson et al (eds) *Essential Labour Law: Individual Labour Law 1* 3 ed (2002) 10.

[4038] Christianson et al *Individual Labour* 10, in citing the "Draft Negotiating Document in the Form of a Labour Relations Bill" [GN 97 of 1995 GG 16259 (10 Feb 1995)], explains that the Commission's finding, and main criticism, was that the South African law "did not necessarily conform to the requirements of the new Constitution, or international instruments to which the government had committed itself; that it was too complicated for ordinary employers and workers; that it operated too slowly; that it was regulated by too many disparate statutes and regulations; that it failed to deal with significant categories of employees; and that the law did not effectively promote collective bargaining or dispute-resolution". See further, C O'Regan "1979-1997: Reflecting on 18 Years of Labour Law in South Africa" (1997) 18 *ILJ* 889 898; Ministerial Legal Task Team "Explanatory Memorandum" (1995) 16 *ILJ* 278 278.

[4039] See Donnelly & Dunn (2006) *BJIR* 10 for the crucial role played herein by NEDLAC, and the interplay and participation in this structure by unions, employers and government.

[4040] Christianson et al *Individual Labour* 10. The Act heralded a new era of labour relations in South Africa and included provisions renaming the Industrial Court to that of the Labour Court and created the CCMA.

[4041] Section 212 of the 1995 Act, lists the enactments repealed in terms of the new Act. Essentially, the 1995 LRA repealed all its predecessors in their entirety, starting with the 1956 Labour Relations Act, all the amendments that followed, and ending with the Labour Relations Amendment Act 9 of 1991.

Labour Organisation's ("ILO") Fact-Finding and Conciliation Commission in 1992.[4042] The Commission reported "on its investigation into the complaint lodged by COSATU against the previous LRA"[4043] a complaint aimed against the 1988 amendments to the 1956 Labour Relations Act (previously ICA 1956).[4044] In particular, the earlier complaint was that "[i]f passed, the [1988] amendments will make fundamental inroads into the freedom of association of trade unions in South Africa".[4045] More specifically, so as to bring the complaint within the required parameters of a "curtailment of freedom of association",[4046] it was argued that the proposed amendments confirm the South African Government's preference for "racially constituted unions at the expense of non-racial ones"[4047] and would result in a "fundamental abridgement of the right to strike".[4048] One outcome of the investigation was that some of the 1956 Act's

[4042] D du Toit, S Godfrey, C Cooper, T Cohend & A Steenkamp *Labour Relations Law: A Comprehensive Guide* 3 ed (2000a) 123.

[4043] 123. For the Commission's Report, see Governing Body, International Labour Organization [ILO Director-General] *Prelude to Change: Industrial Relations Reform in South Africa – Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa (Report of the Director-General – First Supplementary Report)* (1992) 1. For the initial ILO referral/complaint document, see: Governing Body, International Labour Organization [ILO Director-General] *Report of the Director-General – Fourth Supplementary Report: Complaint Submitted by the Congress of South African Trade Unions (COSATU) Against the Government of the Republic of South Africa* (1988) 1.

[4044] This was in the form of the Labour Relations Amendment Act 83 of 1988.

[4045] Governing Body, International Labour Organization *Complaint Submitted* (1988) 3.

[4046] 3. Given that South Africa only re-joined the ILO officially on 26 May 1994, and that at the time of the complaint being lodged by COSATU, and for the duration of the Commission's investigation culminating in its Report in 1992, South Africa had neither ratified or been party to the ILO's Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87), the alternative grounds upon which the ILO founded its jurisdiction in this matter, are set out in Chapter 2 of the Report: Governing Body, International Labour Organization *Freedom of Association* (1992) 4 [ILO Convention 87 was duly ratified by South Africa on 19 February 1996].

[4047] Governing Body, International Labour Organization *Complaint Submitted* (1988) 3.

[4048] Governing Body, International Labour Organization *Complaint Submitted* (1988) 3. In focusing on the latter complaint, five key factors were, *inter alia*, highlighted: (i) Strike action in contravention of section 65 would "expose participants to criminal prosecution, civil claims for damages and dismissal" [see Governing Body, International Labour Organization *Complaint Submitted* (1988) 6]; (ii) Changes being sought to the (then) maximum possible 60-day "cooling-off period" prior to strike action being permitted, through the introduction of a discretion lying with a Department of Manpower official, regarding the extension of such period, as they see fit [Governing Body, International Labour Organization *Complaint Submitted* (1988) 6]; (iii) The attempt to prohibit secondary/sympathy strikes [Governing Body, International Labour Organization *Complaint Submitted* (1988) 7]; (iv) The attempt to prevent intermittent strikes – this was to be done by means of prohibiting a strike over a dispute "which is the same or virtually the same as a dispute which during the previous 12 months gave rise to a strike" [see Governing Body, International Labour Organization *Complaint Submitted* (1988) 7]; and finally, (v)

provisions (as amended) were found to be incompatible with the principle of freedom of association – and it was recommended that "these impediments to organisational freedom be removed".[4049] Included among these provisions was the controversial section 12 of ICA 1956 which, as discussed earlier, granted the Registrar "wide powers to interfere in elections and internal affairs of trade unions".[4050] The significance of these recommendations become apparent when one considers that the "Ministerial Legal Task Team charged with drafting the LRA was instructed that the new law should 'contain a recognition of fundamental organisational rights of trade unions' in the context of, amongst others … the findings of the ILO's Fact-Finding and Conciliation Commission …".[4051]

At first blush, therefore, and given that the earlier and most invasive provisions regarding the regulation of internal union democracy were wholly omitted from the new LRA, it would appear as if the influence of the ILO was central in the decision to remove them and that it was a complaint lodged by South Africa's biggest labour federation that resulted in the change. However, the Commission's Report, released in 1992 and entitled "Prelude to Change: Industrial Relations Reform in South Africa",[4052] was far more expansive than the original complaint tabled by COSATU in 1988.[4053] Part of the reason lies in the four-year timespan between COSATU's complaint to the ILO and the

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The proposed interference with a union's indemnity against damages claims for strike action, including herein the proposed provision (to become subsection 79(2)) that would see "members, officials and office-bearers" being deemed to be "acting on behalf of the trade union unless the contrary is proved, thereby fixing them with liability unless they can prove their innocence" [as per Governing Body, International Labour Organization *Complaint Submitted* (1988) 7]. For a succinct commentary on the complaint, and further background surrounding the subsequent Commission, see S Saley & P Benjamin "The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa" (1992) 13 *ILJ* 731 731-736.

[4049] Du Toit et al *Comprehensive Guide* 123.

[4050] 123.

[4051] 123-124, [footnotes omitted].

[4052] Governing Body, International Labour Organization *Freedom of Association* (1992) 1.

[4053] Saley & Benjamin (1992) *ILJ* 736 provide background to the initial disagreements pertaining to the ambit of the Commission, whereupon, shortly prior to its commencement, it was settled as follows:

> "To deliberate on and consider the present situation in South Africa insofar as it relates to labour matters with particular emphasis on freedom of association". See further Governing Body, International Labour Organization *Freedom of Association* (1992) i, 9-10. In the Summary section of the Report [Governing Body, International Labour Organization *Freedom of Association* (1992) ii], the Commission clarified that any conclusions reached within the Report, essentially related to two issues – with the former relating to freedom of association, and the latter, to "specific acts and measures taken or susceptible of being taken against trade unions and their members to diminish or impede the attainment of their legitimate functions as unions".

time when the Commission formally commenced its investigation[4054] – a period which saw extensive deliberation and negotiations between organised labour (including the trade union federations) and the government, with continued pressure through industrial action and stay-away campaigns.[4055] Furthermore, the Labour Relations Amendment Act 9 of 1991 already saw many of the grounds of the initial COSATU complaint (based on the 1988 Act) addressed[4056] – including the "reverse-onus" provision as contained in subsection 79(2).[4057]

12 2 3 The ILO recommendations

While the recommendations made by the Commission were numerous, of particular interest to this study were the comments surrounding section 12 of the 1956 LRA. In addressing the "wide-ranging powers" given to the Registrar "to conduct an inquiry into the internal affairs of a registered trade union",[4058] the Commission (quoting the relevant principles formulated by the ILO's Committee of Experts in respects of the Application of Conventions and Recommendations) stated the following:

> "The Committee considers that, although the application of legislative provisions and union rules concerning an association's administration must by and large be left to the members of the trade union, the principles set out in the Convention [No. 87] do not exclude external control of the internal acts of an organisation where they are alleged or where there are major reasons for believing them to be against the law (which should not of course infringe the principles of freedom of association) or the union's constitution."[4059]

The primary objection, however, was against the existence of a *discretion* held by external bodies, since it was reasoned that herein lay the possibility of contravening a trade union's rights:

> "If on the other hand the administrative authority has discretionary power to examine the books and other documents of an organisation, conduct an investigation and demand information at any given

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[4054] Following initial meetings with the South African Government representatives in September 1991, the Commission opened the hearings in Cape Town on 7 February 1992, as per Saley & Benjamin (1992) *ILJ* 736-737, and concluded on 21 February 1992 in Johannesburg.
[4055] Saley & Benjamin (1992) *ILJ* 733-734.
[4056] Governing Body, International Labour Organization *Freedom of Association* (1992) 8-9.
[4057] See § 11 3 6 above.
[4058] Governing Body, International Labour Organization *Freedom of Association* (1992) 134 para 600.
[4059] 135.

> time, there is a grave danger of interference which may be of such a nature as to restrict the guarantees provided for in Convention No. 87. Investigatory measures should be restricted to exceptional cases, when they are justified by special circumstances such as presumed irregularities that are apparent from annual financial statements or complaints reported by members of the trade union. Furthermore, in order to guarantee the impartiality and objectivity of the procedure, these controls should be conducted subject to review by the competent judicial authority. *Legislation which empowers the administrative authorities to investigate the internal affairs of a union at their entire discretion does not conform to the principles of the Convention.*"[4060]

As a result, the recommendation was that subsection 12(3) should "more narrowly [define] the grounds on which the Registrar may conduct an inquiry with a view to preventing the possibility of abuse".[4061]

Part V, Chapter 13 of the Commission's Report, entitled "Conclusions and Recommendations",[4062] listed and discussed – including those pertaining to subsection 12(3)[4063] – the various recommendations under six main topics, namely: (i) The right to form and join trade unions;[4064] (ii) The right of trade unions to function freely;[4065] (iii) The right to strike;[4066] (iv) Protection of the right to organise;[4067] (v) Collective bargaining;[4068] and, finally, (vi) Protection of workers excluded from the

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[4060] 135 para 601, [my emphasis].

[4061] 135 para 602. The remainder of the paragraph did see the Commission make the important point that, whereas, "[it] was not suggested in evidence that such abuse [by the Registrar] had occurred … the existence of such a very wide discretionary power always leaves such a possibility open."

[4062] See Governing Body, International Labour Organization *Freedom of Association* (1992) 128-161 para 564-745.

[4063] See § 11 2 1 5 above.

[4064] This section included: the (a) Constitutions of trade unions; the (b) Registration of trade unions; aspects pertaining to (c) Racially exclusive trade unions; and the (d) Deregistration and dissolution of unions. See Governing Body, International Labour Organization *Freedom of Association* (1992) 131-134 paras 580-599.

[4065] This section included: the (a) Executive powers of interference in elections and internal affairs of trade unions; the (b) Legislative regulation of financial affairs of trade unions; the (c) Restrictions on political activities of unions and their office-bearers and officials; and the (d) Impact of security and related legislation on trade union activities. See Governing Body, International Labour Organization *Freedom of Association* (1992) 134-141 paras 600-638.

[4066] This section included: (a) Procedural requirements; (b) Aims and exercise of the right to strike; (c) Essential services; (d) Pickets; and the (e) Sanctions for striking. See Governing Body, International Labour Organization *Freedom of Association* (1992) 141-146 paras 639-670.

[4067] This section included: (a) Attacks on trade unionists and trade union premises; (b) Government interference in trade unions; (c) Government funding of trade unions; and (d) Employer restrictions on access to premises. See Governing Body, International Labour Organization *Freedom of Association* (1992) 146-152 paras 671-707.

[4068] This section included: (a) Interference in collective bargaining agreements and procedures; (b) Provision of facilities for collective bargaining; and the (c) Impact of other statutes on collective

LRA.[4069]

Several further points of recommendation by the Commission warrant brief examination. Firstly, with regard to the constitutions of trade unions, the ILO's Committee of Experts was cited as saying that it is not unheard of for legislative requirements that were "fairly detailed on certain points"[4070] regarding internal administrative aspects of trade unions (elections of officers, fund management and the like) – with their purpose "*primarily to protect the rights of members*, to provide for a sound administration and *to prevent legal complications from arising at a later date as a result of constitutions being drawn up in insufficient detail*".[4071] However, it was clarified that while such measures do not restrict the right of trade unions to draw up their own constitutions and to decide on their own rules, it remained questionable whether "it is always necessary for legislation to contain extremely detailed provisions",[4072] particularly where the approval of compliance with these provisions lay "within the discretionary powers of the public authorities".[4073] Despite this, subsection 8(1) of the (post-1991 amended) LRA was deemed *not* to be in contravention of the Conventions: the list of required topics to be dealt with by trade union constitutions, "[t]hough long and somewhat elaborate",[4074] still permitted unions to prescribe their own content. Subsection 8(4)(a)(iv) of the 1956 LRA (previously ICA) was, however, found to be problematic. The wording of this section permitted the Registrar, under threat of non-registration of that union, to require of a trade union to address "any other matter which in the opinion of the Registrar is suitable to be dealt with in the constitution of a trade union … as the case may be". This was deemed too open-ended.

Secondly, regarding the potential "suspension or removal of trade union officers" in terms of section 12 of the 1956 LRA – which included the possibility of elections being ordered to be held afresh (with the decision of the Minister subject only to judicial

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bargaining. See Governing Body, International Labour Organization *Freedom of Association* (1992) 152-155 paras 708-722.

[4069] This section included: (a) Farmworkers and domestic workers; (b) The Public Sector; and the (c) "Self-governing territories and "national states". See Governing Body, International Labour Organization *Freedom of Association* (1992) 155-159 paras 723-745.

[4070] Governing Body, International Labour Organization *Freedom of Association* (1992) 131 para 580.

[4071] 131 para 580, [my emphasis].

[4072] 131 para 580.

[4073] 131 para 580.

[4074] 131 para 581.

review, as opposed to appeal on the merits) – the recommendation was made that such drastic measures should best be left to an impartial judicial system (with the option to appeal), rather than be given to statutory officials or the executive.[4075]

Thirdly, in considering aspects surrounding "sanctions for striking",[4076] the Commission noted both COSATU's complaints[4077] and the South African Government's response thereto,[4078] before cautioning against legislation and common law provisions "which expose workers and their unions to actions for damages and/or interdicts in respect of the legitimate exercise of the right to strike".[4079] The recommendation was made that it remains "most important that some measure of protection against civil liability be maintained and that the immunities available under section 79 of the [1956] LRA are not weakened or completely avoided because of technical irregularities in the calling or conduct of strikes."[4080]

Fourthly, in examining the broader protection of the right to organise and, specifically, the use of violence against and intimidation of trade unionists and attacks on trade union premises,[4081] the inescapable conclusion[4082] was reached that "to a very large extent, COSATU and other unions, and their members, were outside the protection of the law as enforced by the police" and recommendations for reform were made.[4083]

[4075] 135-136 para 604.

[4076] 144 para 664.

[4077] Grounded upon "the liability of strikers and their unions to prosecution under criminal provisions; interdicts (injunctions); damages claims through civil actions; and dismissal" – see Governing Body, International Labour Organization *Freedom of Association* (1992) 144 para 664.

[4078] Governing Body, International Labour Organization *Freedom of Association* (1992) 144-145 para 665 states:

> "The Government considered that it was impossible to legislate rules in this regard and that the unfair labour practice procedure, which applied the rules of fairness and equity, should be adequate to deal with this difficulty. It recognised, however, the fundamental importance of clarifying the uncertainty and addressing the inadequacy of protection under the LRA and asked for advice on how to improve the present Industrial Court system and streamline its operations. It considered that this would largely solve the problem".

[4079] Governing Body, International Labour Organization *Freedom of Association* (1992) 145 para 666.

[4080] 145 para 666. In addition, the Commission recommended that the "unfair labour practice provisions of the LRA should be amended to provide appropriate protection against dismissal" of strikers participating in legal strikes, and "technically illegal" strikes that nonetheless "legitimately called for the promotion and defence of the worker's economic and social interests" – see Governing Body, International Labour Organization *Freedom of Association* (1992) 145 para 670.

[4081] 146-147 paras 671-680.

[4082] 147 para 681.

[4083] 148 para 687 states:

Finally, the Commission's views on "[g]overnment interference in trade unions"[4084] is of particular interest. It was said that "[i]t is clear from the evidence that spying on, and surveillance of trade unions by the South African authorities was, at least until very recently, an established feature of unionism in South Africa."[4085] Such "official conduct"[4086] was said to be "completely incompatible with international standards governing trade union rights" – "standards [which] are designed to enable trade unions to carry out their functions in full freedom from interference by the Government".[4087] As a result, the Commission recommended that "[s]afeguards should be established to ensure that this objective[4088] is attained",[4089] before stating:

> "These [safeguards] could range from appropriate procedures of internal auditing and official reports to external, independent machinery for considering and investigating complaints by trade unions, their members and others."[4090]

12 3 The third readjustment – the LRA 1995

The majority of the Commission's recommendations were incorporated into what was to become the new LRA. However, this is not to suggest that the Commission's Report was the sole or primary instrument in bringing about such change. This would do a glaring disservice to the mammoth task performed by the Ministerial Task Team of drafting the LRA Bill and facilitating the ensuing consultation processes involving numerous bodies, organisations and individuals,[4091] a process which culminated in

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> "Accordingly the South African Government should take all the steps necessary to ensure that these principles are implemented in respect of the events which have already occurred. It should set in place the safeguards necessary to prevent any recurrence of the kind of violence and attacks which were described in evidence before the Commission – whether by the police or otherwise. Practical measures, such as the establishment of trade union-police liaison committees and police education on trade union functions and rights should be instituted without delay."

[4084] 148.

[4085] 149 para 689. See also 149 para 689 for further reference to the Harms J and Hiemstra J judicial Commissions of Inquiry.

[4086] 149 para 689.

[4087] 149 para 689.

[4088] In this regard, the Commission stated: "In the future there should be scrupulous conformity with these standards by all agencies of the South African State" – see Governing Body, International Labour Organization *Freedom of Association* (1992) 149 para 689.

[4089] 149 para 689.

[4090] Governing Body, International Labour Organization *Freedom of Association* (1992) 149 para 689, [my emphasis].

[4091] Du Toit et al *The Labour Relations Act of 1995* 2 ed (1998) 27-28 state that "[a]bout 280 submissions

(often heated) negotiations at NEDLAC[4092] before the proposed legislation was tabled in Parliament.[4093]

Regardless of where the impetus for the legislative change originated from – be it a government compelled to negotiate with the "victors" of the country's democratisation, broader society, business, or the organised labour movement (in particular the independent unions and their federations) – what remains clear is that South Africa's labour legislation and labour relations system underwent a dramatic overhaul. This was characterised by, in the words of Donnelly and Dunn, "building a set of institutions … that would consolidate worker voice and buttress hard-won democracy" on a foundation "designed to preclude any return to authoritarianism and oligarchy."[4094] In short, the myriad influences in South Africa during this time – a "country in the throes of dramatic changes"[4095] – brought about a fundamental shift in the approach to organised labour, including their internal regulation.[4096]

The first half of the 1990s is therefore significant in that it constitutes yet another period of realignment to a position where trade unions (and, by implication, their relationship with their membership) were largely left unfettered by external interference, at least relative to the situation under the 1956 Act. South Africa's new LRA, aligned with a Constitutional framework and the ILO's guidelines and recommendations, would serve as a statute for empowering unions and their members, collectively, to "take care of their own". As such, the legislation suggested a

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were made on the Draft Bill by individuals and organisations, as well as government departments, the Public Service Bargaining Council and the Education Labour Relations Council." Included too were submissions from Business South Africa (BSA), COSATU and other Federations, that were of "primary importance and formed the basis for the negotiations within NEDLAC. See Ministerial Legal Task Team (1995) *ILJ* 280 paras 4-5, which confirms that several South African legal professionals and academics, along with international labour law experts and academics, provided assistance – in addition to the continued support and expertise provided by the ILO during the process.

[4092] See Du Toit et al *Labour Relations Act* 30-32 and Du Toit et al *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) 23-28 in this regard.

[4093] Du Toit et al *Labour Relations Act* 32 state that Cabinet ratified the revised Bill on 2 August 1995, with Parliament passing the Act on 13 September 1995.

[4094] Donnelly & Dunn (2006) *BJIR* 9. As stated by Du Toit et al *Labour Relations Act* 27, in his speech before Parliament introducing the Draft Bill of the LRA (entitled "A New Era for Labour Relations"), the then Minister of Labour Tito Mboweni spoke of the new approach being "'organised flexibility' [which] represented 'a frontal attack on the rigidities of the old'" [footnotes omitted].

[4095] Governing Body, International Labour Organization *Freedom of Association* (1992) i.

[4096] See Du Toit et al *Labour Relations Act* 26-33 for a useful summation of the background and key moments surrounding the initial drafting and related negotiations that gave rise to the 1995 LRA.

return to the traditional/historical approach to trade unionism – as a single entity based on a voluntary and collective association between employees.

The regulation of South Africa's trade unions had, therefore, come full circle. From prohibition, through acknowledgement and selective assimilation, to a selective but comprehensive (*first*) readjustment, focusing on internal union relations, followed by a further (*second*) readjustment to uniformity in regulation, before the new dispensation heralded a return to, and a reconstruction of, an industrial relations system grounded on the *autonomous*, *traditional*, role to be played by organised labour. A *third* readjustment, if one will.

12 4 The legislative regulation of unions in South Africa

12 4 1 The LRA in the context of the Constitution and an overview of the developments since 1995

The primary legislation regulating South Africa's labour relations system remains the LRA,[4097] a piece of legislation that regulates trade union activity (and their accountability) in three ways – by entrenching (and, in effect, describing) the role of trade unions through its promotion of collective bargaining, by regulating the representative role of trade unions in different contexts and by directly regulating the internal functioning of trade unions. Below, the further discussion of the LRA's provisions will be done under these three headings. At the same time, the LRA does not operate in a vacuum, but in the context of the Constitution and, furthermore, the LRA has been with us for almost a quarter of a century and has been amended and augmented as time went on. This means the discussion must take the Constitution and these amendments and augmentations into consideration.

As far as the Constitution is concerned, no more than a brief consideration is called for. Section 18 of the Constitution grants a general right to freedom of association,[4098] while section 23 elaborates on this right in the employment context. Specifically,

[4097] Of particular interest, for the purposes of this study, is the recent Labour Relations Amendment Act 8 of 2018 (hereafter LRAA) – duly discussed in more detail in the relevant sections below. But suffice it to say at this point that its focus is on, *inter alia*, providing for the extension of "the meaning of [a] ballot to include any voting by members that is recorded in secret" – a significant addition to the LRA.

[4098] The section reads, simply, as follows: "Everyone has the right to freedom of association". For an insightful historical analysis of the origins and development of the association right, in the context of South Africa, see in general M Budeli "Workers' Right to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective" (2009) 15 *Fundamina* 57 57.

workers in South Africa are granted the right to join, form and participate in the activities of trade unions, including a right to strike (limited by relevant legislative enactments) while unions are granted the right to organise, determine their own internal procedures, and to engage in collective bargaining.[4099] Furthermore, section 38 (entitled "Enforcement of rights") of the Constitution provides that "anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief". The remainder of section 38 outlines what is to be understood by "anyone" as it is used in that section, which includes "anyone acting on behalf of another person who cannot act in their own name"; [4100] "anyone acting as a member of, or in the interest of, a group or class of persons";[4101] and "an association acting in the interest of its members".[4102] In principle then, a trade union or its representatives are afforded a constitutional right to approach a competent court in order to enforce their (or their members') primary constitutional rights – which would include those rights specified in terms of section 23. This, however, should be seen in light of the principle of subsidiarity, namely that direct reliance on a constitutional right is precluded where legislation regulates that right (as is done extensively by the LRA).[4103]

As such, the focus below will be on the way trade unions and their accountability are regulated in the LRA as amended and augmented over the past 25 or so years. In this regard, Benjamin and Cheadle[4104] identify "four phases of labour law reform",

[4099] The relevant wording of s 23, as per subs 23(2)(a)-(c) reads: "[2] Every worker has the right- [(a)] to form and join a trade union; [(b)] to participate in the activities and programmes of a trade union; and [(c)] to strike." Furthermore, subs 23(4)-(5) reads "[4] Every trade union ... has the right– [(a)] to determine its own administration, programmes and activities; [(b)] to organise; and [(c)] to form and join a federation. [5] Every trade union ... has the right to engage in collective bargaining ...".

[4100] Subsection 38(b).

[4101] Subsection 38(c).

[4102] Subsection 38(e).

[4103] See, for example, *South African National Defence Union v Minister of Defence* 2007 28 ILJ 1909 (CC) and *National Union of Metalworkers of SA obo Members v Transnet SOC Ltd* 2019 40 ILJ 583 (LC).

[4104] P Benjamin & H Cheadle "South African Labour Law Mapping the Changes – Part 1: The History of Labour Law and its Institutions" (2019) 40 *ILJ* 2189 2189-2218. Part 1, as is evident from the heading, focuses on the history of South African labour law and its institutions, and is described as including "an overview of the institutional arrangements for collective bargaining and industrial action" – Benjamin & Cheadle (2019) *ILJ* 2190. Part 2, which at the time of writing was not yet released, is to focus on "the right to fair labour practices and social security" – Benjamin & Cheadle (2019) *ILJ* 2190.

namely "1994-1999"; "1999-2004"; "2004-2014"; and finally, "2014 onwards"[4105] – which serves as a useful entry point in examining the LRA's regulation of union accountability. The first phase is characterised by the creation of NEDLAC[4106] as central to the transition to the new constitutional labour law framework (embodied in 1995 LRA) and the subsequent promulgation of the various labour statutes that were to "establish [the] core workers' rights".[4107] Apart from the LRA, this includes the Basic Conditions of Employment Act ("BCEA"),[4108] the Employment Equity Act,[4109] and the Skills Development Act.[4110]

Phase two ("1999-2004")[4111] was characterised by the expressed intention of Government to review the LRA and BCEA, "to identify rigidities introduced by the new laws and any unintended consequences for job creation and business".[4112] Following an initial deadlock in discussions at NEDLAC, the outcome was amendments to both the LRA and BCEA in 2002.[4113] Some of the 2002 amendments to the LRA impacted on the powers of the Registrar (and, as such, on trade union accountability) and will be discussed in the course of this chapter.

Phase three ("2004-2014") commenced with a report issued by the Department of Labour focused on (in particular) "the practice of labour broking".[4114] This eventually led to the promulgation of the 2014 amendments to the BCEA[4115] and the 2015 amendment to the LRA.[4116] Of significance to this study, the latter also inserted

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[4105] Benjamin & Cheadle (2019) *ILJ* 2190-2192.
[4106] 2190.
[4107] 2191.
[4108] The Basic Conditions of Employment Act 75 of 1997 – Benjamin & Cheadle (2019) *ILJ* 2191.
[4109] The Employment Equity Act 55 of 1998 – Benjamin & Cheadle (2019) *ILJ* 2191.
[4110] The Skills Development Act 97 of 1998 – Benjamin & Cheadle (2019) *ILJ* 2191.
[4111] Benjamin & Cheadle (2019) *ILJ* 2191.
[4112] 2191.
[4113] 2191 – this in terms of, respectively, the Labour Relations Amendment Act 12 of 2002, and the Basic Conditions of Employment Amendment Act 11 of 2002. The others pertain to changes introduced by the Unemployment of Insurance Act 63 of 2001 and the Skills Development Amendment Act 31 of 2003 – Benjamin & Cheadle (2019) *ILJ* 2191.
[4114] Benjamin & Cheadle (2019) *ILJ* 2192. Given the complexities and opposing views held in terms thereof, it is not surprising that the better part of a decade – and the entirety of the third phase, is characterised by developments around this theme. See further Benjamin & Cheadle (2019) *ILJ* 2192, who further detail the various negotiation processes, including the drafting, withdrawal, and redrafting of various Bills associated with the proposed amendments to the LRA, BCEA and EEA.
[4115] This in terms of the Basic Conditions of Employment Amendment Act 20 of 2013 (which came into effect on 1 September 2014) – Benjamin & Cheadle (2019) *ILJ* 2192.
[4116] In terms of of the Labour Relations Amendment Act 6 of 2014 (which came into effect on 1 January

subsection 103A into the LRA, which regulates the Labour Court's oversight over the administration of a trade union in those instances where the union "fails to materially perform its functions" or "there is serious mismanagement of the finances" of the union.[4117] As such, this amendment is important for purposes of this study and will be considered below. This period was also marked by the introduction of the Labour Relations Amendment Bill of 2014 ("LRAB") as a Private Member's Bill and gazetted on 5 November 2014.[4118] It is the origin of this Bill that is of interest to this study and it will also be considered below at §12 4 2 3.

The fourth phase ("2014 onwards") is primarily focused on labour market stability and the national minimum wage and is based on various initiatives that arose from events during this period (in particular industrial action)[4119] which first led to adoption of the Ekurhuleni Declaration in November 2014.[4120] This, in turn, led to the adoption of the Code of Good Practice on Picketing, Collective Bargaining and Strikes (discussed below at § 12 4 2 3 1) and a series of legislative proposals.[4121] Ultimately, this resulted in the new National Minimum Wage Act[4122] and amendments to the BCEA and LRA,[4123] which came into effect from the 1st of January 2019. In addition, this period also saw the Code and Guidelines on Balloting for Strikes or Lockouts issued and coming into effect on the same date.[4124] Noteworthy is that the Labour Relations

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2015) – Benjamin & Cheadle (2019) *ILJ* 2192. The authors make further reference to a series of legislative enactments and initiatives during this period, not directly applicable to the study at hand – Benjamin & Cheadle (2019) *ILJ* 2192.

[4117] This in terms of subss 103(A)(2)(a)-(b) of the LRA.

[4118] "Labour Relations Amendment Bill" PMB2–2014 in GN R973 *GG* 38180 of 05-11-2014.

[4119] Benjamin & Cheadle (2019) *ILJ* 2192 refer to the State of the Nation address by President Zuma, in June 2014, where the call was made for "the social partners to deliberate on the state of the labour relations environment and to address issues of low wages, wage inequality, and violent and protracted strikes." Whilst not listed specifically by the authors at this point, what was certainly being referenced to [as per Benjamin & Cheadle (2019) *ILJ* 2202], was the reaction to, *inter alia*, the "Marikana and other platinum strikes in 2012 and the Western Cape agricultural strike centred in De Doorns in 2012-2013". It goes almost without saying that Marikana was to have the most indelible impact on the enactments and accords being referenced during this fourth phase.

[4120] Benjamin & Cheadle (2019) *ILJ* 2192 state how this was premised on the "convening of a high-level labour indaba on the theme of 'Promoting Employment and Strengthening Social Dialogue'".

[4121] 2193.

[4122] National Minimum Wage Act 9 of 2018 – Benjamin & Cheadle (2019) *ILJ* 2193.

[4123] Respectively, the Basic Conditions of Employment Amendment Act 7 of 2018, and the LRAA – Benjamin & Cheadle (2019) *ILJ* 2193. Further mention is made by the authors of the Labour Laws Amendment Act 10 of 2018 – which does not speak directly to issues pertaining to organised labour/unions – Benjamin & Cheadle (2019) *ILJ* 2193.

[4124] 2193.

Amendment Act 8 of 2018 (LRAA) introduced numerous changes to key sections in the LRA. These include changes to sections 32 and 49 (with regard to the extension of bargaining council agreements), section 69 (pertaining to picketing), sections 95, 99, 100 (the requirements and obligations on the part of registered trade unions), section 108 (relating to the Registrar) and sections 150A-D, which introduces advisory arbitration in case of industrial action.[4125] Most of these sections do not impact on trade union accountability (other than further refining their institutional role in society and the labour relations system). However, sections 95, 99, 100 and 108 as amended most certainly do impact on union-member relations and require further consideration below.

12 4 2 The promotion of collective bargaining

It is against the background of the Constitution, that the LRA introduces the first foundational mechanism for the regulation of trade union activity and, indirectly, also trade union accountability. Section 1 of the LRA confirms that one of its purposes is to "provide a framework within which employees and their trade unions" can collectively bargain[4126] and "formulate industrial policy".[4127] Directly related hereto, in terms of subsection 1(d), is the promotion of orderly collective bargaining,[4128] sectoral level collective bargaining,[4129] "employee participation in decision-making in the workplace",[4130] and the "effective resolution of labour disputes".[4131] The LRA promotes collective bargaining through recognition and regulation of the four cornerstones of the process, namely: protection of freedom of association; provision for (trade union) organisational rights; recognition of (the primacy) of collective agreements and the regulation of industrial action. As such, the LRA not only institutionalises trade unions but expressly recognises their representative capacity during the collective bargaining process. While the other ways in which the LRA regulates trade union activity (through regulation of representation and the direct regulation of trade unions) are of more

[4125] The LRAA also amended ss 70F, 72, 75, 116, 127, 128, 130, 135 or 208A of the LRA.
[4126] Such will be done in order to "determine wages, terms and conditions of employment and other matters of mutual interest". See subs 1(c)(i) of the LRA.
[4127] Subsection 1(c)(ii).
[4128] Subsection 1(d)(i).
[4129] Subsection 1(d)(ii).
[4130] Subsection 1(d)(iii).
[4131] Subsection 1(d)(iv).

importance to this study, a brief overview of how the LRA promotes collective bargaining is called for (if only to show the intersection between this topic and the topics to follow).

12 4 2 1 Freedom of association provisions

Section 4 of the LRA introduces the right to freedom of association with the important proviso of membership of a union made subject to the association's constitution.[4132] Furthermore, all trade union members are specifically afforded the right "to participate in [the union's] lawful activities",[4133] to participate in the election of union office-bearers, officials or trade union representatives (shop stewards),[4134] to stand for union elections, and be eligible for appointment (and to hold office if elected) as either an office-bearer, official[4135] or trade union representative[4136] of that union – or carry out the functions of such a representative.[4137] In addition, these provisions apply to a member of a trade union that is a member of a federation of trade unions.[4138]

Section 5 provides that no person may be discriminated against on the basis that they are exercising their rights in terms of the LRA.[4139] This includes a prohibition on requiring an employee or person seeking employment to *not* be/become a union member, or to give up such membership[4140] – or to prejudice employees or prospective employees because of, *inter alia*, "past, present or anticipated" membership, formation

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[4132] Subsection 4(1)(b), read with subs 4(2).

[4133] Subsection 4(2)(a).

[4134] Subsection 4(2)(b). In terms of s 213, the Definitions' clause of the LRA, "official" in relation to a trade union, employers' organisation, federation of trade unions or federation of employers' organizations, is deemed to mean:

> "[A] person employed as the secretary, assistant secretary or organiser of a trade union, employers' organisation or federation, or in any other prescribed capacity, whether or not that person is employed in a full-time capacity. And, in relation to a council means a person employed by a council as secretary or in any other prescribed capacity, whether or not that person is employed in a full-time capacity". The term "office-bearer" means "a person who holds office in a trade union, employers' organisation, federation of trade unions, federation of employers' organisations or council and who is not an official". The term "trade union representative" is defined as meaning "a member of a trade union who is elected to represent employees in a workplace".

The latter position is more commonly referred to as a shop steward.

[4135] Subsection 4(2)(c).

[4136] Subsection 4(2)(d).

[4137] Subsection 4(2)(d).

[4138] Subsections 4(3)(a)-(c).

[4139] Subsection 5(2)(b).

[4140] Subsections 5(2)(a)(i)-(iii).

of or participation in lawful activities of, a trade union.[4141]

Section 8 of the Act regulates the rights of trade unions (and employer organisations). It grants all unions the right to "determine [their] own constitution and rules" and to hold elections for its office-bearers, officials and representatives, subject to the provisions of Chapter IV.[4142] Similarly, in terms of subsection 8(b), all unions have the right to "plan and organise its administration and lawful activities" and to form or join union federations,[4143] or to become affiliated to international workers'/employers' organisations (including the ILO).[4144]

12 4 2 2 Collective bargaining, trade union organisational rights and collective agreements

Chapter III of the LRA, entitled "Collective Bargaining", is divided into six distinct parts, namely "Organisational Rights" (Part A),[4145] "Collective Agreements" (Part B),[4146] with Parts C, D, E and F regulating bargaining councils.[4147] In considering Parts A and B, namely organisational rights and collective agreements, a number of aspects are of interest.

Section 12 grants certain registered trade unions access to the workplace, in order to recruit, communicate with "or otherwise serve members' interests".[4148] Section 13 regulates the deduction of union dues, and section 14 the election and functions of a trade union's shop stewards. In addition, section 15 provides for time off for trade union activities, while section 16 regulates the right to disclosure of information for purposes of consultation and negotiation. Section 14 (the regulation of shop stewards) is discussed in greater detail below. Section 21[4149] also provides for a mechanism for a registered trade union to obtain some or all of these organisational rights through arbitration (in addition to negotiation and reaching a collective agreement).

[4141] Subsections 5(2)(c)(i)-(iii).
[4142] Chapter IV, ss 64-77 deals with Strikes and Lock-outs.
[4143] Subsection 8(d).
[4144] Subsection 8(e).
[4145] Sections 11-22.
[4146] Sections 23-26.
[4147] Included herein are "Bargaining Councils" (as outlined in ss 27-34 of the LRA); "Bargaining Councils in the Public Service" (as outlined in ss 35-38 LRA); "Statutory Councils" (as outlined in ss 39-48 LRA), and finally, "General Provisions concerning councils" (as outlined in ss 49-63 of the LRA).
[4148] Subsection 12(1).
[4149] Subsections 21(1)-(12).

Section 23 regulates the binding effect of collective agreements (again, premised on the involvement of a registered trade union) and clearly provides that such an agreement is binding on the members of a trade union. Subsection 23(1)(d) goes as far as making provision that a collective agreement binds "employees who are not members of the registered trade union or trade unions party to the agreement", if "the employees are identified in the agreement", "the agreement expressly binds the employees", and furthermore, "that [the] trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace".[4150] Furthermore, in terms of subsection 23(3), a collective agreement – "[w]here applicable" – "varies any contract of employment between an employee and employer who are bound by the collective agreement". As such, the collective agreement is binding and enforceable and is viewed as part of the employment contract.[4151] These provisions also confirm the representative role of trade unions during the collective bargaining process and the binding effect of trade union decisions on members of that trade union.

Agency shop and closed shop agreements are respectively regulated by sections 25 and 26 of the LRA. These agreements can have potentially far-reaching implications for trade union members (as the discussion of the British experience also showed). While the intricacies of the requirements for these types of agreements are not of importance to this study, there are some aspects that deserve attention. Firstly in the case of an agency shop agreement, workers who are not necessarily members of the applicable union are expected to make monetary contributions *as if* they were fully-fledged members.[4152] Secondly, in the case of closed shop agreements,

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[4150] See subsections 23(1)(d)(ii)-(iii) respectively.

[4151] See *Maritime Safety Authority v McKenzie* 2010 31 ILJ 529 (SCA), where Wallis AJA – in referring to the quoted subs 23(3) states:

> "That section deliberately sets out to address the problematic issue of the incorporation of the provisions of collective agreements into contracts of employment so as to give the employee and employer contractual remedies against one another … The legislature accordingly took the step of making express provision for incorporation of appropriate terms from the collective bargaining into the individual contracts of the employment of the workers" [at 541E-H].

Compare the above, and the effective presumption of the enforceability of the collective agreement, with that of the approach followed in Britain (which Wallis AJA also makes reference to at 541G-H, and n36, n38) where the exact opposite, namely that the collective agreement is presumed *not* to be enforceable unless expressly indicated as such in writing, exists.

[4152] Subsection 25(1) of the LRA states: "[T]he employer [is required] to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but

employees are compelled (barring certain exceptions) to become members of the relevant representative union(s) and, importantly, should they be expelled on valid grounds (or refuse to join in the first place without valid reason), they may face a *fair* dismissal.[4153]

In this regard, section 26 provides that where two-thirds of affected employees agree by means of a ballot[4154] to the conclusion of the closed shop agreement, the agreement is valid and binding on employees and prospective employees.[4155] Essentially this means that in spite of as many as one-third of the concerned workforce objecting to the agreement, the agreement is valid.[4156] Of further relevance is subsection 26(5)(a), which states that no trade union may refuse membership or expel an employee from the trade union unless "the refusal or expulsion is in accordance with the trade union's constitution" – *and* – that "the reason for the [above] is fair, including, but not limited to, conduct that undermines the trade union's collective exercising of its rights".[4157] The trade union's constitution is therefore of critical importance and could well decide the fate of a dismissed employee in the context of a closed shop agreement. In this regard, subsection 26(9) of the LRA is of interest in that it specifically makes provision for liability on the part of the union:

> "If the Labour Court decides that a dismissal is unfair because the refusal of membership of or the expulsion from a trade union party to a closed shop agreement was unfair, the provisions of Chapter VIII apply,[4158] *except that any order of compensation in terms of that Chapter must be made against the trade union*."[4159]

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are eligible for membership thereof." In terms of subs 25(3)(c), the dues are paid into a separate account, administered by the representative trade union (but note the exception in terms of subs 25(4)(b)). Additional requirements regarding the auditing and inspection of this account, are found in subss 25(6)-(7).

[4153] Subsection 26(6)(a)-(c), read with subs 25(5)(a)-(b).

[4154] Read with subs 26(4).

[4155] Barring the specific exceptions contained in the section, such as found in subss 26(3)(c)-(d) and 26(7).

[4156] As regulated in terms of subss 26(7)(a)-(b), where is stated (respectively) that "the employees at the time a closed shop agreement takes effect may not be dismissed for refusing to join a trade union party to the agreement", and secondly, where employees refuse to join such union "on the grounds of conscientious objection", they too may not be fairly dismissed.

[4157] Subsection 26(5)(b).

[4158] Chapter VIII of the Act is entitled "Unfair Dismissal and Unfair Labour Practice".

[4159] Subsection 26(9), [my emphasis].

In addition, the mechanism outlined in subsections 26(10)-(14) allows for a "registered trade union that represents a significant interest in, or a substantial number of, the employees covered by a closed shop agreement"[4160] to become an additional (*ex post facto*) party to said agreement (subject to the relevant requirements).

Part C of Chapter III of the LRA ("Bargaining Councils")[4161] is that part of the LRA which promotes sectoral level (centralised) collective bargaining. It commences with section 27 and states that "[o]ne or more registered trade unions" may establish (together with the applicable registered employers' organisation) "a bargaining council for a sector and area"[4162] through the adoption of a constitution that meets the requirements set out in section 30. Sections 28 and 29 confirm the "powers and functions" and "registration" of bargaining councils respectively, while sections 31 and 32 regulate the "[b]inding nature of [a] collective agreement concluded in [a] bargaining council" and the "extension" of such collective agreements, respectively. Part D of chapter III of the LRA sets out the requirements for bargaining councils in the Public Service,[4163] while Part E regulates Statutory Councils,[4164] and follows *mutatis mutandis* the same outline as in case of bargaining councils in general.[4165] Part F is the final section of Chapter III, focusing on the "[g]eneral provisions concerning councils"[4166] – and provides fairly detailed regulation of matters ranging from *inter alia* the "representativeness of council",[4167] its "dispute resolution functions",[4168]

[4160] Subsection 26(10).

[4161] It would be prudent at this point to state that in all of the sections below pertaining to bargaining councils (including Statutory and Public Sector councils [as below]), it will become clear that trade unions play a pivotal role as the representative, not only of their members, but of countless other employees who are being represented (merely on account of them falling within the applicable sectoral unit). And in all of these instances – and their related provisions – trade unions are, in effect, being regulated by the LRA. Considerations of space and volume do not permit each of these provisions to be discussed in detail, or even (necessarily) listed. As such, what follows (here – and in similar sections discussing the LRA below) is a mere cursory mention, focused on individual provisions that are either singular in example, or representative of a larger point being made.

[4162] Subsection 27(1).

[4163] Sections 35-38.

[4164] Sections 39-48.

[4165] Two primary differences is the lower threshold requirement for a representative union, in order to apply for the creation of a Statutory Council, it being a minimum of 30 per cent [subs 39(1)(a)]. Secondly, the relevant trade union or employer organisation applies to the Registrar (as opposed to approaching each other), as per subs 39(2).

[4166] Sections 49-63.

[4167] Section 49.

[4168] Section 51.

"accounting records and audits",[4169] admission to the council,[4170] and the winding-up of councils.[4171]

Bargaining councils originated in the 1924 ICA,[4172] which provided for "the voluntary establishment of what were then termed 'Industrial Councils'", in efforts to "provide an orderly system for self-regulation through collective agreements in particular industries".[4173] With the changes leading up to the promulgation of the new LRA,[4174] "centralised collective bargaining was strongly promoted" – with the result that the LRA "strongly supports the establishment of bargaining councils … within defined sectors of the economy … [albeit that] their establishment is still based on the voluntary agreement of employers and trade unions".[4175] Thus, as explained by Finnemore, a bargaining council "is an organisation, registered by the Department of Labour, comprising one or more registered trade unions and one or more registered employer organisations", which are "termed the 'parties' to the council".[4176] The primary function of these councils, according to Grogan, is "to regulate relations between management and labour in the sectors over which they have jurisdiction by concluding collective agreements, and to settle disputes between parties falling within their registered scope".[4177] Regarding the extension of bargaining council agreements, the LRAA saw the introduction of certain key changes. As explained by Godfrey et al, the amendments do "this by streamlining and bolstering the process for extending agreements as well as adapting the procedural requirements for doing so".[4178] One of

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[4169] Section 53 – including the "duty to keep records and provide information to the Registrar", in terms of s 54.

[4170] Section 56.

[4171] Section 59.

[4172] H Bhorat et al "Trade Unions in South Africa*"* in C Monga & JY Lin (eds) *The Oxford Handbook of Africa and Economics: Policies & Practices* (2015) 641 642. See further S Godfrey et al *Collective Bargaining in South Africa: Past, Present and Future?* (2010) 40-54.

[4173] Finnemore *Introduction* 204. As discussed above, the author makes the further point [Finnemore *Introduction* 204] that the system's "fatal flaw" was that it excluded black workers in South Africa, resulting in a "one-sided and protective system that favoured skilled white workers at the expense of black workers".

[4174] See Godfrey et al *Collective Bargaining* 80-108 for an overview of the initial negotiations and development of the bargaining council structure, as contained within the.

[4175] Finnemore *Introduction* 204.

[4176] 204. Subsection 27(1)(a) states that a council can be established by means of adopting a constitution that meets the requirements of s 30, and registering in terms of s 29.

[4177] Grogan *Workplace* 372.

[4178] S Godfrey et al "The New Labour Law Bills: An Overview and Analysis" (2018) 39 *ILJ* 2161 2168. Following a request by the bargaining council to the Minister of Labour in terms of section 32(1) of the

the key reasons for the adjustment was the changing South African labour relations system – in short when initially promulgated, "trade union membership was at a historical peak",[4179] something which is no longer necessarily the case in many industry areas.

The impact and effect of bargaining councils, both in respect of wage levels and wage premiums and the number of workers that fall under bargaining council agreements were discussed in chapter 2. However, and for present purposes, this brief consideration of the role of bargaining councils in the South African labour relations system does serve to highlight yet another area of representation of members by their trade unions, an area where trade union decisions may, yet again, bind those members.

12 4 2 3 Strikes, lockout and picketing provisions

Chapter IV of the LRA represents the fourth legal mechanism – regulation of the right to strike and recourse to the lockout, secondary strikes and picketing – through which the Act promotes and regulates collective bargaining. Sections 64 and 65 are premised on a distinction between protected and unprotected strikes and contain the substantive and procedural limitations on the right to strike and recourse to the lockout. Section 66 regulates secondary strikes, arguably a powerful weapon in the hands of

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LRA, the agreement can be extended to "any non-parties to the collective agreement that are within its registered scope and are identified in the request", provided that certain procedural requirements are complied with. One requirement is that, as per subss 32(1)(a)-(b) LRA, where "one or more registered *trade unions* whose members constitute the majority of the members of the *trade unions* that are party to the *bargaining council* vote in favour of the extension" (subs 32(1)(a) LRA, [their emphasis]) – with the same criterion being required of employers' organisations (in terms of subs 32(1)(b) LRA). The changes effected by the LRAA are primarily contained in subsection 32(3), which now allows for *either* the trade union(s) or employers' organisation(s) outlined in subsection 32(1) to instigate the request to extend. As a result, in the words of Godfrey et al (2018) *ILJ* 2169: "where trade union membership has dropped below the required level, extension could be based on the organisations of employers which dominate the sector". Furthermore, in terms of subsection 32(5), the Registrar (as opposed to Minister of Labour) is now to play the primary role in determining whether extension is possible on the basis of a "sufficiently representative" – threshold, with this determination guided by the requirements of section 49 LRA. Therefore, employees/members not necessarily directly involved in a specific union's structures can nonetheless be affected by a bargaining council agreement. Further mention must be made of the series of requirements regarding possible exceptions to such extension, and additional factors that the Minister or Registrar (as applicable) need to take into consideration, as listed at, *inter alia*, subss 32(3), 32(3A), 32(5) and 32(5A) LRA. Finally, section 33A regulates the "enforcement of collective agreements" and contains a series of detailed sub-provisions in this regard.

[4179] Godfrey et al (2018) *ILJ* 2168.

organised labour, in that it permits (with the required administrative organisation on the part of the unions or labour federations) a rapid escalation in the scope, ambit and related coercive pressure of the initial (primary) strike.

Section 67 elaborates on the protection of employees engaged in protected strike action. Should an employee participate, or perform any conduct in contemplation or in furtherance of a protected strike, such a person neither commits a delict nor breaches the employment contract.[4180] Nor may they be dismissed for such participation[4181] or have civil proceedings instituted against them by the employer.[4182] However, it must be noted that in terms of section 67(8), this protection[4183] does *not* apply "if that act" (be it in contemplation or in furtherance of a strike) "is an offence".[4184] At the same time, subsection 67(5) introduces an exception: it does not prevent an employer (in spite of subsection 67(4)) from "from fairly dismissing an employee in accordance with the provisions of Chapter VIII[4185] *for a reason related to the employee's conduct during the strike*, or for a reason based on the employer's operational requirements."[4186]

Subsection 67(7) is particularly noteworthy in that it apparently obviates the requirement for a pre-strike ballot to be held:

> "The failure by a registered trade union… to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike … may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike".[4187]

This important subsection and its effect will be considered in more detail in the balloting section below at § 12 4 4 4 3.

[4180] Subsections 67(2)(a)-(b) LRA.
[4181] Subsection 67(4).
[4182] Subsections 67(6)(a)-(b).
[4183] As provided for in terms of subss 67(2) and 67(6).
[4184] Subsection 67(8).
[4185] Chapter VIII regulates unfair dismissals and unfair labour practices.
[4186] Subsection 67(5), my emphasis.
[4187] Of course, nothing prevents a trade union from conducting pre-strike ballots, and regulating same in terms of its own constitution (as it is compelled to, in terms of subs 95(5)(p), discussed below) – subs 67(7) does however mean that, notwithstanding such a clause (and it being disregarded by the union), nothing will come of such contravention in terms of challenging the legality of the strike. With this being said, the recent amendments in terms of the LRAA, have instituted potentially significant changes to the requirements surrounding balloting, and will be discussed in further detail below.

Section 68 regulates the situation where a strike or lockout[4188] is *not* in compliance with the LRA (that is, unprotected). This provision grants the Labour Court the exclusive power to either issue an interdict to restrain any person from "participating in a strike"[4189] or "to order the payment of just and equitable compensation for any loss attributable to the strike or lock-out, or conduct".[4190] In deciding on the level of compensation, subsection 68(1)(b)(iv) states that one of the factors[4191] that the court must "[have] regard to" in deciding the extent of the award, is the "financial position of the employer, trade union or employees respectively." Subsection 68(5) confirms that participation in (or conduct in contemplation or in furtherance of) a strike that does not comply with the provisions of Chapter IV, may constitute a fair reason for dismissal.[4192]

Section 69 regulates "Picketing" as a further expression of industrial protest.[4193] Section 76 regulates the use of replacement labour during a strike.[4194] To conclude Chapter IV, section 77 regulates the circumstances surrounding protest action to defend or promote the socio-economic interests of workers. The protest action must have been called by a registered trade union or federation of trade unions[4195] subject to certain requirements.[4196] Should a person participate in protest action that complies with subsection 77(1), that person will enjoy the same protection as in the case of a protected strike.[4197]

The nature and consequences of industrial action, primarily on employers and broader society, have had a deciding influence on reconsideration of and amendments to the LRA over the years – as will be illustrated in the remainder of this chapter. One such endeavour that may be considered at this stage was the proposed (private)

[4188] Including herein any conduct in contemplation or in furtherance of a either a strike or lock-out, see subs 68(1) LRA.

[4189] Similarly, to restrain a person from "any conduct in contemplation or furtherance of a strike", [my emphasis], care of subs 68(1)(a)(i).

[4190] Subsection 68(1)(b).

[4191] Subsections 68(1)(b)(i)-(iii) list additional factors.

[4192] Subsection 65(5). The section states that in order to determine "whether or not the dismissal is fair, the Code of Good Practice: Dismissal in Schedule 8 must be taken into account".

[4193] The requirements surrounding picketing has undergone fairly significant changes in terms of the LRAA (as introduced at § 12 4 1 above) – specifically s 4 of the amendment Act – and is discussed in more detail, to the extent that it is relevant, in the remainder of this chapter.

[4194] Which in turn is defined within s 75 of the LRA.

[4195] Subsection 77(1)(a).

[4196] Subsections 77(1)(b)-(d).

[4197] Subsection 77(3).

LRAB. This proposal was largely borne out of the reaction to the damages caused in the centre of Cape Town by striking security guards, following a protest march under the auspices of SATAWU and COSATU[4198] in May 2006.[4199] This gave rise to litigation that culminated before the Constitutional Court in the *SATAWU v Garvas* case.[4200] In the words of Ollis, the parliamentary representative who was responsible for the LRAB: "The bill sought to enforce accountability from trade unions and large organisations whose members unlawfully cause the destruction of property or bring harm to members of the public during strike action."[4201] As such, even though it was aimed at protection of the public (as opposed to trade union members), the Bill is noteworthy for its attempt to regulate perhaps the primary trade union weapon (the strike) and for its attempt to make a trade union liable for the conduct of its members and functionaries. In an indirect way, then, the Bill presents a vision of the relationship between trade union members and the trade union itself.

The key focus of the Bill was to insert a new section 68A[4202] entitled "Duty to limit harm caused by collective action" into the LRA. Section 68A(1) declared the section to apply to a trade union that "expressly or tacitly, facilitated, called, endorsed, supported or ratified a strike or collective action"[4203] and placed on this trade union a "duty to take reasonable steps to prevent, repair or remedy injury to persons and loss or damage to property" where this arises "out of acts or omissions constituting a delict, breach of contract or crime perpetrated in contemplation of furtherance of a strike or other collective action".[4204] Subsection 68A(2) provided that, failing this, a person (or organ of state) "may institute civil claim action against the trade union".[4205] The proposed subsection 68A(3) empowered the Labour Court to either: (i) "[I]ssue an

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[4198] Anonymous "Mayhem: 37 unionists in court" (17-05-2006) *News24* <https://www.news24.com/SouthAfrica/News/Mayhem-37-unionists-in-court-20060517-3> (accessed 18-10-2018)

[4199] Anonymous "Legislation: DA bill would make unions liable for strike" *Legalbrief* (19-06-2006) 1; W Khuzwayo "Nedlac passes labour bills for drafting" (10-02-2012) *IOL/Business Report* <https://www.iol.co.za/business-report/economy/nedlac-passes-labour-bills-for-drafting-1231224> (accessed 20-10-2018) 1.

[4200] *SATAWU v Garvas* 2013 1 SA 83 (CC).

[4201] Ollis *IOL/Business Report* (2015) 1.

[4202] Section 68 regulates strikes (or lock-outs) not in compliance with the LRA – in other words, *unprotected* industrial action.

[4203] Subsection 68(A)(1) of the LRA; s 1 of the LRAB.

[4204] Subsection 68(A)(1) of the LRA; s 1 of the LRAB.

[4205] Subsection 68(A)(2) of the LRA; s 1 of the LRAB.

interdictory or mandatory order" in order to secure compliance;[4206] (ii) Make a damages award which would then "include punitive damages for breach of the duty";[4207] (iii) Declare the industrial action in question to no longer be protected in terms of section 67,[4208] or, finally, (iv) Declare that the "the issue in dispute" be referred to arbitration in terms of section 74 of the LRA as if it were an essential service.[4209]

The Bill accordingly encapsulated a legislative attempt to hold unions directly accountable – arguably for their own conduct, but in truth, for the conduct of their members. After all, the union, as organiser and perceived instigator of industrial action is very frequently the only responsible party *that can be* identified, and accordingly, held accountable. And while the proposed Bill addresses the accountability of trade unions to external parties, it also serves as an important reminder of the limits of legislation in regulating trade unions, especially when juxtaposed with the British experience described in chapter 5. It will be recalled form that discussion that, while the British IRA 1971 was a dismal failure for a variety of reasons, one of the key causes was a complete miscalculation on the part of the British legislature to fully understand the complexity of the relationship between the upper echelons of a trade union and the shop stewards and trade union members on the shop floor.[4210] It was argued in that context that increasing statutory restrictions on unions without an appreciation for the potential disregard therefore by the union's broader membership (despite protestations from the union), will result in a potentially "dead-letter" law. At the very least then, and this is to be considered in the conclusion to this study, the LRAB raised the fundamental question of whether or not legislative control provides the solution to promoting union-member accountability. And it is furthermore noteworthy that later endeavours to address the nature and consequences of strike action – discussed below – both recognise and regulate the internal union-member relationship (through, for example, balloting) as point of departure to ensure that industrial action not only is

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[4206] Subsection 68A(3)(a) of the LRA; s 1 of the LRAB.

[4207] Subsection 68A(3)(b) of the LRA; s 1 of the LRAB.

[4208] Subsection 68A(3)(c)(i) of the LRA; s 1 of the LRAB.

[4209] Subsection 68A(3)(c)(ii) of the LRA; s 1 of the LRAB.

[4210] It will be recalled what was said by B Hepple "Union Responsibility for Shop Stewards" (1972) 1 *ILJ* 197 210, at § 5 2 4 10 2 above, in his commenting on warning issued by the Donovan Commission prior to the IRA 1971:

> "Or will it [the IRA 1971] … push shop stewards outside the ambit of the rules, increase their power as centres of dissention beyond the control and influence of union leadership, and make the leadership appear to take the side of management?" [footnotes omitted].

aligned with trade union members' wishes but also not unduly destructive to broader society.

12 4 2 3 1 The Code of Good Practice

The Code of Good Practice on Collective Bargaining, Industrial Action and Picketing (hereafter the Code) came into effect on 1 January 2019[4211] – and owes its origins to the Ekurhuleni Declaration of 4 November 2014,[4212] the subsequent "Declaration on Wage Inequality and Labour Market Stability"[4213] and the "Accord on Collective Bargaining and Industrial Action[4214] – all largely in response to the Marikana tragedy.[4215]

Within the context of this study, the Code is important, for three reasons. Firstly, it regulates one of the prima activities (collective bargaining) and use of trade unions' primary weapons in that process (striking and picketing) and, as such, augments the statutory provisions discussed above. Secondly, while the Code clearly is also concerned with the external impact of trade union activities, it says a lot about the internal functioning of trade unions and trade union-member accountability as the basis of collective bargaining and resultant strike action and picketing. The discussion below will focus on these aspects. The third reason is a legal one and concerns the status of the Code as a legal instrument. Section 203 of the LRA empowers NEDLAC[4216] and the Minister of Labour to issue codes of good practice. Subsections 203(3) and (4) require "[a]ny person interpreting or applying [the LRA to] take into

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[4211] "Code of Good Practice on Picketing, Collective Bargaining and Strikes" (GN R1396 in *GG* 42121 of 19-12-2018), read with "Commencement of the Labour Relations Amendment Act, 2018" (GN R 1377 in *GG* 42103 of 12-12-2018). Further mention must be made of the 2018/2019 Code *replacing* the prior 1998 "Code of Good Practice on Picketing" (GN R765 in *GG* 18887 of 15-05-1998) – as per "Labour Relations Act, 1995 Repeal of Code of Good Practice on Picketing" (GN R279 in *GG* 42260 of 01-03-2019).

[4212] Benjamin & Cheadle (2019) *ILJ* 2192 – see RSA "Declaration of the Labour Relations Indaba" (2014) *NEDLAC* <http://nationalminimumwage.co.za/wp-content/uploads/2015/08/0012indaba_declaration.pdf> (accessed 18-06-2018) 1.

[4213] RSA "Declaration on Wage Inequality and Labour Market Stability" (04-11-2014) <https://www.parliament.gov.za/storage/app/media/BusinessPubs/National_Minimum_Wage_Report/Declaration_on_wage_inequality_and_labour_market_stability-NMW_report.pdf> (accessed 10-07-2018) 1.

[4214] The Accord is also reproduced in full after Annexure 2, within the Code, at 87-92.

[4215] Benjamin & Cheadle (2019) *ILJ* 2192. See further, item 1.1 of the RSA *Ekurhuleni Declaration* (04-11-2014) and item 1.3 of RSA *NEDLAC* (2014).

[4216] Subsection 203(1)(a) of the LRA.

account any relevant code of good practice".[4217] Several court cases have dealt with the status of these Codes relative to the LRA. To date, there are in effect two "streams" of decisions involved – those where the courts considered the Schedule 8 Code of Good Practice: Dismissal, and those considering the Codes issued with regard to sexual harassment.[4218]

In the context of the Code of Good Practice: Dismissal[4219] judicial views span from one that the Code must be taken into account,[4220] that the "code provides guidance to those who apply and supervise industrial justice"[4221] to the view that it serves merely as an (often recommended) guideline.[4222] In 2007, the LAC clarified that a code's interpretation cannot place it in conflict with the LRA,[4223] while in 2012[4224] and 2015[4225] the LAC sanctioned commissioners of the CCMA for failing to properly take the Code into account. Similarly, (although in the context of discrimination law and application of the Sexual Harassment Codes)[4226] judicial views have ranged from the LAC's view that the Code(s) are relevant to guide commissioners in the interpretation and application of the LRA,[4227] to the view that an arbitrator is "compelled to have specifically considered and applied" the Code[4228] and, most recently, that a Code

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[4217] Subsection 203(3).

[4218] These being the 1998 and 2005 Codes of Practice on the Handling of Sexual Harassment Cases in the Workplace – GN R 1367 in *GG* 19049 of 17-07-1998, and GN 1357 in *GG* 27865 of 04-08-2005.

[4219] The cases considered were as follows: *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd* 1998 19 ILJ 635 (LC); *Komane v Fedsure Life* 1998 2 BLLR 215 (CCMA); *County Fair v CCMA* 1998 6 BLLR 577 (LC); *National Construction Building & Allied Workers Union v Masinga* 2000 21 ILJ 411 (LC); *BIAWU v Mutual & Federal Insurance Co Ltd* 2002 7 BLLR 609 (LC); *Engen Petroleum v CCMA* 2007 8 BLLR 707 (LAC) 742; *Independent Municipal & Allied Trade Union obo Strydom v Witzenburg Municipality* 2012 7 BLLR 660 (LAC); and, *General Motors (Pty) Ltd v National Union of Metalworkers of South Africa obo Ruiters* 2015 5 BLLR 464 (LAC).

[4220] *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd* 1998 19 ILJ 635 (LC) 639I; *County Fair v CCMA* 1998 6 BLLR 577 (LC) 585 para 20.

[4221] *Moropane v Gilbeys Distillers & Vintners (Pty) Ltd* 1998 19 ILJ 635 (LC) 640D

[4222] *BIAWU v Mutual & Federal Insurance Co Ltd* 2002 7 BLLR 609 (LC) 614.

[4223] *Engen Petroleum* 742 para 82, as per Zondo JP (as he was then).

[4224] *Independent Municipal & Allied Trade Union obo Strydom v Witzenburg Municipality* 2012 7 BLLR 660 (LAC) 663-664

[4225] *General Motors (Pty) Ltd v National Union of Metalworkers of South Africa obo Ruiters* 2015 5 BLLR 464 (LAC) 475.

[4226] The following matters were considered: *SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration* 2014 35 ILJ 2848 (LC); *Campbell Scientific Africa (Pty) Ltd v Simmers* 2016 37 ILJ 116 (LAC); *University of Venda v M* 2017 38 ILJ 1376 (LC); and, *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen* 2018 39 ILJ 1330 (LC).

[4227] *Campbell Scientific* 123 para 24 – as per Savage AJA.

[4228] *University Venda* 1393A, as per Snyman AJ.

serves as the "starting point" to then "guide commissioners".[4229] These cases broadly confirm that, while mindful of the specific circumstances of a case, decision-makers need to consider the codes of good practice and that a failure to do so provides a concrete standard against which their conduct may be measured.

This in mind, the Code is divided into five parts: Part A serves as the background and describes the context and purpose of the Code, along with how (and by whom) it is to be interpreted. Part B regulates collective bargaining, while Part C addresses workplace democracy and dialogue. Part D addresses industrial action and Part E regulates picketing. A number of provisions speak directly to union accountability.

12 4 2 3 1 1 Part A – interpretation and context of the Code

In terms of sub-item 1(2), "[a]ny person interpreting the [LRA] must take this Code into account", which "includes employees, trade unions, employers… the registrar of labour relations, conciliators, arbitrators and judges".[4230] Following this, sub-item 1(4) confirms that no interpretation imposing "any unconstitutional limitation on the right to strike" or undermining this can be placed on the Code.[4231] At the same time, sub-item 1(5) states that the Code "is intentionally general" and that a "departure from its norms (subject to the requirements of the [LRA]) may be justified".[4232]

In terms of the "context" provided by item 2 of the Code, sub-item 2(3) states that "[p]rolonged and violent strikes have a serious and detrimental effect on strikers, the families of strikers, the small businesses that provide services in the community to those strikes, the employer, the economy and community" and that, as such, "[s]erious measures are needed to induce a behaviour change in the way that trade unions and employers… engage with each other in [the different] phases of collective bargaining".[4233] Key purposes of the Code, highlighted in item 3, are to "strengthen

[4229] *Rustenburg Platinum* 1337 para 25.

[4230] Code, sub-item 1(2), 42. Coupled hereto, sub-item 1(3) states as follows:

"The legal context within which this Code should operate is explained in the text. While every effort is made to ensure that the explanations in the Code are accurate, any interpretation of the law advanced in this Code is always subject to what the courts ultimately determine."

[4231] Code, sub-item 1(4), 42.

[4232] Code, sub-item 1(5), 42. The above accordingly speaks to the points raised in the section above and pertains to subsections 203(3) and (4) of the LRA. Furthermore, specific acknowledgement is given to the need of possible interpretation by the Courts, given the purposefully general approach of the Code in catering for the varying circumstances within the South African labour relations system.

[4233] Code, sub-item 2(3), 43. The "serious measures" identified here, are expanded upon in sub-item

and promote orderly collective bargaining" by means of "promoting trust and mutual understanding and constructive engagement";[4234] "promoting the maximum involvement of workers and worker representatives in negotiations";[4235] "recognise the importance of workplace democracy and dialogue";[4236] promote the peaceful resort to a strike … free of intimidation and violence"[4237] and "proactively promote steps to avoid or prevent prolonged or violent strikes".[4238]

12 4 2 3 1 2 Part B of the Code – collective bargaining

Item 5 outlines the "fundamental commitments" on the "part of trade unions and their members, trade union federations [and] employers", so as to ensure "orderly and constructive collective bargaining and peaceful industrial and protest action".[4239] Of specific interest is sub-item 5(1)(c), which speaks of the "promot[ion] of maximum participation and *accountability in the preparation for, the conduct and the conclusion of negotiations* by" union members[4240] and "worker representatives of the trade union party to the negotiations".[4241] What is envisaged is that unions (along with the other parties identified above) will "take *all necessary measures to ensure the competence of negotiators* appointed to represent the parties to the negotiations".[4242]

This raises several important issues, ranging from how unions and their members (as a collective entity) are identified to the promotion of accountability with regard to

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2(4), and centres around the proactive, quick resolution of disputes prior to industrial action, combined with the parties having "explore[d] all genuine options" to resolve the issues at hand.

[4234] Code, sub-item 3(1)(a)(i), 43.

[4235] Code, sub-item 3(1)(a)(ii), 43.

[4236] Code, sub-item 3(1)(b), 43.

[4237] Code, sub-item 3(1)(d), 43.

[4238] Code, sub-item 3(1)(e), 43. Further reference can be made to sub-item 2(1), where "serious measures" are identified as being necessary to prevent violence and "induce a behaviour change in the way employees, employers and the police and private security, engage with each other during a strike". The "role and conduct" of the SAPS and "private security services" are also addressed in terms of sub-item 2(2).

[4239] Code, sub-item 5(1), 45.

[4240] Code, sub-item 5(1)(c), 45 – [my emphasis].

[4241] Code, sub-item 5(1)(c)(i), 45.

[4242] Code, sub-item 5(1)(d), 46 – [my emphasis]. Furthermore, the aforementioned are expected to "adhere to the principles of good faith bargaining", as per sub-item 5(1)(e). In addition, sub-item 5(1)(f) reads that "violence, intimidation, damage to property and the use of dangerous weapons in the pursuit of collective bargaining, industrial action or protest action is condemned in the strongest terms and should not be tolerated". Related hereto (as per sub-item 5(1)(h)), is the further commitment that the above parties prioritise their "dealing with violence related conduct… in an expeditious manner".

union members and representatives during negotiations. Of particular interest is the commitment to "take all necessary measures to ensure the competence of negotiators", which certainly raises broader questions of what is to be understood by the services rendered by a trade union in representing its members during negotiations. Reference is also made to expediently prioritise "dealing with violence related conduct",[4243] which, in turn, raises questions about internal union disciplinary processes.

Item 7 of the Code addresses the "[p]rinciples of good faith bargaining" and attempts to regulate the way parties bargain.[4244] Obtaining a proper and informed mandate from union members is obviously a critical aspect to the negotiating process.[4245] In this regard, sub-item 11 provides that the mandating processes must be "conducted in facilities that are conducive to collective bargaining" and that employers should assist this process by means of (where possible) providing facilities and allowing the necessary time off for "trade union officials or worker representatives to meet and if need be *ballot members* as provided for in the [LRA]".[4246]

Under the heading of "[d]evelopment and support for negotiators", item 8 again emphasises the commitment to "develop competent negotiators to engage in collective bargaining".[4247] This is to be effected by both "supporting the establishing of training courses on [the] Code *by recognised training institutions* to train negotiators in collective bargaining"[4248] and by "requiring negotiators to undergo such training".[4249] The Code, care of sub-item 8(2), furthermore expects of, *inter alia*, "[e]ach trade union" to "identify specific individuals for training and appointment as negotiators"[4250] and that these individuals should be afforded a reasonable paid time off from work unless

[4243] Code, sub-item 5(1)(h), 46.
[4244] Examples hereof span from all demands/responses being "in writing" (Code, sub-item 7(3), 47) – and that negotiations "should be conducted in a rationale and courteous manner", thereby avoiding "disruptive or abusive behaviour" (Code, sub-item 7(6), 48).
[4245] Code, sub-item 7(10), 48.
[4246] Code, sub-item 7(11), 48 – [my emphasis]. The balloting requirements in terms of the LRA and the Code, are discussed in greater detail in § 12 4 4 4 below – but suffice it to state at this point, that the Code duly acknowledges the importance of "worker voice" (and union democracy) in the context of the process.
[4247] Code, sub-item 8(1), 49.
[4248] Code, sub-item 8(1)(a), 49 – [my emphasis].
[4249] Code, sub-item 8(1)(b), 49.
[4250] Code, sub-item 8(2), 49.

already provided for in terms of an existing collective agreement.[4251] To this sub-item 8(4) ads that the "[n]egotiators of parties should on a regular basis, either jointly or separately, attend training courses using the same training materials and *conducted by recognised training institutions, trade unions or employers' organisations*".[4252]

What this demonstrates is that the Code is concerned with an alignment of the wishes of union members with their union and also the increased professionalisation of key individuals within trade unions. This is reminiscent of the earlier discussion – in chapter 6 – of the UMF instituted in Britain in 2005 with its focus on, *inter alia*, the facilitation of the operational modernisation of unions, to allow their improved response to changing labour market conditions.[4253] A key aspect of this initiative included the internal training of union officials. While the contrast between the Code and its origins in response to challenges within the broader South African labour relations system and the UMF and its origins is clearly significant, there nevertheless is an overlap. Under the right conditions, the professionalisation of unions – even at the instigation of government – is not unprecedented and is certainly worthy of more attention given the critical role that many unions fulfil.

Directly related to the above is sub-item 9(1), which regulates the process of "[p]reparing for negotiations". In terms of this provision (and subject to the democratic procedures contained in the union constitution), a trade union's leadership should in preparation for the union's negotiating demands/responses and "to the extent that it is necessary"[4254] do as follows: (i) "[C]onduct proper research into the state of the economy, sector, and ability of individual employers, particularly [SME] and new enterprises, the cost of living, the alleviation of poverty and reduction of wage differentials and inequality, and the likely impact of any proposal or response on

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[4251] Code, sub-item 8(3), 49.

[4252] Code, sub-item 8(4), 49 – [my emphasis]. It can be mentioned that the wording as italicised in the above sentence introduces an element of ambiguity. Sub-item 8(1)(a) requires of the parties to support the establishment of training courses, which are (presumably) to be presented by the "recognised training institutions" referenced therein. Sub-item 8(4), however, appears to then conflate the recognised training institutions, with that of trade unions and employers' organisations. Presumably, the item intended to reference those instances of "repeat" training, with participants then using the same training materials developed by those recognised training institutions, but with the "repeated" training then being conducted by unions or employer's organisations.

[4253] This being a paraphrasing of the words of M Stuart, M Martinez Lucio & A Charlwood "Britain's Trade Union Modernisation: State Policy & Union Projects" (2010) 45 *Ind J IR* 635 636, as cited at § 6 2 2 above.

[4254] Code, sub-item 9(1), 49-50.

employment and health, safety or welfare of employees";[4255] (ii) "[T]ake advice from labour market experts on [the] employment effects of a proposed demand or response";[4256] and, (iii) "[T]ake advice on settlement rates generally and specific to the sector".[4257]

These provisions again speak to the skill and expertise of the different representatives of the union in a process that requires appreciation of, depending on the circumstances, fairly complex economic and labour-related data. Furthermore, in terms of sub-item 9(3), the data/information so obtained "must be conveyed to members in order that in securing a mandate" for the negotiations, the members "are fully informed", also to "deal with expectations and introduce a sense of realism on the part of the members".[4258] Clearly, while the level of skills, knowledge and experience of representatives is a challenge, the further challenge is to accurately and effectively convey the information in such a manner that an involved membership is able to appropriately understand it so as to make informed decisions.

Finally, item 12 regulates the recommended use of "facilitators", as appointed by mutual agreement between the parties, in order to enable and assist with the negotiations.[4259] Of interest is sub-item 12(4) which provides that where unions "engage in collective bargaining on a regular basis", they should consider "the appointment of a facilitator or a panel of facilitators to facilitate their negotiations and their relationship from one course of negotiations to the next".[4260] This appears to recognise, justifiably, the particular skillset and challenges associated with collective bargaining negotiations and that "in-house" union officials might not always be best placed, particularly given past negotiations with a specific employer, to focus objectively on what might be best for the general membership. This provision is reminiscent of the trade union experience in the USA and the appointment of an independent panel of experts as discussed in chapter 8 above (at § 8 5 6). In short, there is much value in allowing complex and frequently emotionally-charged negotiations or disputes being handled by objective and impartial outsiders.

[4255] Code, sub-item 9(1)(a), 50.
[4256] Code, sub-item 9(1)(c), 50.
[4257] Code, sub-item 9(1)(d), 50.
[4258] Code, sub-item 9(3), 50.
[4259] Code, item 12, 52-53.
[4260] Code, sub-item 12(4), 53.

12 4 2 3 1 3 Parts D and E of the Code – industrial action (strikes and lockouts) and picketing

In Part D of the Code ("Industrial Action: Strikes and Lockouts"), item 16 commences with the "[c]onstitutional background" and confirms that both the right to engage in collective bargaining and industrial action (on the part of workers and employers) are "constitutionally protected",[4261] but may be limited if justifiable and reasonable.[4262] Sub-item 16(3) serves as a reminder that "[u]nlike most other rights in the Bill of Rights, the right to strike ... is a right to cause economic harm". This provision echoes the approach to trade unionism in Britain and the 1964 *Rookes v Barnard* decision (discussed in chapter 5).[4263]

Item 19 of the Code outlines the procedures for the "[b]allot of members" (these procedures are discussed in the balloting section below). Item 20 regulates the 48-hour "notice" that is to be provided prior to the commencement of the industrial action in terms of section 64(1)(b) of the LRA.[4264] Item 23 provides for "peace and stability and communication" during industrial action. Sub-item 1 – in addressing what rules may be developed by the parties to regulate industrial action – mentions that this may include the "establishment of a peace and stability committee made up of [*inter alia*] union officials, shop stewards [and] the conciliator or facilitator".[4265] The remainder of the Item regulates the exchange of contact details, subject to the applicable persons being identified, so as to ensure that appropriate communication and liaison/negotiation can take place during the course of the industrial action.[4266] These provisions accordingly emphasise the role played by trade union officials and shop stewards as member representatives during the course of industrial action.

[4261] Code, sub-item 16(1), 58.

[4262] Code, sub-item 16(2), 58. The item states further that these limitations, as placed on industrial action, "seek to make a strike ... the last resort or unnecessary because of other judicial or arbitral remedies or to protect society from strikes in essential services".

[4263] The above is followed by sub-item 16(5), which reads in full as follows: "Workers exercising the right to strike or the right to protest action ... must therefore recognise the constitutional rights of others", [footnotes omitted]. It would appear that the "others" in the aforementioned quote, is in reference to "the strikers, the families of the strikers, the small businesses that provide services in the community to those strikers, the employer, the economy and community" – as per sub-item 16(4).

[4264] Code, item 20, 62-63. As an aside – compare this to the effective two-*week* notice period required in Britain, as discussed at § 6 4 7 above.

[4265] Code, sub-item 23(1), 65.

[4266] Code, sub-item 23(2)(a)-(d), 65-66.

Part E of the Code ("Picketing") regulates picketing[4267] on the basis of section 69 of the LRA.[4268] Of interest to this study is, firstly, item 25 ("Authorisation") which confirms that a picket *must* be authorised by a registered trade union,[4269] while sub-item 25(2) requires that the authorisation "must be made in accordance" with the union's constitution before stating that this must "either be a resolution authorising the picket or a resolution permitting a trade union official to authorise a picket".[4270] This provision stands in noticeable contrast to issues outlined in chapter 6 above in relation to Britain, specifically how the ET (and ERDRA as the regulating statute) manage settlement agreements[4271] and the different provisions in TULRCA regarding the authority of officials to act on behalf of their unions in case of industrial action.[4272]

Item 32 regulates the expected "[c]onduct in the picket" and requires a series of positive actions on the part of unions.[4273] These include, *inter alia*, the appointment of convenors/marshals to "monitor and control" the picket in terms of the agreed rules[4274] and taking measures to ensure that the marshals "understand those rules".[4275] Technically, the item makes no direct reference to the union needing to ensure that the convenors/marshals, or the picketers for that matter, actually *comply* with those rules. Finally, in item 35[4276] the Code confirms that persons participating in such a

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[4267] Code, items 24-35, 66-75.

[4268] The latter provision has seen extensive changes and additions introduced by the LRAA, by means of s 4.

[4269] Code, sub-item 25(1), 67 [my emphasis].

[4270] Code, sub-item 25(2), 67. The sub-item also confirms that such resolution "should be formal and in writing." In terms of sub-item 25(3), a copy of the aforesaid resolution "ought" to be served on the employer prior to the start of the picket. It remains unclear why this particular provision was not stated more affirmatively, and what the implication would be where this was not done. Sub-item 25(4) confirms the authorisation "only applies to its members and supporters", with this being in reference to s 69 LRA.

[4271] As will be recalled, a "relevant independent adviser" is permitted to advise on settlement agreements, with the former now including union officials where their unions have certified in writing that said officials are both competent to provide advice, and have been authorised to do so on behalf of the union (whilst the necessary indemnity/insurance must also be in place) – see § 6 3 2 4 4 3 above.

[4272] As discussed above in the "Industrial action" section at § 6 4 6, this is centred around the potential liability of the unions for the actions of their officials in calling the strike action. Key to the aforementioned, is of course whether or not the union was deemed to have authorised (or repudiated) the action so taken by the officials.

[4273] Code, sub-item 32(2)(a)-(c) 71.

[4274] Code, sub-item 32(2)(a) 71. The Code lists an extensive set of "Default Picketing Rules" under Annexure B [at 78-84], that can be utilised – subject to the provisions of the LRA and Code – either by the parties or Commissioners, as a basis for an agreement or dispute resolution.

[4275] Code, sub-item 32(2)(c) 71.

[4276] Code, sub-item 35(1)-(2) 75.

(protected) picket "[do] not commit a delict or breach of contract".[4277]

12 4 2 3 2 The Code – concluding remarks

In summary it may be said that the Code, at least in respect of one of the primary functions of trade unions, namely collective bargaining, shows a clear concern with the current state of collective bargaining and the need to get the process back on track. While any endeavour to do so through intervention (be it via legislation or the Code) is limited in the first instance by the constitutional rights of the parties involved, the Code shows a clear appreciation that a focus on the accountability of negotiating partners, including trade unions, could contribute to this objective. The Code's vision of accountability is not only limited to what may be termed external accountability,[4278] but includes internal trade union accountability through improved mandates, improved skills of representatives (or the use of external facilitators), improved communication with members, balloting and authorisation in terms of a trade union's constitution. As such, the Code recognises that external accountability (the responsible use of power in society by trade unions in playing their institutionalised and constitutionally recognised role) is inextricably linked to a trade union's internal accountability in relation to its members.

12 4 3 The regulation of trade union representation in South Africa

12 4 3 1 Legislative provisions regulating trade union representation

Labour-related legislation contains numerous provisions specifically regulating the representation of trade union members by a trade union or its officials – both in the workplace and once a dispute is referred to an external dispute resolution institution.

[4277] The remainder of sub-item 35(1) states that "the employer may not sue a person *or union* for damages caused by a picket held in compliance with section 69 of the [LRA] *and* the applicable picketing rules", [my emphasis]. The above accordingly affirms picketing falling within the ambit of subsection 67(2) read with subsection 67(6) of the LRA, in terms of how conduct "in furtherance of a protected strike" is protected from the civil actions of delict and breach of contract – but subject to such conduct not amounting to criminally punishable offences. In this regard, see further Grogan *Workplace* 429.

[4278] Due acknowledgement is made to fact that the other role-players are also addressed in the Code – with their concomitant responsibilities, duties and obligations as well. However, given the focus of this study, same are not highlighted or referenced, unless necessary. Mention is made of the aforementioned, merely to offset what might otherwise appear as being a fairly one-sided account of the underlying approach of the Code.

This is in addition to representation during the process of collective bargaining described above.[4279] If anything, any discussion of the representative role of trade unions demonstrates to what extent trade union members rely on the services provided by their trade unions and why incompetence of the part of the union can have

[4279] At the outset, mention should be made of Chapter V, and its "Workplace Forums", since any discussion about the LRA and representation of workers, would (at least at first glance) warrant such inclusion. However, the prevalence of such Forums within South African workplaces – or more pointedly, the lack thereof – will unfortunately see this innovative mechanism, relegated to a footnote entry. See in this regard Van Jaarsveld et al "Labour Law" in *LAWSA* para 431, who commence their introduction to the system by stating: "The establishment of the system of workplace forums is an innovating aspect of the new labour law dispensation and a concrete manifestation of the concept of workplace democracy." Notwithstanding the aforesaid, they then proceed to state (at Van Jaarsveld et al "Labour Law" in *LAWSA* para 431 n1):

> "This system of workers' participation and co-determination is, however, doomed to failure. This sad state of affairs has been aptly summarised as follows by Thompson 2001 *CurLL* 31: 'The 1995 LRA ushered in an institution and a process to achieve the high road: workplace forums and consensus-seeking consultation. A paltry seventeen such bodies have been established, and the attempt of the drafters of the 2001 amendments to open up new channels to establish workplace forums died mid-year' [quoting C Thompson "Labour-Management Relations" (2001) 10 *Curr LL* 29 31]."

D Du Toit "Collective Bargaining and Worker Participation" (2000) 21 *ILJ* 1544 1547, in explaining the underlying causes behind the lack of support for the Forums, states as follows:

> "As matters stand, therefore, trade union control over workplace forums would seem to be all but complete. Workplace forums can only exist if majority trade unions wish them to exist and can be dissolved at the behest of the same unions. Their members are likely to be union nominees. While they exist, their powers are by definition confined to areas not covered by collective agreements, trade unions have the right to be involved in all their activities and every aspect of their existence can be regulated by collective bargaining to the exclusion of the LRA. They are, in essence, creatures of trade unions and collective bargaining rather than creatures of statute."

Thus, despite suggestions that the Department of Labour was considering amendments to the procedures of forming Workplace Forums [Du Toit (2000) *ILJ* 1547], they remain, essentially, a non-entity in the context of present-day labour relations in South Africa. And, in light of subs 80(2), they accordingly remain (if anything) "creatures of trade unions" – and not very popular ones, at that. In this regard, F Steadman "Workplace Forums in South Africa: A Critical Analysis" (2004) 25 *ILJ* 1170 1182-1183 provides figures regarding the diminishing number of Forums that were registered, ranging from 20 in 1997, to as few as 6 in 1999 (of which, 3 were later dissolved). Finally, A Steenkamp et al "The Right to Bargain Collectively" (2004) 25 *ILJ* 943 958-959 state:

> "Since its inception, very few workplace forums have, however, been established. There appears to be a general sense that, while institutionalized participation is a laudable proposition, trade unions are less than enthusiastic about committing themselves in this way. They fear that cooperative bodies such as workplace forums will undermine their independence and their traditional adversarial role inherent in collective bargaining."

See further P Benjamin "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)" (2013) Working Paper 47 *ILO IERD* 1 30. For an overview and background to the mechanism, see in general: V Satgar "The LRA and Work-place Forums: Legislative Provisions, Origins, and Transformative Possibilities" (1998) 2 *LDD* 43 43-62; G Wood & P Mahabir "South Africa's Workplace Forum system: A Stillborn Experiment in the Democratisation of Work" (2001) *ILJ* 230 and Steadman (2004) *ILJ* 1170 1170-1202.

such serious consequences. Below, examples of such representation is given with reference to the provisions of the LRA.[4280]

As point of departure, section 200 LRA regulates the (general) representation of employees or employers. Subsection 200(1) states that a registered trade union may act in any dispute to which any of its members is a party and allows for representation where the union acts "on behalf of any of its members",[4281] or "in the interest of any of its members".[4282] Similarly, subsection 200(2) LRA states that a registered trade union "is entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings."[4283] Section 202 LRA confirms that where a trade union is acting on behalf of any of its members in a dispute, service of any documents pertaining on the union, will be deemed "sufficient service on those members" for the purposes of the LRA. The rules applicable to conciliation and arbitration proceedings at the CCMA (and, by implication, proceedings at bargaining councils) specifically allow for members to be represented by an office-bearer, official or other member of a trade union.[4284] In addition, subsection 161(1)(c) and section 178 of the LRA specify that in any proceedings before the labour courts a party to the proceedings may be represented by, *inter alia*,[4285] "any member, office bearer or official of that party's registered trade union…". These provisions all confirm the role trade unions play in representing their members once a dispute is referred to external dispute resolution institutions.

Turning the attention to the role of trade union representation in the workplace, the key role player is the shop steward. In this regard, section 14 of the LRA, entitled "trade union representatives", is important. The term "representative" in this specific context refers to union shop stewards,[4286] who are present at the workplace and fulfil the dual

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[4280] Other pieces of labour legislation also provide for trade union representation. As far as the BCEA is concerned, see, for example, sections 50, 58, 65, 78 and 89.

[4281] Subsection 200(1)(b) of the LRA.

[4282] Subsection 200(1)(c).

[4283] See, for succinct commentary on s 200 of the LRA – and the employer's obligation to regard the trade union as representative of the employee/member – T Cohen et al *Trade Unions and the Law in South Africa* (2009) 23-24.

[4284] Rule 25 of the "Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration" (GN R223 in *GG* 38572 of 17-03-2015).

[4285] See subss 161(a)-(e) LRA for additional categories of persons who may represent workers before the Labour Court.

[4286] The other categories defined within the LRA, are union office-bearers and union officials. See the definition clause of the LRA at s 213.

role of being employed and remunerated by the employer, while simultaneously functioning as union intermediary. While this section is not exhaustive of the way in which a trade union may acquire the right to have shop stewards in a workplace or of their functions, the section is instructive as to the role shop stewards play in any workplace.

The section defines the meaning of a "representative trade union" (for purposes of acquiring the right to have shop stewards through section 21 of the LRA)[4287] and stipulates the number of representatives that a particular union is allowed per workplace, as determined by the corresponding number of that union's members who are employed at the workplace.[4288] Subsection 14(3) in turn confirms that the constitution of the relevant trade union "governs the nomination, election, term of office and removal of office of a trade union representative." Section 16 regulates the disclosure of information to either a representative trade union or such a union's representatives (subject to the conditions contained in subsection 16(5) LRA), in order to comply with subsection 14(4) LRA, which sets out the right that a union representative has to perform his functions.

As to areas in which shop stewards may represent employees in the workplace, there are many examples. One is mentioned by subsection 14(4)(a) LRA which provides that a shop steward has the right to – at the request of an employee in that workplace – "assist and represent the employee in grievance and disciplinary proceedings". This representative role of trade unions during the disciplinary process is confirmed in Schedule Eight to the LRA – the "Code of Good Practice: Dismissal". In terms of item 4(1) of the Code ("Fair Procedure"), the role of the trade union representative in assisting an employee/member in preparation for and participating in a disciplinary enquiry is reiterated, while item 4(2) states that a union should first be consulted in the event that the employee facing discipline is a shop steward, office-bearer or official of the trade union. The Code of Good Practice also expands on the representative role of trade unions during the dismissal process relating to unprotected strikes. Item 6(2) states that "[p]rior to dismissal [for unprotected strike action] the employer should, at the earliest opportunity, contact a trade union official to discuss the course of action it intends to adopt", before issuing an ultimatum to the striking

[4287] See subsection 14(1).
[4288] Subsections 14(2)(a)-(e).

workers. In the context of poor performance, item 8(1)(h), focusing on "Probation", provides that an employer "may only decide to dismiss… or extend the probationary period" after having invited the employee to make representations (and considered them) – and a trade union representative "may make the representations on behalf of the employee." The same right to represent a member is extended in case of a dismissal for poor performance after probation (item 8(4)). In cases where an investigation has been launched in respect of incapacity (either ill health or injury),[4289] item 10(2) recommends that the employee "should be allowed the opportunity to state a case in response and to be assisted by a trade union representative". And, to the extent that an employer and employee may agree to substitute a pre-dismissal arbitration for an enquiry into misconduct or incapacity, subsection 188A(5) of the LRA preserves the right of a trade union member to be represented by a trade union official or office-bearer.

Another example of trade union representation in the workplace is in the context of section 189 of the LRA regulating dismissals based on operational requirements. This section, as a point of departure, requires (in subsection 189(1)(b)(ii)) consultation with "any registered trade union whose members are likely to be affected by the proposed dismissals". And, in case of so-called large-scale dismissals for operational reasons by large employers (regulated in section 189A), there is an even more prominent role envisaged for unions and their representatives (see, for example, subsection 189A(7)(b) LRA,[4290] subsection 187(8)(b)(ii) LRA[4291] and subsection 189A(10)(b)(i) LRA).[4292]

From this discussion (and the broader discussion in chapter 2) it is clear that trade unions and their representatives fulfil a crucial role as spokesperson of – and participant in – their members' everyday labour relations environment, be it in the capacity of shop steward, office-bearer or official. In many cases, the stakes for the

[4289] In terms of sch 8, item 10(1).

[4290] Where a Facilitator has been appointed – and 60 days have elapsed – this subsection regulates either the notice of strike (in terms of subs 64(1)(b) or (d) of the LRA), or the referral of the dispute to the Labour Court (in terms of subs 191(11) LRA), that may be made by the trade union who received the notice of termination (in terms of subs 189(3) of the LRA).

[4291] The procedure here is the same *mutatis mutandis* as set-out in subs 189A(7)(b) of the LRA, but for the difference that no Facilitator has been appointed – and a minimum of 30 days have elapsed.

[4292] In terms of this subsection, where the union has given notice of a strike – no union members (or employees who fall under that trade union by virtue of a collective agreement) may then refer that dispute to the Labour Court.

trade union member in question are high and poor decision-making may have dire consequences for that member.

12 4 3 2 Judicial perspectives on the representative role of trade unions

The representative role of trade unions (and their concomitant accountability) has sporadically come before the courts since the LRA 1995 was adopted. In this regard, and as point of departure, it is important to distinguish the accountability of unions to their members from the accountability of unions to third parties, the broader public, non-union-member workers, employers and the state. Despite many cases exploring the accountability and liability of trade unions *and* their members for violence and damage to property during strike action (protected or unprotected),[4293] defamation claims,[4294] contempt proceedings stemming from (frequently violent) industrial action,[4295] damages incurred during marches,[4296] economic losses suffered by employers as a result of the shut down of operations and the like,[4297] the focus below is on the union-member relationship.[4298]

[4293] *Coin Security Group (Pty) Ltd v Adams* 2000 4 BLLR 371 (LAC); *Mangaung Local Municipality v SAMWU* 2003 3 BLLR 268 (LC); *Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union* 2005 26 ILJ 1458 (LC); *National Union of Metalworkers of SA on Behalf of Khanyile v Dunlop Mixing & Technical Services (Pty) Ltd* 2018 39 ILJ 2226 (LAC) and *National Union of Metalworkers of South Africa obo Khanyile Nganezi v Dunlop Mixing & Technical Services (Pty) Ltd* 2019 (5) SA 354 (CC).

[4294] *NEHAWU v Tsatsi* 2006 6 SA 327 (SCA).

[4295] *Security Services Employers' Organisation v SA Transport & Allied Workers Union* 2007 28 ILJ 1134 (LC); *In2food (Pty) Ltd v Food & Allied Workers Union* 2013 34 ILJ 2589 (LC); *Food & Allied Workers Union v In2Food (Pty) Ltd* 2014 35 ILJ 2767 (LAC); *KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union* 2018 ILJ 609 (LC); *GRI Wind Steel SA v Association of Mineworkers & Construction Union* 2018 39 ILJ 1045 (LC); *Swissport SA (Pty) Ltd v Mphalele* 2018 39 ILJ 656 (LC).

[4296] *SATAWU v Garvas* 2013 1 SA 83 (CC).

[4297] *Rustenburg Platinum Mines Ltd v Mouthpeace Workers Union* 2001 22 ILJ 2035 (LC); *Professional Transport & Allied Workers Union on Behalf of Khoza v New Kleinfontein Gold Mine (Pty) Ltd* 2016 37 ILJ 1728 (LC); *Algoa Bus Company v SATAWU* 2010 2 BLLR 149 (LC) and *Algoa Bus Company (Pty) Ltd v Transport Action Retail & General Workers Union (TARGWU)* (P368/13) 2015 31 (07-05-2015) *SAFLII* <http://www.saflii.org/za/cases/ZALCPE/2015/31.pdf> (accessed on 02-04-2017).

[4298] See further the following, by no means comprehensive, list of journal articles involving the abovementioned: M Christianson "Sueing the Union for Losses After an Unprotected Strike: Rustenburg Platinum Mines Limited v The Mouthpeace Workers Union" (2001) 11 *Contemp Lab L* 29 29-30; A Landman "No Place to Hide – A Trade Union's Liability for Riot Damage: A Note on Garvis v SA Transport & Allied Workers Unions (Minister for Safety & Security, Third Party) (2010) 31 ILJ (WCC) 2521" (2011) 32 *ILJ* 834 834-846; IM Rautenbach "The Liability of Organisers for Damage Caused in The Course Of Violent Demonstrations as a Limitation of the Right to Freedom of Assembly – SATAWU

Relevant case law shows that questions around trade union representation, for the most part, arose from four scenarios: Where trade unions enter into settlement agreements (or collective agreements) on behalf of their membership, but to the detriment of some members; Where trade union members are unhappy with the level of service provided to them during industrial action (with a consequent loss of jobs); Where trade unions allegedly fail in the quality of advice provided for purposes of representing members during legal proceedings and in their pursuit of those proceedings; and, Intra-union strife (between officials or between members and officials). From these cases, in turn, there are four legal issues which have confronted the courts: (i) The role, status and binding effect of the representative role of the trade union; (ii) The willingness of the courts to interfere in intra-union disputes, especially in light of section 158(1)(e) of the LRA which empowers the Labour Court to determine disputes between members and their union about non-compliance with the union's constitution; (iii) The possibility for members of holding a trade union liable on the basis of delict; and, (iv) The possibility for trade union members of holding a trade union liable on the basis of contract. The last two questions were already considered in the context of the common law discussion in chapter 11. The discussion below focuses on the first two of these issues – the representative role of unions and the willingness of the courts to intervene in the union-member relationship. Furthermore, the discussion should be seen as an extension of the discussion of common law principles introduced in chapter 11. It will be recalled from the discussion in that chapter that the bulk of earlier cases revolved around the interpretation of union constitutions and measurement of trade union conduct against the standards set by these

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v Garvas 2012 8 BCLR 840 (CC)" (2013) *TSAR* 151 151-164; SB Gericke "Revisiting the Liability of Trade Unions and/or Their Members During Strikes: Lessons to be Learnt from Case Law" (2012) 75 *THRHR* 566 566-585; A Rycroft "Being Held in Contempt for Non-compliance with a Court Interdict: In2Food (Pty) Ltd v Food & Allied Workers Union & Others (2013) 34 *ILJ* 2589 (LC)" (2013) 34 *ILJ* 2499 2499-2505; A Rycroft "The Legal Regulation of Strike Misconduct: The Kapesi Decisions" (2013) 34 *ILJ* 859 859-870; MM Botha "Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?" (2015) 48 *De Jure* 328 328-350; K Calitz "Violent, Frequent and Lengthy Strikes In South Africa: Is the Use of Replacement Labour Part of the Problem" (2016) 28 *SA Merc LJ* 436-460; MM Botha & W Germishuys "The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court (1)" (2017) 80 *THRHR* 351 351-369; and, finally, MM Botha & W Germishuys "The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court (2)" (2017) 80 *THRHR* 531 531-552.

constitutions.[4299]

This being said, in considering the case law, the concept of majoritarianism first needs to be explored – both majoritarianism in the sense of a majority trade union representing employees in a workplace and majoritarianism as an internal trade union democratic organising principle.

Majoritarianism[4300] in its first sense, a principle much commented on through the years,[4301] is embraced by the 1995 LRA.[4302] Writing in 1997, Macun quotes Baskin and Satgar as follows:

> "[T]he LRA is profoundly majoritarian. Unions with majority support get distinct advantages. Small,

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[4299] See for instance, *inter alia*, the following (some of which, have been discussed above in chapter 11): *Garment Workers' Union v Smith* 1936 CPD 249; *Maxwell v Amalgamated Bricklayers Union* 1939 TPD 300; *Fouche v Building Workers Industrial Union of SA* 1947 1 SA 266 (T); *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1947 4 SA 690 (T); *Du Plessis v Building Workers' Industrial Union* 1948 3 SA 1059 (W); *De Beer v Mineworkers' Union* 1948 4 SA 503 (T); *Mine Workers' Union v Brodrick* 1948 4 SA 959 (A); *The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling* 1948 3 SA 831 (A); *Garment Workers' Union v De Vries* 1949 1 SA 1110 (W); *Klemp v Mentz, NO* 1949 2 SA 443 (W); *Gründling v Beyers* 1967 2 SA 131 (W); *Sorenson v Executive Committee, Tramway & Omnibus Workers Union (Cape)* 1974 2 SA 545 (C); and *National Union of Textile Workers v Ndlovu* 1987 3 SA 149 (D).

[4300] For the purposes of this study, deserving of mention is the notable similarities between the concept in South Africa, and the exclusive representation system of the American approach to collective bargaining – as discussed above in chapters 8 and 9. See in this regard S Christie "Majoritarianism, Collective Bargaining and Discrimination" (1994) 15 *ILJ* 708 708, 720 – it being no mere coincidence that both the *International Brotherhood of Electrical Workers v Foust* 442 US 42 (1979) and *Vaca v Sipes* 386 US 171 (1967) cases, are referred to. That being said, this is however subject to significant *differences* between both, key of which is the American system being dependent on representative elections within a bargaining unit, and approval thereof by the NLRB (see chapter 9).

[4301] See for instance B Grant "In Defence of Majoritarianism: Part 1 – Majoritarianism & Collective Bargaining" (1993) 14 *ILJ* 305 305-315; B Grant "In Defence of Majoritarianism: Part 2 – Majoritarianism and Freedom of Association" (1993) 14 *ILJ* 1145 1145-1153; Christie (1994) *ILJ* 708 708-720 and D Du Toit "An Ill Contractual Wind Blowing Collective Good-Collective Representation in Non-Statutory Bargaining and the Limits of Union Authority" (1994) 15 *ILJ* 39 39-53.

[4302] See for instance I Macun "Does size matter? The Labour Relations Act, Majoritarianism and Union Structure" (1997) 1 *LDD* 69 69-82; J Kruger & CI Tshoose "The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective" (2013) 16 *PELJ* 285 285-326; T Cohen "Limiting Organisational Rights of Minority Unions: POPCRU v Ledwaba 2013 11 BLLR 1137 (LC)" (2014) 17 *PELJ* 2209 2209-2227; TG Esitang & S van Eck "Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions" (2016) 37 *ILJ* 763 763-778; S Snyman "The Principle of Majoritarianism in the Case of Organisational Rights for Trade Unions – Is it Necessary for Stability in the Workplace or Simply a Recipe for Discord?" (2017) 37 *ILJ* 865 865-879 and J Barnard & MM Botha "Trade Unions as Suppliers of Goods and Service" (2018) 30 *SA Merc LJ* 216 216-250.

> minority and craft-based unions are disadvantaged. The message for unions is clear … grow or stagnate".[4303]

And, if one considers the following remarks made in *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd*[4304] about the virtues of majoritarianism in its first, broad sense, the importance of majoritarianism with regard to the internal functioning of trade unions also becomes clear:

> "Majoritarianism in the context of retrenchments is a rational system that is well integrated in order to achieve the legitimate governmental purpose of orderly collective bargaining and giving representative unions primacy in order to promote workplace peace and avoid a proliferation of unions and a multiplicity of consulting partners. Tugging the thread of majoritarianism with regard to consulting partners might unravel the entire sweater woven by the legislature in the Act. It is not a task that this court should undertake. It is a task best left for the legislature to consider, if it is so inclined".[4305]

From a comparative perspective, these remarks are important: the discussion of the USA experience showed how a strict majoritarian representative regime led to judicial development of a DFR. Put differently – the stronger majoritarianism, the easier to question a trade union's role in exercising its representative functions. Not surprisingly, in the South African context, Grogan translates the broad principle of majoritarianism into its second sense – that is, in the context of internal trade union decisions – by stating that "[a] union's authority to conclude agreements to which some of its members might object flows from the principle of 'majoritarianism'"[4306] – before quoting as follows from the LAC in *Ramolesane v Andrew Mentis*:[4307]

> "[T]here will inevitably be people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. Nonetheless, because of the principle of majoritarianism, such decision must be enforced against them also."[4308]

[4303] Macun (1997) *LDD* 73, quoting Baskin & Satgar [(1995) "South Africa's New Labour Relations Act: A Critical Assessment and Challenges for Labour" (1995) 12].
[4304] *Association of Mineworkers & Construction Union v Royal Bafokeng Platinum Ltd* 2018 39 ILJ 2205 (LAC).
[4305] 2221F-H.
[4306] J Grogan *Workplace Law* 12 ed (2017) 353.
[4307] *Ramolesane v Andrew Mentis* 1991 12 ILJ 329 (LAC).
[4308] *Andrew Mentis* 336E-F.

In short, therefore, "majoritarianism" is the foundation of a system where the interests of the majority are potentially placed above those of a minority.[4309] It applies to a trade union's right in its relationship with the employer (and other trade unions) to represent employees in a workplace and it also applies to a trade union's right, in relation to its members, to represent those members. For purposes of this study, it is the second meaning of majoritarianism, in particular, that is important and it is to a discussion of those cases where it was considered that the discussion now turns. In general, it may already be said that courts have expressed themselves strongly on the centrality of the representative role to played by trade unions and also that the will of the majority will be recognised and given effect to.

Considering these cases in chronological sequence, the 1999 decision of *Ngcobo v Blyvooruitzicht Gold Mining Co*[4310] saw the court confirm that where members are represented by their union, "even if [the members] did not give a specific mandate to the union, both in terms of the ordinary rules of agency and in terms of the principles of collective bargaining and majoritarianism", the members are bound by those agreements concluded between an employer and their union.[4311] A year later, Blyvooruitzicht Gold was again in court, this time before the Labour Appeal Court as the appellant in *Blyvooruitzicht Gold Mining v Pretorius*.[4312] Here, Conradie JA, in considering the quality of representation by UASA of the respondent,[4313] stated as follows:

> "When a trade union conducts negotiations of this kind, it represents the interests of the employees.

[4309] Different contexts see this playing out differently. In the context of the LRA, certain rights or benefits are afforded to majority unions, that smaller (less representative) unions do not necessarily have. In this manner, the collective bargaining process is streamlined, since effectively, the number of potential role-players are limited on the grounds of size, influence, and therefore, representivity. Regarding these rights/benefits, they include, *inter alia*, the following:

> "[T]he right to appoint representatives; to disclosure of information; the right to enter into a collective agreement and set thresholds of representativity for the granting of access, stoporder facilities; the right to conclude agency shop and closed shop agreements; to apply for the establishment of a workplace forum; and the right to conclude collective agreements which will bind employees who are not members of the union or unions party to the agreement" – as per *Municipal & Allied Trade Union of SA v Central Karoo District Municipality* 2019 40 ILJ 386 (LC) 395B-D – as extracted from Part A "Organisational Rights", under Chapter III "Collective Bargaining" of the LRA.

[4310] *Ngcobo v Blyvooruitzicht Gold Mining Co Ltd* 1999 20 ILJ 1896 (LC).

[4311] 1908E-G.

[4312] *Blyvooruitzicht Gold Mining Co Ltd v Pretorius* 2000 7 BLLR 751 (LAC).

[4313] 754 para 11.

> It acts as their spokesperson. It does not act as the agent of any one of them. A union's obligations in situations of collective bargaining derive from the principles of representative governance rather than the principles of agency".[4314]

In the same year, in *NUMSA v CCMA*,[4315] Landman J (as he then was), stated that "[t]here is no doubt in my mind that the Act intended that an employee be entitled to representation by a union in all the dispute resolution and collective bargaining mechanisms which are provided for under the LRA".[4316] 2001 saw Davis AJA (as he was then) hand down judgment in *Baloyi v M & P Manufacturing*,[4317] confirming that in terms of section 189(1) of the LRA there is no obligation on an employer to consult in parallel with both the representative union *and* the employee, since the premise of the section in terms of such consultation was to specifically allow for consultation by representation (where applicable).[4318]

One immediate consequence of a combination of acceptance of majoritarianism, recognition of the representative role of trade unions and the common law recognition of the sanctity of union constitutions (described in chapter 11), is that courts will not lightly interfere in the internal functioning of trade unions. In this regard, two cases require examination – given their focus of the internal processes of a trade union related to the removal from office of office-bearers, and their subsequent attempts to be reinstated. As such, these cases did not – strictly speaking – focus on the union-*member* relationship. However, they remain instructive regarding the approach to internal union processes and applications in terms of section 158 of the LRA.

In *Theron v FAWU*[4319] the court, after consideration of *GWU v De Vries*[4320] (discussed in chapter 11), found that there is no "basis which would give a court power to interfere with a decision of a trade union whereby it removes or elects office-bearers in a way in which the members of such union have agreed" and that it is not "open to the courts to look at the reason why a particular official was removed or elected as this is beyond the court's powers of interference".[4321] The court did add that courts "would

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[4314] 754 para 12, [references omitted].
[4315] *NUMSA v CCMA* 2000 22 BLLR 1330 (LC).
[4316] 1339D.
[4317] *Baloyi v M & P Manufacturing* 2001 2001 BLLR 389 (LAC).
[4318] 389 para 23.
[4319] *Theron v FAWU* 1997 18 ILJ 1046 (LC).
[4320] *GWU v De Vries* 1129.
[4321] *Theron v FAWU* 1056G. The court stated further in this regard, as follows:

be in a position to interfere in the decisions of such associations or trade unions if they have not adhered to their own constitutions which enjoins them to act in a certain manner."[4322] A further noteworthy aspect of the case related to a point *in limine* raised on behalf of FAWU. It was contended that the office-bearers' complaint stemmed from section 4 of the LRA (the freedom of association provision) and, as such, should have been remedied in terms of section 9 of the LRA which requires such disputes to be referred for conciliation at the CCMA.[4323] This meant, it was argued, that the LC was effectively *precluded* from hearing an application on the basis of subsection 158(1)(e).[4324] The court, relying on subsection 157(4)(a) of the LRA, disagreed, reasoning that the LC has a discretion (based on assessment of the facts before it) on whether or not to entertain claims arising from Chapter II of the LRA.[4325]

In the related *FAWU v Buthelezi* matter,[4326] the Labour Court was tasked with review of a CCMA arbitration award to the effect that one of the office-bearers (from the same facts as the *Theron v FAWU* dispute) had the right to be heard before FAWU's National Conference.[4327] The court, in finding that an internal trade union delay following the CCMA award had seen the National Conference already held,[4328] was unprepared to make a further order that a special National Conference be organised – and stated as follows:

> "For this court to order the applicant to convene a special national conference would, in my view, amount to undue and unwarranted interference in the applicant's affairs. The drafters of the Act that established this court could never have contemplated that this court should also have the right to

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> "I agree that where a tribunal is sitting as a disciplinary forum and performing a disciplinary function it is implicit that the rules of natural are applicable and procedural and substantive unfairness apparent from the workings of such tribunals would give the courts leeway to interfere. I think that the point of distinction is very clear. Where an association or trade union is exercising original jurisdiction… whereby by majority vote it takes decisions is not reviewable on substantive or procedural unfairness grounds" [1056G-I].

[4322] 1056J.

[4323] 1049F-H.

[4324] 1049D.

[4325] 1050G-I. The court furthermore reasoned that the office-bearers could rely on the internal procedures of the union, by means of garnering the required support to overturn the decision take, at the union's next National Conference – *Theron v FAWU* 1057BC.

[4326] *Food & Allied Workers Union v Buthelezi* 1998 19 ILJ 829 (LC).

[4327] The respondent was opposing FAWU's application to review and set aside the order, and was in turn requesting (in terms of subs 185(1)(c) LRA) to have the LC make the arbitration award an order of court – *FAWU v Buthelezi* 831A.

[4328] 835E-H.

interfere in the affairs of domestic tribunals to the extent that I am requested to do".[4329]

Mzeku v Volkswagen[4330] provided further support for the representative role of trade unions in light of section 200 of the LRA. This matter involved a dispute between trade union members and their own union.[4331] The court confirmed that in spite of "a rift between the union" and its members,[4332] "until an employee has resigned as a member of a trade union and such resignation has taken effect and the employer is aware of it, the employer is, generally speaking, entitled, and obliged, to regard the union as the representative of the employee and to deal with it on that basis".[4333] As such, the court held that the CCMA's view that Volkswagen was not to have dealt with NUMSA (the trade union) would have "required [Volkswagen] to act in breach of its statutory obligation" – in terms of section 200(1) of the LRA.[4334]

In *Manyele v Maizecor*[4335] the court interpreted section 200(2) of the LRA and stated: "Philosophically, the union constitutes the institutional embodiment of the several members involved in the dispute".[4336] Handed down some five years later, the judgment in *Mhlongo v FAWU*[4337] concerned a settlement agreement concluded on behalf of the trade union members who alleged the union "had no mandate to settle

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[4329] 835I-J.

[4330] *Mzeku v Volkswagen SA (Pty) Ltd* 2001 8 BLLR 857 (LAC).

[4331] The facts are briefly that NUMSA had suspended a number of shop stewards working at the Volkswagen factory outside Port Elizabeth. This resulted in a downing of tools by the NUMSA members, in solidarity with the suspended shop stewards – which the NUMSA warned would amount to an illegal (and unprotected) strike – *Mzeku* 873H-J. Upon their refusing to return to work, they were dismissed. Their dismissal was challenged, and made its way via the CCMA and LC to the LAC.

[4332] 874G. Regarding member dissatisfaction with their union, the LAC states:

> "It can reasonably be expected that, as in any organisation, there would at any one time be a number of employees in any workplace who may not be happy with the union for one reason or another. That a member of a union may be unhappy with his or her union at any one time does not necessarily mean that such member no longer wants to continue as a member of the union nor does it necessarily mean that the member no longer wants the union to continue to be his or her representative" – *Mzeku* 874I-875A.

[4333] 875B.

[4334] 876G.

[4335] *Manyele v Maizecor (Pty) Ltd* 2002 23 ILJ 1578 (LC).

[4336] 1583H. The court furthermore stated that the union does not act as an agent, "because its pre-existing representative relationship already constitutes the foundation for that status and power" – to which was added, that the union's role is "akin to that of a curator ad litem in civil proceedings" – *Maizecor* 1583G-H.

[4337] *Mhlongo v FAWU* 2007 2 BLLR 141 (LC).

the dispute on their behalf".[4338] The court was called on to consider whether or not the settlement agreement should be reviewed and set aside.[4339] Notable is that the case involved consideration of an application in terms of subsection 158(1) of the LRA.[4340] At the outset, the arguments pertaining to the settlement agreement came down to whether or not the members had terminated their membership. The court held that they had not[4341] – by finding that terminating a mandate does not equate to a termination of membership[4342] – and that, in light of both *Mzeku* and *Baloyi*,[4343] the union and employer were entitled to conclude the settlement agreement.[4344] Specifically, the court stated that "[t]he union was not an agent of the applicants as one would terminate the authority of an attorney".[4345] Also of note is that the applicant trade union members alleged that they "were not fairly represented".[4346] Unfortunately, this allegation – based on the apparent dissatisfaction with the service offered by their union and reminiscent of the DFR in the USA – was not properly pleaded and presented before the court.[4347]

Mhlongo v FAWU and *Mzeku* were both considered in the 2008 decision of *NUM v Geffens Diamond Cutting Works.*[4348] In this case the court was required to decide on another dispute about a dismissal for operational requirements in response to an application by a minority union (NUM).[4349] The court concluded that since "UASA [the

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[4338] 142 para 1.

[4339] 142 para 1. Regarding the facts, briefly stated: FAWU instituted proceedings against the employer on the basis of the dismissal of a number of its members, including the applicants [*Mhlongo v FAWU* 142 paras 2-3]. The members appointed attorneys to represent them, who met with the employer (and some of the applicant members), but the dispute could not be settled [*Mhlongo v FAWU* 142 paras 4-5]. FAWU continued negotiating with the employer, and concluded the settlement agreement [*Mhlongo v FAWU* 142 para 6].

[4340] It must be pointed out that, unfortunately, it is not clear from the judgment as to which *specific* sub-provision of subsection 158(1) was relied on.

[4341] Key to this outcome, was the failure on the part of the applicant members to rely on a provision within the union constitution – *Mhlongo v FAWU* 143 para 12.

[4342] 143 para 12.

[4343] These being referred to at *Mhlongo v FAWU* 144-145 paras 18-19, respectively.

[4344] 144 paras 14-15. The court states further that: "The union is entitled to decide how best to protect the interest of its members in general without excluding the others" – *Mhlongo v FAWU* 145 para 20.

[4345] 144 para 14. Again, the court also emphasised that "union representation is based on the principle of majoritarianism".

[4346] 143 para 9.

[4347] 143 para 9.

[4348] *National Union of Mineworkers v Geffens Diamond Cutting Works (Pty) Ltd* 2008 29 ILJ 1227 (LC).

[4349] Briefly stated, whilst the employer was negotiating with the majority union, UASA (in terms of section 189A consultations) – certain UASA members thereafter resigned their membership and joined NUM,

majority union] was authorized and mandated to act on their behalf"[4350] and where procedural irregularities regarding the dismissals were alleged, "the only recourse in this regard would be against UASA" and that the member's "relationship with UASA [accordingly] has nothing to do with the [employer]".[4351]

Settlement agreements were again considered in *SA Post Office v CWU*[4352] and in *Fakude v Kwikot.*[4353] Both judgments confirmed the principle of majoritarianism in trade union representation, particularly since in both cases a minority group opposed the conclusion of the agreements on the basis that it adversely affected their interests. *SA Post Office v CWU* referred favourably to the *Andrew Mentis* case,[4354] while *Kwikot* considered both *Maizekor* and *Mzeku* before concluding that "a decision taken by a union cannot be vitiated by the fact that the decision was taken without having regard to the interest of the minority members".[4355] The court also made the point that "[t]he fact that the minority are adversely affected by the decision taken by the union is immaterial because in law, those affected by the decision joined the union voluntarily and in the exercise of their freedom of association".[4356]

Interestingly, in *National Entitled Workers Union v Sithole*,[4357] the Labour Appeal Court had to decide whether the labour courts could entertain a section 158(1)(e) application on the part of a union in an attempt to extract outstanding membership fees from their own (current and former) members.[4358] The court overturned the court *a quo's* reasoning that it was not the intention of the LRA to see "the Labour Court [serving] as a collection agency for unions… to collect subscriptions"[4359] – and was

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the minority union at the employer. They were therefore represented by UASA at the time of their dismissal [para 39]. When the applicant members argued their dismissals were unfair [para 1], NUM instituted action against the employer – UASA was not joined as a party to the proceedings [para 39].

[4350] Para 39.

[4351] Para 41. See further Gericke (2012) *THRHR* 578 n89.

[4352] *SA Post Office Ltd v CWU* 2010 1 BLLR 84 (LC).

[4353] *Fakude v Kwikot (Pty) Ltd* 2013 34 ILJ 2024 (LC).

[4354] The specific quotation cited [*SAPO v CWU* 83 para 23], was also quoted above [*Andrew Mentis* 336A], with the court furthermore referencing Grogan [*Workplace Law* 3 ed (1998) 203], in stating:

> "Implied in the principle of majoritarianism is that the union leadership as representatives and not as agents of members may take binding decisions which may not necessarily be supported by the membership or other structures of the union".

[4355] *Fakude v Kwikot (Pty) Ltd* 2013 34 ILJ 2030 (LC) para 24.

[4356] Para 30.

[4357] *NEWU v Sithole* 2004 11 BLLR 1085 (LAC).

[4358] 2202J.

[4359] 2204C. The court *a quo* was instead to hold "that s 158(1)(e) was intended to give power to the

forced to concede that the correct interpretation of the provision could include the claim (albeit, on the facts, in respect of a single member)[4360] being sought.[4361]

This overview shows that the role fulfilled by unions as representatives of their members (and, sometimes, other employees based on the broader notion of majoritarianism) is of central importance. It furthermore shows some of the challenges facing trade union members in those situations where they might feel aggrieved at the service being offered by their union. Where the entire system is fundamentally built around the representative role of trade unions against the backdrop of majoritarianism, the options for aggrieved trade union members in terms of the common law and in terms of section 158 of the LRA are accordingly limited.

12 4 4 The direct regulation of the internal functioning of trade unions

12 4 4 1 Introduction

The discussion thus far about the legislative regulation of trade unions and their accountability focused on, firstly, the entrenchment of the role of trade unions through promoting collective bargaining and, secondly, specific recognition of the representative role of trade unions. In this section, Chapter VI of the LRA, entitled "Trade Unions and Employers' Organisations",[4362] which is of critical importance in examining the extent to which the LRA regulates the internal functioning of trade

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Labour Court to determine disputes within unions … that might threaten labour relations and which would otherwise tend to detract from the purpose and primary objects of the Act" – *NEWU v Sithole* 2204D-E.

[4360] *NEWU v Sithole* 2205A sees the order being made that the LC decision is set aside, with the first respondent being ordered to pay an amount of R350.00 for arrear dues, with no order as to costs".

[4361] Davis AJA was to state as follows:

> "[T]he implication of this meaning holds serious consequences for the Labour Court. To convert the Labour Court into a collection agency holds undesirable consequences for the court's workload and implications which may not have been fully appreciated at the time that s 158(1)(e) was included in the Act. For this reason, I would recommend that serious consideration be given to a legislative amendment to the section so as to ensure that disputes concerning union subscriptions do not fall within the jurisdiction of the Labour Court. The court should not be burdened with demands for payment of subscriptions which can easily and more appropriately be dealt with by the lower courts in general and the small claims courts in particular, especially when the matter has nothing to do with employment or labour relations" – *NEWU v Sithole* 2204H-J.

[4362] The Chapter is divided into 4 parts: Part A "Registration and Regulation of Trade Unions or Employers' Organisations", ss 95-111 LRA; Part B "Regulation of Federations of Trade Unions or Employers' Organizations", s 107 LRA; Part C "Registrar of Labour Relations", ss 108-110 LRA; and Part D "Appeals from Registrar's Decision", s 111 LRA.

unions and their accountability, is examined.

Any attempt to promote collective bargaining (as the LRA does) will be of little value in the absence of properly functioning trade unions. Furthermore, the examination of South Africa's past experience shed light on the different mechanisms that were introduced at different times via legislation in order to bring about increased control over the internal affairs of unions. When this is furthermore viewed in the light of the political transition during the mid-1990s which culminated in measures to *remove* many union control mechanisms from legislation, it quickly becomes apparent that chapter VI of the LRA requires close consideration.

12 4 4 2 The registration of unions

Section 95 of the LRA contains the requirements for the registration of trade unions.[4363] Subsection 95(1) requires the union to be properly named,[4364] to have adopted a constitution,[4365] to have an address within South Africa[4366] and to be "independent".[4367] The union constitution will be discussed separately below at § 12 4 4 3.

Section 96 sets out the procedure for registration[4368] before section 97 regulates the effect of registration on trade unions. Of particular relevance here are subsections 97(1), 97(2) and 97(3). Subsection 97(1) states that a certificate of registration is sufficient proof that the union is deemed registered, but more importantly, is also

[4363] The specifics of s 95 is also discussed, as appropriate, at § 3 4 2 above, in regard to the LRA's control over the internal functioning of labour associations, specifically in the context of union constitutions.

[4364] Subsection 95(1)(a) of the LRA – which requires compliance with the requirements of subs 95(4) of the LRA.

[4365] Subsection 95(1)(b) – a constitution that meets the requirements of subss 95(5) and 95(6).

[4366] Subsection 95(1)(c).

[4367] Subsection 95(1)(d) – hereby meaning that the said unions is not a so-called "sweetheart" union, thus under the control of the workplace employer (as regulated by subs 95(2) LRA).

[4368] Briefly stated, "any trade union … may apply for registration" (s 96 LRA) by providing the Registrar with the necessary information listed in subss 96(a)-(c) LRA. Should the Registrar require further information, or find that the union has not complied with the aforesaid requirements, then in terms of subss 96(4)(a)-(b) – the Registrar must notify the union of same, and afford it 30 days to provide the further information/comply with the requirements. Failure to do so, sees the Registrar (in terms of subss 96(6)(a)-(b) LRA) "refuse to register the applicant; and notify the applicant in writing of that decision".

considered a body corporate. Subsections 97(2)[4369] and (3)[4370] make provision for the limited liability of a member, office-bearer or official of a registered trade union, by stating that they are not personally liable for any loss suffered by any person as a result of conduct while performing functions for (or on behalf of) the trade union, provided this was done in good faith. This noteworthy provision – and its impact on both a possible legal duty owed by union officials to their members and on vicarious liability – was briefly discussed in chapters 2 and 11. This provision contains one of the key distinctions between registered and unregistered trade unions and one of the primary advantages of registration.

12 4 4 3 The requirements for union constitutions

Subsection 95(5) requires a more detailed examination, given the legal importance of a trade union's constitution which runs as a golden thread right through this study. Subsection 95(5) is peremptory in nature in that it states that "[t]he constitution of any trade union… that intends to register *must*" (my emphasis) regulate (or at least address) a list of 23 topics.

The constitution must firstly state that it "is an association not for gain";[4371] must "prescribe qualifications for, and admission to, membership;[4372] must "establish the circumstances in which a member will no longer be entitled to the benefits of membership";[4373] and "provide for the termination of membership".[4374] Continuing down the list is subsection 95(5)(e), which requires that an appeal process needs to be provided for, along with related procedures, and the relevant (union) "body" that such appeals will be heard by in instances involving either the termination of, or loss of benefits, of membership. Membership fees, the methods of determining them (and

[4369] Subsection 97(2) of the LRA states: "The fact that a person is a member of a registered trade union … does not make that person liable for any of the obligations or liabilities of the trade union".

[4370] Subsection 97(3) states: "A member, office-bearer or official of a registered trade union… or, in the case of a trade union, a trade union representative *is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith* by the member, office-bearer, official or trade union representative *while performing their functions for or on behalf of the trade union*" [my emphasis].

[4371] Subsection 95(5)(a).

[4372] Subsection 95(5)(b).

[4373] Subsection 95(5)(c).

[4374] Subsection 95(5)(d).

any "other payments") must also be provided for.[4375]

While subsection 95(5)(h) simply states that the constitution must "establish the manner in which decisions are to be made", it follows directly on subsection 95(5)(g), which requires rules to be prescribed for the "convening and conducting of meetings of members" *and* "meetings of representatives of members". This includes details regarding the required quorum and meeting minutes.[4376] After requiring the establishment of the "office of [the trade union] secretary" (and this office's functions),[4377] the section requires that the constitution must provide for office-bearers, officials and trade union representatives (shop stewards) and define their respective functions.[4378] Subsection 95(5)(k) requires a procedure for the nomination and election of office-bearers and shop stewards, while subsection 95(5)(l) regulates the procedure for "appointing, or nominating and electing, officials". The inverse hereof is provided for by subsection 95(5)(m), which requires the constitution to establish the circumstances surrounding the *removal* from their positions of office-bearers, officials and union representatives. Similar to subsection 95(5)(e), subsection 95(5)(n) LRA requires the constitution to provide for an appeal against such removal, along with the related procedures and the appeal body involved.

What follows is the important requirement to establish "the circumstances and manner in which a ballot must be conducted",[4379] followed in turn by subsection 95(5)(p) which requires the constitution of a union to provide for a pre-strike ballot of

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[4375] Subsection 95(5)(f).

[4376] The distinction between, on the one hand "meetings of members", and on the other, "meetings of representatives of members" is interesting. It is submitted that the former is intended to cater for shop-floor/factory-level meetings, whilst the latter, speaks to higher-level meetings at regional, provincial, sectoral or national levels – and would therefore involve (at bare minimum) union representatives/shop stewards, and then office-bearers and officials. But then equally so, one could certainly point at union AGMs, national conferences and the like, where members and representatives are present. Ultimately, this might be an argument of mere semantics – it would not be difficult to defend a view that the Legislature, in line with the plain language aims of the LRA, had as its purpose that union constitutions would contain the necessary rules and procedures to properly cater for decision-making meetings, regardless of where and at what level they occur.

[4377] Subsection 95(5)(i).

[4378] Subsection 95(5)(j).

[4379] Subsection 95(5)(o). As mentioned in the discussion of strike procedures in terms of Chapter IV above, it bears repeating that the actual specifics around how a ballot is to be held, is left entirely to the discretion of the union in question. However, the extent to which the LRAA and the recent slew of amendments has altered this state of affairs, is discussed in more detail at 12 4 4 4 below.

affected members as potential participants in that strike.[4380] Related to these requirements is subsection 95(5)(q) LRA, which requires the constitution to provide that union members "may not be disciplined or have the membership terminated for failure or refusal to participate in a strike"[4381] if either no ballot was held,[4382] or a ballot was held and it failed to garner a majority vote in favour of that action.[4383]

The next four sub-provisions focus on banking and investment of union funds,[4384] along with "the purposes for which its money may be used"[4385] acquiring/controlling property[4386] and specifying how the financial year-end date is determined.[4387] Finally, subsection 95(5)(v) LRA requires a procedure for any changes to a trade union's constitution, while subsection 95(5)(w) LRA addresses the requirement for how a decision is to be reached in order to wind-up the union.

It must be kept in mind that section 95(5) and its 23 sub-provisions are aimed at ensuring that union constitutions either "state",[4388] "prescribe",[4389] "establish",[4390] "determine"[4391] or "provide for"[4392] the various topics specified. The actual *content* and formulation of those clauses remain completely in the hands of the union (and, by implication, their membership).

Subsection 95(6) LRA ensures that no union constitution is allowed to discriminate on the basis of race or sex, before subsection 95(7) LRA states that the Registrar "must not" register a trade union unless he/she is satisfied that the union in question is a "genuine trade union".[4393]

[4380] As discussed below, prior to the promulgation of the Code of Good Practice: Collective Bargaining, Industrial Action & Picketing, 2018 – a simple "show of hands" would no doubt have been sufficient, and even then – were it to have been ignored, subs 67(7) (as at § 12 4 2 3 above) offers protection over the legality of that strike. The impact of the Code, and in particular, the further additions brought about under the LRAA, are discussed in more detail below at § 12 4 3 3 1 and § 12 4 4 3.

[4381] Subsection 95(5)(q) of the LRA.

[4382] Subsection 95(5)(q)(i).

[4383] Subsection 95(5)(q)(ii).

[4384] Subsection 95(5)(r).

[4385] Subsection 95(5)(s).

[4386] Subsection 95(5)(t).

[4387] Subsection 95(5)(u).

[4388] Subsection 95(5)(a).

[4389] Subsectionss 95(5)(b), 95(5)(d), 95(5)(e), 95(5)(g), 95(5)(k), 95(5)(l), 95(5)(v), 95(5)(w).

[4390] Subsections 95(5)(c), 95(5)(h), 95(5)(i), 95(5)(m), 95(5)(o), 95(5)(s).

[4391] Subection 95(5)(u).

[4392] Subsections 95(5)(f), 95(5)(j), 95(5)(n), 95(5)(p), 95(5)(q), 95(5)(r), 95(5)(t).

[4393] Read with subs 95(8), regarding the possibility of gazetted guidelines in this regard.

Two final aspects need to be briefly mentioned at this point: Firstly, the LRAA brought about a change to subsection 95(8), by means of introducing a reference to a "system of voting" (in other words, balloting). Secondly, the LRAA introduced a new section 95(9), which purports to explain what is to be understood by the word "ballot" in section 95(5). The significance of these new provisions, inasmuch as they potentially impact on required processes prior to strike action, is discussed below.

12 4 4 4 Balloting requirements in the LRA

As mentioned above, section 95(5)(o)-(q) requires ballots to be addressed in union constitutions for purposes of registration. The LRAA has now introduced a new subsection 95(9) which reads as follows: "For the purpose of subsection 95(5), 'ballot' includes any system of voting by members that is recorded and in secret." Section 95(9) seemingly brought about fundamental changes to balloting in the context of trade union activities, particularly in relation to strike activity. This is a widely held view in South Africa.[4394] As recently as September 2019 the Registrar of Labour Relations

[4394] There have been numerous media articles in the wake of the amendments to the LRA, regarding the expected changes. See for instance: Anonymous "New laws an attack on Amcu: Mathunjwa" (20-09-2019) *eNCA* <https://www.enca.com/news/new-laws-attack-amcu-mathunjwa> (accessed 20-09-2019); J Botes "When logic fails: Labour unions reject their members' right to a secret vote" (19-09-2019) *Business Maverick* <https://www.dailymaverick.co.za/article/2019-09-19-when-logic-fails-labour-unions-reject-their-members-right-to-a-secret-vote/> (accessed 21-09-2019); S Mkhwanazi "'New' law has unions up in arms" (15-09-2019) *Weekend Argus* <http://capeargus.newspaperdirect.com/epaper/showarticle.aspx?article=42edd311-9141-46de-8663-d9f139580ece&key=r6p6NeflxQLvEzQI8%2bXjFg%3d%3d&issue=706720190915000000000001001> (accessed 20-09-2019); T Cohen "New legislation requiring secret strike ballots is the latest in South Africa's intra-union battles" (15-09-2019) *Business Maverick* <https://www.dailymaverick.co.za/article/2019-09-15-new-legislation-requiring-secret-strike-ballots-is-the-latest-in-south-africas-intra-union-battles/> (accessed 20-09-2019); I Jim "Code of Practice treats African workers as violent savages – NUMSA" (09-01-2018) *Politicsweb* <https://www.politicsweb.co.za/politics/working-class-must-stand-up-and-fight--irvin-jim> (accessed 20-07-2019); E Cottle "The Labour Relations Amendment Bill – A Victory for Business" (04-06-2018) *Daily Maverick* <https://www.dailymaverick.co.za/opinionista/2018-06-04-the-labour-relations-amendment-bill-a-victory-for-business/> (accessed 07-07-2019); L Omarjee "Explainer: Why unions have mixed feelings on secret ballot votes for strikes" (15-09-2019) *Fin24* <https://www.fin24.com/Economy/explainer-why-unions-have-mixed-feelings-on-secret-ballot-votes-for-strikes-20190913> (accessed 16-0-2019); M Sibanyoni "Secret vote before strike pits unions against each other" (13-09-2019) *Sowetan Live* <https://www.sowetanlive.co.za/news/south-africa/2019-09-13-secret-vote-before-strike-pits-unions-against-each-other/> (accessed 14-09-2019); O Molatudi "It's now law — no secret balloting, no strike" (31-05-2019) *BusinessLive* <https://www.businesslive.co.za/bd/opinion/2019-05-31-its-now-law--no-secret-balloting-no-strike/> (accessed 06-06-2019); W Saunderson-Meyer "A tentative move to curb union destructiveness" (21-

was quoted in a media statement that "[i]t is now illegal to embark on [a] strike without a secret ballot" and that "balloting was now part of [the] legislative framework and needs to be respected".[4395] In support hereof, reference was made to the "guidelines on balloting for strikes or lockouts"[4396] (to be discussed below at § 12 4 4 4 6). This in mind, the earlier discussion already mentioned provisions of the Code directly applicable to strike balloting. While the relevant provisions of the Code will be discussed in more detail below, suffice it to say for present purposes that item 19(2) makes specific reference to "a secret ballot" for "the calling of a strike". It accordingly appears that for all intents and purposes it is then a *fait accompli* that secret (pre-strike) ballots are now a requirement in terms of the LRA and part of the South African industrial relations landscape.

This study is not in direct agreement with this view. It is submitted that the legislative framework upon which the secret ballot requirement presently rests is not nearly as clear-cut as might appear to be the case. Certainty will in future no doubt be established through judicial interpretation or by further legislative amendment. However, the current uncertainty requires careful consideration and, in that process, it is important to pay attention to the historical experience with pre-strike balloting, what additional sources tell us about the LRAA amendments, the effect of the LRAA's transitional provisions (along with two recent judgments) before one considers what the LRAA and the Guidelines issued in terms of the LRA actually say about pre-strike balloting.

12 4 4 4 1 The historical experience with (the regulation of) pre-strike balloting

Benjamin and Cooper's excellent analysis of the requirements surrounding strike ballots in South Africa,[4397] particularly under the apartheid-era 1956 LRA, provides

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09-2019) *IOL* <https://www.iol.co.za/news/opinion/a-tentative-move-to-curb-union-destructiveness-33390496> (accessed 22-09-2019); and S Singh & K Sidzumo "Employment Alert: Secret ballot required prior to engaging in a strike" (08-04-2019) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/employment-alert-8-april-secret-ballot-required-prior-to-engaging-in-a-strike-.html> (accessed 21-05-2019).

[4395] Department of Employment and Labour "Employment and Labour on Labour Relations Act amendments on strike action" (09-09-2019) *South African Government – Gov.za* <https://www.gov.za/speeches/employment-and-labour-labour-relations-act-amendments-strike-action-9-sep-2019-0000> (accessed 11-09-2019).

[4396] Department of Employment and Labour *South African Government – Gov.za* (09-09-2019).

[4397] P Benjamin & C Cooper "Strike Ballots in South Africa" (2016) 29 *AJLL* 210.

background context to any discussion of the balloting amendments introduced by the LRAA. The 1956 LRA required pre-strike balloting as initially recommended by the Botha Commission.[4398] This recommendation made its way into ICA 1956 (as it was then) through section 8,[4399] read with section 65.[4400] Benjamin and Cooper explain:

> "The requirement that a majority of members of a union should be in favour of going on strike may be justified by the principle of workplace democracy, usually expressed through the concept of majoritarianism. Majoritarianism, however, is a double-edged sword. On the one hand, it may promote workplace democracy by giving workers an opportunity to voice their opinion over engaging in strike action which may have an adverse impact on their livelihoods through the no-work, no-pay rule. This assumes that such workers will be able to express their view in a ballot without fear of, or actual, intimidation.[4401] A secret ballot promotes both voice and deliberative democracy by enabling

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[4398] See further the decision of Kirk-Cohen, J (as he was then) of the Labour Appeal Court, Transvaal Division (as it was then) – in *Sasol Industries (Pty) Ltd v SA Chemical Workers Union* 1990 11 ILJ 1010 (LAC) 1036I-1037B, where is stated as follows:

> "The aforegoing is also borne out by the 1952 Botha Commission which recommended that a ballot should be held before strikes take place. In motivating its recommendation the commission said: 'I think that very often employees are dragged into a strike as the result of some impetuous action on the part of a particular group. It is much better to get the settled view of the whole industry, because a strike is a very serious matter; it dislocates the industry; it affects the public interest very severely, and I think that if the employees want to retain strike action it should be used with responsibility, and it can only be used with responsibility if it carries the full weight and the sanction of all its members in the particular union… One never knows how these things are organized, but at least the employers will be satisfied if the strike carried the weight of all the members of the union…' The commission went on to acknowledge the right of workers to refuse to sell their labour but stated that strike action requires 'sober reflection without intimidation or influence before being resorted to' (see the report of Industrial Legislation Commission of Enquiry UG 61/1952 paras 94952 at 133)".

[4399] As a whole, s 8 ICA 1956 dealt with regulating the constitutions of unions and employers' organizations. In particular, subs 8(1)(l) spoke to balloting for the purposes of office-bearer elections, subs 8(1)(o) regulated their removal from office, and subs 8(1)(p) required that the constitution regulate "the manner in which a ballot shall be conducted". Subsection 8(6)(b), in turn, sees the important requirement that "all voting by ballot shall be secret and ballot papers shall be retained by the secretary of the union … concerned in safe custody for a period of three years".

[4400] Section 65 ICA 1956, entitled "[p]rohibition of strikes or lock-outs in certain circumstances", accordingly regulated, *inter alia*, strike action. Subsection 65(2) stated that no union or office-bearer, official or member of such union "shall call or take part in any strike … by members of the union", "unless [in terms of subs 65(2)(b)] the majority of members of the union… in good standing in the area and in the particular undertaking, industry, trade or occupation in which the strike… is called … have voted by ballot in favour of such action".

[4401] Reference can again be made to *Sasol Industries* 1036F-I, where is stated: "Both public policy and the policy of the legislature in enacting s 65 inter alia dictate that no minority group should influence the majority. The majority will must prevail; this is enshrined in the peremptory provisions of s 65(2)(b) and s 8(6)(b) and, so important is this policy, that a breach of these sections constitutes criminal offences. In particular, the ballot must be fair and secret; there should be no intimidation. In a strike situation the employer is entitled to know that he is dealing with the majority of members in question which is so

minorities to express their opinion. On the other hand, the requirement for a secret majority vote by workers can open the process to challenge by the employer, which can use both elements – the majority and secrecy requirements – as a means legally to challenge the strike on the basis of deviations from these requirements."[4402]

As was the case in Britain (discussed § 6 4 7 above), this is precisely what happened: employers used non-compliance with these balloting requirements as a particularly effective weapon in interdicting industrial action.[4403] At the time, this was also part of a broader "juridification of collective bargaining"[4404] which saw a strict judicial focus on all aspects of the collective bargaining process.[4405] As a result, strike action was no longer able to effectively fulfil its integral and "functional role" as part of collective bargaining.[4406] Accordingly, the pre-strike ballot requirement was removed

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demonstrated by a ballot conducted in terms of the Act and the union's constitution".

[4402] Benjamin & Cooper (2016) *AJLL* 213.

[4403] Says Benjamin & Cooper (2016) *AJLL* 213-214 in this regard:

"The LRA 1956, by requiring detailed balloting procedures in unions' constitutions, opened the way for employer challenges to strikes on the basis of noncompliance with those procedures. A scrutiny of those procedures reveals a high degree of formality akin to the balloting procedures required in parliamentary elections, even though such formality may not be appropriate for a strike ballot by trade unions in a workplace."

[4404] Benjamin & Cooper (2016) *AJLL* 214.

[4405] See A Rycroft "Strikes and the Amendments to the LRA" (2015) 36 *ILJ* 1 7-8 for examples of case law from this time period, demonstrating the requirements and formalities expected of both the High Court and Industrial Court, for properly held ballots. In this regard, the words of Benjamin & Cooper are again apposite:

"Under the LRA 1956, the High Court frequently curtailed the exercise of power by trade union parties by interdicting strikes on the basis of noncompliance with the ballot requirements, thus determining the outcome of disputes to the employer's advantage … [S]uch interventions were a feature of South African labour relations from 1985 onwards when trade unions began to make use of balloting to protect their members against strike dismissals" – Benjamin & Cooper (2016) AJLL 214.

[4406] As per Benjamin & Cooper (2016) *AJLL* 211, along with the sources referred to at Benjamin & Cooper (2016) *AJLL* 211 n10. See further Benjamin & Cooper (2016) *AJLL* 215, in quoting Lord Diplock (he of *Cheall v APEX*, and *Cross v British Iron* – in *NWL Ltd v Nelson* [[1979] 3 All ER 614, as per Benjamin & Cooper (2016) *AJLL* 215 n33], where is stated about the importance of timing, in regards to both strike action and interdicts against them, as follows: "It is the nature of industrial action that it can be promoted effectively only so long as it is possible to strike while the iron is hot. Once postponed, it is unlikely that it can be revived". It must be added that the aforementioned quote, as made clear by Benjamin & Cooper (2016) *AJLL* 215 n34, was itself quoted by a South African court in *Steel & Engineering Industries Federation v National Union of Metalworkers of SA* 1992 13 ILJ 1422 (T) 1432. Regarding the latter, that same judgment saw Myburgh J state as follows:

"I would like to say that it cannot be expected of a trade union, its officebearers and members that they should conduct a ballot with the precision that is shown in a parliamentary election. They have neither the infrastructure nor the expertise to do so. This ballot was conducted on a national basis

in its entirety from the new LRA.[4407] Subsection 67(7) of the LRA now serves as a shield for trade unions in case of non-compliance with its own constitutional provisions regarding a strike ballot.[4408] This section, which refers to the non-compliance with "a provision in [a union's] constitution requiring it to conduct a ballot", is closely related to the provisions of section 95 of the LRA, but in particular subsection 95(5), which regulates union constitutions, as discussed above.

Non-compliance with balloting technicalities no longer serves as a ground for an employer and (by implication) judicial interference in the right to strike. Even so, the overviews provided by both Benjamin and Cooper[4409] and by Rycroft[4410] serve as a reminder that, subsequent to the 1995 LRA, there have been endeavours to revive the earlier status of pre-strike ballots, notably in the proposed amendments to the LRA by the 2012 Labour Relations Amendment Bill. Rycroft quotes COSATU as saying that the proposed amendments amounted to the "greatest threat to the right to strike since the fall of apartheid".[4411] The Bill proposed that a ballot had to be certified as valid by

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at many hundreds of premises. The union had to rely on officials and shop stewards to carry out its instructions. It was impossible to supervise the ballot at each polling venue" – Steel & Engineering 1427.

Nonetheless, given the extent of irregularities involved in the ballot, NUMSA was interdicted from proceeding with its strike action – *Steel & Engineering* 1432.

[4407] Here Benjamin & Cooper (2016) *AJLL* 220 quote from the Explanatory Memorandum, as accompanying the first draft of the proposed LRA, and state:

"[B]alloting was removed as a statutory requirement for a protected strike because ballots 'provide fertile soil for employers to interdict strikes and to justify the dismissal of strikers in strikes that are technically irregular but otherwise functional to collective bargaining', thus preventing 'the proper conclusion of collective bargaining processes' [Ministerial Legal Task Team "Explanatory Memorandum" (1995) 16 ILJ 278 303].

[4408] Whilst also quoted at § 12 4 2 3, the wording of subs 67(7) reads as follows:

"The failure by a registered trade union… to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike… may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike".

[4409] Benjamin & Cooper (2016) *AJLL* 221-222.

[4410] Rycroft (2015) *ILJ* 4, 7, 9-10.

[4411] Rycroft at 7 – the applicable wording being as follows:

"[T]he 2012 version of the LRA amendments resurrected the strike ballot requirement. In early August 2012 COSATU described the amendments as the 'greatest threat to the right to strike since the fall of apartheid'. General secretary Zwelinzima Vavi [as he was then] said the proposed ballots could easily be manipulated by employers to delay strike action. What Vavi was expressing is borne out by the pattern of litigation in the pre-1995 era", [footnotes omitted].

Benjamin & Cooper (2016) *AJLL* 221, quoting from the Explanatory Memorandum accompanying the Bill, explain that it was intended to prevent strike action that was grounded on "'only minority support, as violence or intimidation are more likely to occur', under such circumstances".

an independent body such as the CCMA and only upon this certification being issued would the protection afforded by subsection 67(7) kick in. Conversely, if a valid pre-strike ballot was *not* held the 67(7) "shield" would not protect against subsequent litigation seeking to rule the strike action unprotected.[4412] The 2012 proposals never saw the light of day (they were not included in the eventual amendments introduced through the Labour Relations Amendment Act 6 of 2014). COSATU and its affiliated unions had done enough to counter the initial proposals borne of the NEDLAC consultations which gave rise to the 2012 Bill.[4413]

Writing as they were in 2016, Benjamin and Cooper make the point that while subsection 99(c) LRA requires of unions to keep ballot papers for a period of three years – which "suggest[s] that a strike ballot should be conducted via secret ballot on paper"[4414] – they proceed to make the equally important point that this would apply to the constitutions and registration of new unions, since "the registrar has extremely limited scope to direct existing unions to amend their constitution".[4415]

Prior to the LRAA amendments – with one exception – no further reference to a "secret" ballot is made in the whole of the LRA. The exception relates to procedures surrounding the workplace forum process.[4416] It is therefore noticeable that whereas the LRA required secret ballots of employee-based forums in a specific workplace, no such requirement existed for trade union activity prior to the new amendments. This already says a lot about the different view of trade unions embodied by the 1995 LRA as discussed earlier. It also allows for an argument to be made – given the unfavourable view towards workplace forums held by major unions in light of their perceived threat to the representative function of trade unions – that this requirement

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[4412] Benjamin & Cooper (2016) *AJLL* 222.

[4413] See P Benjamin "Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration" (2014) 35 *ILJ* 11; B Creighton & S McCrystal "Strike Ballots and the Law in Comparative Perspective" (2016) 29 *AJLL* 121 126; Benjamin & Cooper (2016) *AJLL* 222 and Rycroft (2015) *ILJ* 4-5.

[4414] See Benjamin & Cooper (2016) *AJLL* 223 for their arguments raised immediately prior to this statement, in explanation of how they arrive at this conclusion.

[4415] 223-224.

[4416] The LRA speaks of a "secret ballot" a total of two times, but within the same context: Firstly, in terms of subs 82(1)(*i*)(i), which states that – in regulating the 'requirements for the constitution of a workplace forum' – that the latter *must* "provide that in any ballot every *employee* is entitled… to vote by secret ballot" [their emphasis]. Secondly, in Schedule 2 ["Guidelines for Constitution of Workplace Forum"], under item 4 regulating "Elections", item 4(2)(e) again reiterates that "voting must be by secret ballot" in the context of workplace forum elections.

survived the pre-LRA negotiations precisely due to the union-held view that *workplace forums* would require processes to promote democratic functioning, but *unions*, on the other hand, given their inherent (and thereby already existing) underlying democratic principles, would not.[4417]

12 4 4 4 2 The Explanatory Memorandum to the LRAA

The explanatory memorandum (hereafter Memorandum) to the LRAA, gazetted on 17 November 2017,[4418] addresses "the objects of the Labour Relations Amendment Bill, 2017" and contains a "Socio-Economic Impact Assessment System (SEIAS) template", both of which are helpful in determining the meaning of the balloting requirements in the LRAA.

Clause 1.1(h) of the Memorandum states that section 95 of the LRA is to be amended in order to "provide for a ballot for a strike or lock-out to *include* a secret vote".[4419] Under Part 2 of the Memorandum, clause 2.7[4420] first recognises that "[s]ection 95(5)(p) of the Act requires trade unions… that seek registration to have a provision in their constitutions requiring a ballot of members before embarking on a strike ... as the case may be" before stating as follows with regard to the proposed section 95(9):

> "Section 95(9) of the Act has been inserted to clarify that a ballot *means* any system of voting by members that is recorded and secret. The clarification is to provide for new technologies of balloting while at the same time ensuring good governance and secrecy".[4421]

As such, the Memorandum gives us a clear definition of a "ballot" ("any system of voting by members that is recorded and secret"), aligns "good governance" in the context of trade unions with "secrecy", and makes it clear that good governance is not

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[4417] Regarding the lack of support for workplace forums by elements of organised labour, see G Wood & P Mahabir "South Africa's Workplace Forum system: A Stillborn Experiment in the Democratisation of Work" (2001) 32 230 239-240.

[4418] See the "Memorandum on the Objects of the Labour Relations Amendment Bill, 2017" (GN R 1273 in *GG* 41257 of 17-11-2017).

[4419] My emphasis. More on the use of the word/term "include", will be discussed below – in examining the changes made to the LRA.

[4420] Subclause 2.7 [at 172] appears under the following subheading: "Clauses 8 to 10: Amendment of sections 95, 99 and 100 of the Act respectively".

[4421] Subclause 2.7.2 [at 172], [my emphasis].

only important but also dependent on a voting system that is recorded and secret.

Clause 2.7.3 of the Memorandum[4422] confirms that section 99 "deals with the records that registered trade unions… must keep and which includes ballot papers, [and] is amended to include the attendance register and other prescribed record, and other forms of documentary or electronic records of a ballot" (section 99 is discussed below). Clause 2.13 of the Memorandum also makes it clear that in the past, despite the requirement of section 95(5)(p), "[t]rade union… constitutions were registered in the past without strike ballot requirements".[4423] The Memorandum also confirms that the Bill ("LRAA") "seeks to provide for transitional provisions" in order to allow the Registrar the opportunity to engage with unions to allow for the amendment of union constitutions in order to ensure compliance with subsection 95(5)(p) of the LRA. Furthermore, the Memorandum outlines the procedures surrounding the Registrar's directive to unions to comply, a procedure that essentially was included in the final LRAA.[4424] This is a significant point and will see further discussion below.

Also noteworthy – in dealing with the financial implications of the Bill – the Memorandum states that "further costs… *will* be incurred by the CCMA in relation to the establishment of Advisory Arbitration Panels, *conducting secret ballots*, stakeholder workshops on the Code of Good Practice, commissioner training and material development".[4425] Section 115(2)(f) of the LRA has always foreseen that the CCMA "may … conduct, oversee or scrutinise any election or ballot of a registered trade union… if asked to do so by that trade union".[4426] Whether the LRAA changed this voluntary involvement in balloting in any way (into compulsory involvement) will be considered below. The Memorandum also states that:

> "These costs could be reduced by the involvement of private agencies in verification of strike ballots and the costs of being borne by the parties to the dispute. ..."[4427]

As such, the Memorandum raises the involvement of external "agencies" in the

[4422] Subclause 2.7.3, at 172.
[4423] Subclause 2.13, at 177.
[4424] Subclause 2.13, at 177.
[4425] As per the "Financial Implications" clause, Explanatory Memorandum, at 178, [my emphasis].
[4426] Subsection 115(2)(f) of the LRA.
[4427] Explanatory Memorandum, cl 2.3, 197-198.

verification of strike ballots[4428] – not at all dissimilar to the role of the so-called "scrutineer" in Britain, regulated in terms of, *inter alia*, sections 49, 75 and 226B of TULRCA.[4429]

Also of interest is the "Socio-Economic Impact Assessment System (SEIAS) Final Impact Assessment Template (Phase 2)" report issued by the Department of Planning, Monitoring and Evaluation in relation to the proposed LRAA.[4430] Following a general background, which provides an overview of industrial action statistics, a brief analysis of the impact of industrial action,[4431] the associated high levels of violence (with due reference to the "Marikana tragedy"),[4432] the Labour Relations Indaba and the Ekurhuleni Declaration,[4433] the Report proceeds to again outline the proposed amendments.[4434]

Clause iv, entitled "Secret ballot (clauses 95 and 99)", reiterates how the "existing LRA" in subsection 95(5)(p) requires a strike ballot provision within the constitutions of unions seeking registration,[4435] before stating as follows: "To clarify that a ballot *means* any system of voting that is recorded and secret, a definition of a ballot is inserted in section 95."[4436] Furthermore, the intended outcomes of the proposal is, among others, stated to be: "The reinvigoration of strike balloting is also intended to contribute to peaceful industrial action".[4437] As far as the beneficiaries of the proposed

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[4428] Mention can be made of the "List of Private Agencies that have been Accredited by the CCMA (2014)" (GN 971 in *GG* 38178 of 05-11-2014), which – as stated, contains a list and other details of agencies that have been accredited to perform certain duties in respects of the LRA, such as, *inter alia*, pre-dismissal arbitration. The Notice duly outlines the respective provisions within the LRA that the agencies are allowed to perform functions in, and furthermore also outlines provisions/services that agencies may *not* be accredited for. As such, there is certainly precedent for the use of such external agencies.

[4429] As discussed at, for instance, § 6 4 7 above. This being said, some references involving the role to be potentially fulfilled by the CCMA in terms of the balloting above, sees the use of the term "may". As such, it is still not readily apparent what the actual obligations of the Commission are, in regard to their involvement in the proposed process.

[4430] See Explanatory Memorandum 200, where Tendani Ramulongo and Ian Macun, in their capacity as Directors: Research Policy & Planning / Collective Bargaining, Department of Labour, are identified as the authors of the Report.

[4431] Explanatory Memorandum 182-183.

[4432] 184.

[4433] 184.

[4434] 185.

[4435] 185.

[4436] 186, [my emphasis].

[4437] Cl 1.2, 188.

amendments are concerned, "workers" are listed given that the changes are "intended to provide a stronger environment for collective bargaining and wage negotiations and to ensure that due processes are followed when strikes take place".[4438] Trade unions are also listed on account of there being "more flexible ways in which strike ballots may be conducted".[4439] At the same time, costs for involved parties are also foreseen. Employers,[4440] trade unions,[4441] and employees[4442] are identified as groups that will bear costs in terms of the proposed amendments. Notably, the CCMA is again listed, with its cost partly arising from the fact that "[t]he CCMA is also likely to be called on to oversee balloting in workplaces and to provide an independent verification of the results of a ballot".[4443]

Clause 1.4 of the Memorandum commences with a description of "the behaviour that must be changed [and] main mechanisms to achieve the necessary changes".[4444] With regard to employees, this behaviour is described as "[v]iolent behaviour during strikes, intimidation of other workers, damage to property during marches and industrial action".[4445] The mechanism identified to bring about this change, sees, *inter alia*, the following listed: "To ensure that registered trade unions make provision for secret ballots in their constitutions and that they abide by their constitutions".[4446]

[4438] Cl 1.3, 188.

[4439] Cl 1.3, 188.

[4440] The explanation offered is that "[e]mployers will bear the cost of loss of working time when balloting takes place and time off for union representatives for training on the Code" – Explanatory Memorandum, cl 1.3, 189.

[4441] By explanation, unions will need to "bear operational costs of conducting ballots and training members in terms of the Code" – Explanatory Memorandum, cl 1.3, 189.

[4442] The costs identified for workers pertain to those "instances where time off work for balloting and training is not paid for by the employer and/or trade union" – Explanatory Memorandum, cl 1.3, 190. This raises the interesting point, of a mutual or collective responsibility towards the costs of conducting the ballot, being borne by either or both the employer and union. Whilst mere speculation, would it be inconceivable of an employer offering to cover all the costs of conducting and arranging a secret ballot, in order to ensure that the proposed industrial action is supported? Coupled hereto, would it be inconceivable of a union being accepting of such an offer, since if the voting outcome is in favour of the action – then such would have far more legitimacy in terms of possibly negotiating further with the employer. The aforementioned also offers interesting contrasts (and similarities) to the British system of balloting, as evidenced from the discussion at § 6 4 7 above.

[4443] Explanatory Memorandum, cl 1.3, 190.

[4444] In maintaining this section's discussion focus on balloting, under the first heading – whilst the CCMA, Department of Labour and the SAPS are listed – their adjacent columns do not make any reference to balloting.

[4445] Cl 1.4, 191.

[4446] Cl 1.4, 191.

In this sense, the Memorandum seems premised on the notion of internal union democracy grounded in the traditional/historical perspective of unionism, as a collective entity, in that the membership is able to exercise the necessary control over their union to ensure that their unions, firstly, amend their constitutions to make provision for secret ballots, and secondly, abide by those constitutions.[4447] In contrast, where the Memorandum addresses the behaviour of trade unions in need of change it simply states: "Not conducting secret ballots prior to embarking on strike action". *No further reference* is made to unions having to either amend or comply with, their constitutions, in order to ensure that their purported behaviour (of *not* conducting secret ballots prior to strike action) is actually changed. In the minds of the drafters of the proposed legislation, this is left to the union membership. More on this point below.

One of the risks associated with implementing the proposed legislation is that of a "[l]ack of adherence to [union] constitutional provisions relating to strike balloting". Significantly, the concomitant "mitigation measure" to this is listed as "[p]ublication of notices of intention to cancel the registration of trade unions".[4448] What is undoubtedly being referenced here are notices issued by the Registrar in terms of section 106 of the LRA (discussed below).[4449] This seems to be the most direct solution that the drafters of the Bill were prepared to take to compel strike ballots.

In summary, the Memorandum firstly confirms the central importance of the proposed secret balloting approach for the purposes of increased stability (and decreased violence) in the South African labour relations system. Secondly, the Memorandum makes it clear that the proposed voting system *means* a recorded and secret ballot. Thirdly, the Memorandum provides several references to the involvement of the CCMA within the proposed balloting process – along with mention of external agencies to assist in this role.[4450] All in all, the Memorandum makes it clear

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[4447] Further mention can be made of the apparent acceptance that it is *solely* employees who are responsible for violent behaviour during industrial action and the like.

[4448] Explanatory Memorandum, cl 3.1, 198.

[4449] See the discussions at § 12 4 5 1 and § 12 4 5 2 6 below.

[4450] Further reference can be made to the CCMA's 2018-2019 Annual Report available at <www.ccma.org.za/About-Us/Reports-Plans/Annual-Reports> (accessed 16-09-2019), which states as follows: "During the 2018/19 financial year, the CCMA received approval for additional funding allocation of R107 million over the MTEF [Medium Term Expenditure Framework] period 2020 to 2022. This allocation represents part funding towards the expenditure related to the increase in case referral, training and training material development in respect of identified external Assessors and Commissioners who are presiding over advisory arbitration processes arising from sections 150A-D of the amended LRA. *This funding is also intended for the conducting of balloting and certification*

that a greater measure of internal union democracy and union accountability should contribute to a greater measure of external accountability.

12 4 4 4 3 The Code of Good Practice: Collective Bargaining, Industrial Action and Picketing

A further source of balloting guidelines is the Code of Good Practice: Collective Bargaining, Industrial Action and Picketing (already introduced earlier in the context of collective bargaining). Of current interest is item 19 ("Ballot of members"). It provides as follows:

> "The Act does not require the conduct of a ballot as requirement for a protected strike ... Section 67(7) of the Act states quite explicitly that the failure by a registered trade union ... to conduct a ballot may not give rise to any litigation that will affect the legality and the protected status of a strike. [19](2) The obligation to ballot flows instead from the constitution of a registered trade union ... The constitutional obligation flows from the requirement in section 95(5)(p) of the Act that a trade union ... that seeks registration must provide in its constitution for the conduct of a ballot before calling the strike ... That ballot must be a secret ballot. [19](3) Registered trade unions ... are obliged to comply with their constitutions even though the failure to do so does not have the consequence of invalidating the protected status of the strike".[4451]

What is interesting about this provision is, firstly, *how* it refers to section 67(7) of the LRA. Item 19(1) states that the LRA does not require a pre-strike ballot for the purposes of that strike being protected and then says section 67(7) "quite explicitly" states that the failure by a union to conduct a ballot does not affect its protection. Technically, this is incorrect.[4452] In addition, nestled in between the sub-items (1) and

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processes" [at 14, my emphasis].

[4451] Code, sub-items 19(1)-(3), 62 – the ellipses above pertain to either "lock-outs" or "employers organisations".

[4452] What subsection 67(7) says is that the failure by a trade union to *comply with a provision in its constitution* requiring it to conduct a ballot, sees the protection arise. This, it is submitted, is worded in such a manner given the requirement of subsection 95(5)(p) – since the drafters of the LRA would correctly have presumed that unions could not register unless their constitutions contained a provision requiring a pre-strike ballot. Thus, the majority (if not all) unions *would* have such a clause (keeping in mind the examination of balloting requirements of union constitutions in chapter 3 of this study), and *would* therefore be in a position where they *could* violate it, by *not* holding the ballot in question. As it stands, were a union constitution *not* to have a pre-strike ballot clause, then no failure to comply could arise – and technically, subsection 67(7)'s protections are not available to that union. See in this regard *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA* (2019) 40 ILJ 1814 (LC) 1816D-E (discussed further below), where Gush J states as follows:

(3), it is stated that the pre-strike ballot that must be provided for in the union constitution "*must* be a secret ballot".[4453]

In other words, the Code states that unions are obliged to comply with their constitutions (despite no loss of strike protection) and that their constitutions (while already needing to provide for a pre-strike ballot) must now provide for a secret ballot.

12 4 4 4 4 The transitional provisions of the LRAA

Section 19 of the LRAA deals with transitional arrangements and also provides direction to the meaning of the new section 95(9) of the LRA. To date, these are the only provisions of the new balloting system that have been considered by South African courts.

In terms of subsection 19(1), the Registrar "must, within 180 days of the commencement of [the LRAA], in respect of registered trade unions… that do not provide for a recorded and secret ballot in their constitutions"[4454] – "consult with the national office bearers of those unions… on the most appropriate means to amend the [union] constitution to comply with section 95".[4455] The Registrar is also required to "issue a directive to those unions" regarding a time period for those changes.[4456] Section 19(2) then states as follows: "Until a registered trade union…complies with the directive made in terms of subsection (1)(b) *and* the requirements of section 95(5)(p) and (q) of the Act, the trade union… before engaging in a strike or lockout, must conduct a secret ballot of members."[4457]

The immediate comment to make is that subsection 19(1) does not speak specifically to *pre-strike* ballots – it refers to "recorded and secret ballots" and applies to those unions that do not provide for this in their constitutions. The remainder of

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"It is so that s 67(7) provides that the failure of a trade union to comply with a provision in its constitution regarding a ballot may not give rise to or constitute a ground for any litigation affecting the legality of, and the protection conferred by the section on, the strikers. *It is apposite to emphasise that this section applies only to those trade unions who have complied with the requirements of s 95 with regard to the inclusion in their constitution of the requirement to ballot before engaging in a strike*", [my emphasis].

[4453] In terms of Code sub-item 19(2), 62 [my emphasis].

[4454] Subsection 19(1) LRAA.

[4455] Subsection 19(1)(a) LRAA.

[4456] This is terms of subs 19(1)(b) LRAA. It is worth noting that the remainder of the provision refers to the fact that such changes/amendment to the union constitution, needs to be made in terms of the amendment procedures provided for in terms of their constitution.

[4457] Subsection 19(2) LRAA, [my emphasis].

section 19(1) is geared towards empowering the Registrar to ensure the changes to union constitutions. As an interim measure, section 19(2) compels secret ballots in case of strike action.

These provisions certainly offer a plausible explanation for the series of media reports about the threat of the new Registrar to deregister specific unions during the course of 2019.[4458] It furthermore possibly explains the recent comments from the Registrar, referred to earlier.[4459]

Two recent judgments have considered the implications of these transitional provisions. In *Mahle Behr v NUMSA*[4460] the Labour Court was approached on an urgent basis to interdict a strike. [4461] At the outset, it was accepted that NUMSA had neither conducted a ballot of its members prior to engaging in the strike[4462] nor that its constitution provided "for a 'recorded and secret ballot' to be held prior to engaging in a strike".[4463] Two arguments were raised by NUMSA: Firstly, that the transitional provisions "amounted to an infringement of the respondent's constitutional right to strike".[4464] Secondly, that the provisions did not apply since the Registrar had not yet

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[4458] See in this regard, *inter alia*, the following newspaper articles/internet sources: T Mahlakoana "Amend constitutions on balloting or be deregistered, unions warned" (02-04-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/04/02/amend-constitutions-on-balloting-or-be-deregistered-unions-warned> (accessed 20-07-2019) 1; T Mahlakoana "Labour Registrar waiting on court to place 2 unions under administration" (02-04-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/04/02/labour-registrar-waiting-on-court-to-place-2-unions-under-administration> (accessed 20-07-2019) 1; E Stoddard "Department of Labour threatens to cancel Amcu's registration" (25-04-2019) *Business Maverick* <https://www.dailymaverick.co.za/article/2019-04-25-department-of-labour-threatens-to-cancel-amcus-registration/> (accessed 18-06-2019) 1; S Smit "Media workers' union gets the boot" (13-08-2019) *Mail & Guardian* <https://mg.co.za/article/2019-08-13-media-workers-union-gets-the-boot> (accessed 16-08-2019) 1; L Mkentane "Amcu thrown a lifeline as labour registrar decides against deregistering it" (02-09-2019) *Business Day* <https://www.businesslive.co.za/bd/national/2019-09-02-amcu-thrown-a-lifeline-as-labour-registrar-decides-against-deregistering-it/> (accessed 10-09-2019) 1; and P Harper "Key union faces deregistration" (17-10-2019) *Mail & Guardian* <https://mg.co.za/article/2019-10-16-key-union-faces-deregistration> (accessed 20-10-2019) 1.

[4459] Department of Employment and Labour *South African Government – Gov.za* (09-09-2019).

[4460] *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA* 2019 40 ILJ 1814 (LC).

[4461] The matter involved a consolidation of two cases, involving Mahle Behr SA (Pty) Ltd, under case number D448/19, and Foskor (Pty) Ltd, under case number D436/19 – with both actions being instituted against NUMSA and its members.

[4462] *Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA* 2019 40 ILJ 1814 (LC) 1815E.

[4463] 1815J. In this regard, the reader is reminded of NUMSA being identified, under the "Strike ballots" section of chapter 3, as being one of three unions that did not "fully comply" with the requirements of subss 95(5)(p)-(q), in that – whilst it did address subs 95(5)(q) – it had no provision for a ballot prior to strike action.

[4464] 1816F.

issued NUMSA with the directive required in terms of subsection 19(1)(b).[4465]

In considering the first argument, the court reasoned that the transitional provisions do not limit the right to strike, since a union may easily avoid its effect: "all that is required… is for that union's constitution to essentially comply with the requirements of s 95(5)(p)".[4466] Gush J then qualified this by stating: "It is also simply so that, in order to engage in a strike, all that is required is for the union to conduct a secret ballot of members" – "[t]hat is the extent of the compliance the transitional provision requires."[4467] Regarding the second argument, the court reasoned that the "provisions of s 19 are clear and unambiguous and the court is obliged to give effect thereto",[4468] before stating that "the legislation [the LRAA] is clear in that its purpose, *inter alia*, is to provide that, before a union may engage in a strike, it should conduct a secret ballot of its members".[4469] As such, the second argument was rejected as well and an order was granted interdicting NUMSA from engaging in their strike.

In *Johannesburg Metropolitan Bus Services*[4470] the court also faced an urgent application seeking to interdict strike action called by DEMAWUSA.[4471] Here too there was the contention that "the union has not held a secret ballot of members before engaging in the strike, contrary to section 19" of the LRAA.[4472] At the outset, the court took a different approach. The court's point of departure was that section 67 provides protection to a strike that complies with the provisions of Chapter IV of the LRA – in particular, section 64.[4473] Because section 19 of the LRAA is not part of Chapter IV it means that non-compliance with the transitional arrangements cannot "render a subsequent strike unprotected", since such failure "would not constitute non-compliance with a provision of" Chapter IV.[4474] However, the court did state that since

[4465] 1816J.
[4466] 1816G. Coupled hereto, Gush J affirms that "[t]his [latter] provision has been a requirement since the inception of the [LRA]" – 1816G-H.
[4467] 1816I.
[4468] 1817A.
[4469] 1817A-B.
[4470] *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union and Others* [2019] 45883 JOL 1 (LC).
[4471] Para 1.
[4472] Para 1.
[4473] Para 3. In contrast to this then, is section 65, in regulating the circumstances "in which a strike is nonetheless prohibited, irrespective of whether or not" there has been compliance with section 64 – Para 3.
[4474] Para 4.

"a failure to comply with section 19 of the [LRAA] in the circumstances described in that section would be a breach of a provision of the LRA",[4475] a "party with a legal interest" could, in terms of an application under subsection 158(1)(b) of the LRA, seek compliance with the "balloting requirement in section 19" of the LRAA.[4476] It is unclear how non-compliance with a "transitional provision" in the LRAA – where the provision does *not* make any amendment to an existing section in the LRA – amounts to non-compliance with the LRA.

In any event, the court continued by stating that "[u]nlike an order declaring a strike unprotected, an order[4477] requiring a union to conduct a secret ballot would merely prohibit it from engaging in the planned strike until such time as it had conducted a secret ballot."[4478] It is in this regard that the court considered the earlier *Mahle Behr* decision and expressed agreement with the conclusion reached in that case: that the transitional provision does not result in a limitation on the right to strike as "[i]t remains entirely within the union's power to remedy the situation [of delaying strike action until a ballot is held] by amending its constitution".[4479]

With regard to the same argument as the second argument raised before the *Mahle Behr* court (the absence of a directive from the Registrar), the court in *Metropolitan Bus* reached the same conclusion, but for different reasons. The court first stated that *Mahle Behr* "held that on a plain reading of the provision a union which had not included the obligatory provisions in its constitution had to conduct a secret ballot of members before engaging in a strike".[4480] Hereafter, the Court reasoned that the principal aim of subsection 19(2) is to compel "a registered union which has failed to include in its constitution the provisions required by section 95(5)(p) and (q) of the LRA to do so".[4481] This statement, with respect, misses the necessary reference to subsection 19(1)(b) as contained in subsection 19(2). The court created the

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[4475] Para 5.

[4476] Para 5.

[4477] This presumably being in reference to subs 158(1)(b) of the LRA.

[4478] Para 5.

[4479] Para 10.

"[T]he court rejected the suggestion that the transitional provision infringed the right to strike, because it did not prevent a union from engaging in strike action provided it conducts a ballot, which is merely giving effect to the missing clauses which are supposed to be in its constitution in terms of section 95(p) of the LRA, requiring it to ballot members in respect of whom it intends to call the strike" – Para 9.

[4480] Para 10.

[4481] Para 10.

impression that the principal aim of section 19(2) is to bring about compliance with sections 95(5)(p) and (q) (which ignores the wording in subsection 19(1) that speaks specifically of an amendment to a constitution to provide for "a recorded and secret ballot"). The court then stated, after considering the interplay between the directive and the intent of section 19, that "the object of the section would have been achieved once the amendments were effected."[4482]

No mention is made of subsection 67(7) anywhere in *Metropolitan Bus*. All that was in effect confirmed in *Metropolitan Bus* is that, prior to the necessary union constitution amendments, ballots must be held – but once the constitutions reflect what they should, the protection of subsection 67(7) continues as before.[4483] Any recourse would then have to be in terms of a provision such as subsection 158(1)(b) of the LRA – seeking compliance with a specific provisions of the LRA (namely subsection 95(5)(p)).

These two judgments displayed different approaches but were in agreement that the transitional provisions required a secret ballot to be held prior to strike action commencing.

12 4 4 4 5 The LRAA's amendments to the balloting requirements of the LRA

In its original guise, subsection 95(8) of the LRA empowered the Minister to publish guidelines in the Government Gazette for the purposes of determining whether a trade union that applies for registration "is a genuine trade union".[4484] To this the LRAA added the words "and guidelines for the system of voting as contemplated in subsection (9)".[4485]

As mentioned, the new subsection 95(9) introduced by the LRAA reads as follows: "For the purpose of subsection [95](5), 'ballot' includes any system of voting by members that is recorded and in secret." As also discussed above, subsections 95(5)(o)-(q) are the only three provisions in section 95 – beyond the new subsection 95(9) – that make reference to the word "ballot". Notable is that section 95(9) uses the

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[4482] Para 10, [my emphasis].

[4483] Lagrange J at para 20 states in his concluding paragraph of the judgment:

> "In relation to the effect of not having amended the union's constitution to provide for balloting, the failure to do so might not render a strike unprotected, but nonetheless the union cannot embark on the strike without conducting a ballot in terms of section 19(2) of the Amending Act".

[4484] Subs 95(8) of the LRA.

[4485] Subs 8(a) of the LRAA.

word "includes" before its reference to secret ballots. This is also done in the preamble to the LRAA where it declares one of its purposes to be "[T]o extend the meaning of ballot to *include* any voting by members that is recorded and in secret".[4486]

Herein lies the root of the earlier concerns expressed about certainty that trade union ballots are now required to be secret. These concerns are shared by Godfrey et al who state that the variation between the wording of the Explanatory Memorandum and the then Bill, "creates an element of ambiguity."[4487] It will be recalled from the discussion above that the Memorandum made more than one mention that a ballot was to *mean* any system of voting that is recorded and secret.[4488] Admittedly, this is offset somewhat by the wording of clause 1.1(h) of the Memorandum – albeit in reference to what were to be the objects of the Bill. Similarly, item 19(2) of the Code simply states: "That ballot must be a secret ballot".

It is submitted that Godfrey et al were perhaps too kind in suggesting a *mere* ambiguity arising from the use of the word "includes" in the new section 95(9). After all, one would expect the word "include(s)" to be interpreted as "in addition".[4489] There are different ways of conducting a ballot and the word "includes" suggests that a secret vote *is but one* of the approaches that may be followed (but is not required). A counter argument would be based on the underlying intention of the LRAA (as identified in the Memorandum and Code). The latter then, in effect, *replaces* that which might have been done before, which was *not* recorded and/or in secret.[4490] This being said, Godfrey et al reason that "it may be left to the courts to decide whether 'includes'

[4486] My emphasis.

[4487] S Godfrey et al "The New Labour Law Bills: An Overview and Analysis" (2018) 39 *ILJ* 2161 2172, in specific reference to subclause 2.7.2.

[4488] As per Memorandum subclause 2.7.2 and SEIAS report subclause iv.

[4489] In other words, any current system utilised by trade unions (which would then, include, a show of hands) would *also* fall within that which is to be understood by balloting. Alternatively, in terms of this interpretation, balloting could mean (for example) a show of hands, but would *also* include a system of voting that is "recorded and in secret".

[4490] The author is very mindful of wanting to avoid straying into the realm of statutory interpretation, and the purposive, textual, teleological interpretation and canons of construction theories that would be associated with such – which fall most decidedly outside the scope of this study. At most, the earlier point – and subsequent counterpoint – are merely made as illustrative of the term's meaning not necessarily being clear, and open to interpretation. However, the LAC has offered very succinct guidance in this regard, as per Ngcobo AJP (as he was then) in *Staff Association for the Motor & Related Industries v Motor Industry Staff Association* 1999 20 ILJ 2552 (LAC), where is stated [at 2555E]:

> "It is trite that words in a statute must be given their ordinary grammatical meaning unless the context indicates otherwise".

should be interpreted purposively as being equivalent to 'means'", but caution further that "neither the memorandum nor ministerial guidelines can override the language of the Act".[4491] However, this is not to suggest that the interpretation of the word "includes" is *necessarily* problematic. This would largely depend on whether or not there is continued general opposition to secret balloting on the part of organised labour.[4492] Given the historical background of balloting requirements being utilised by employers as a means to prevent industrial action and organised labour's successful attempts at preventing previous statutory attempts to re-introduce strike balloting, this is of course eminently possible.[4493] The primary basis for the opposition to balloting requirements was the very fact that employers – assisted in no small part by a judiciary heavily focused on the criminality of strike action that was in contravention of earlier legislation[4494] – "mined [balloting requirements] for technical deficiencies in the hope that, by discrediting the strike, they might justify their conduct in taking reprisal [by interdicting the action]".[4495] Even so, the possibility exists that, *were* balloting requirements to again become central to whether or not strike action can be taken, this might not be overly problematic *if* the approach of the courts (going forward) is grounded in a pragmatic approach of seeking to confirm whether or not the majority of members (potentially) involved in the strike were appropriately balloted and afforded sufficient protection to express their will freely. In other words, were the courts to revert to a "formalistic and strict approach to determining the legality of a strike"[4496] and reject "a more nuanced consideration of the actual balloting to determine whether in fact the trade union had, in a substantial sense, demonstrated that there was majority support

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[4491] Godfrey et al (2018) *ILJ* 2173.

[4492] See for instance, *inter alia*, the following media reports (some of which have already been referred to above) surrounding organised labour's reaction to the proposed secret ballot changes, and related amendments: D Spies "Numsa to march against new labour laws on Human Rights Day" (17-03-2018) *News24* <https://www.news24.com/SouthAfrica/News/numsa-to-march-against-new-labour-laws-on-human-rights-day-20180317?isapp=true> (accessed 24-05-2018); Cohen *Business Maverick* (15-09-2019); Mkhwanazi *Weekend Argus* (15-09-2019); Botes *Business Maverick* (19-09-2019); Anonymous *eNCA* (20-09-2019) 1 and N Marrian "Adapt or Die" *Financial Mail* (3-9 October 2019) 24 28.

[4493] Reference has been made of alleged pending Constitutional Court challenges, at the behest of NUMSA, as per the abovementioned newspaper source [Marrian *Financial Mail* (3-9 October 2019) 24 28]. At the time of writing, no such application had yet been launched.

[4494] Benjamin & Cooper (2016) *AJLL* 215.

[4495] M Brassey "Fixing the Laws that Govern the Labour Market" (2012) 33 *ILJ* 18. The author adds further at 18 that "[n]o one wants a return to those days of naked opportunism [on the part of employers]".

[4496] Benjamin & Cooper (2016) *AJLL* 215.

for the strike",[4497] unwavering opposition can be expected.

12 4 4 4 6 The Guidelines issued in terms of subsection 95(9) of the LRA

The final source to shed light on the new balloting requirement is the "Guidelines issued in terms of Section 95(9)"[4498] by the Minister of Labour.[4499] Interestingly, these Guidelines were issued in terms of the incorrect section (with reference to subsection 95(9) in its title, the issuing page, the first heading, and in Clause 1).[4500] Secondly, the LRA subsections referred to in both Clauses 2 and 3 of the Guidelines were incorrectly referenced (and should be swapped around).[4501] This being said, Clauses 2 and 3 merely confirm the contents of subsections 95(5)(p) and (q) of the LRA.

Clause 4 then states as follows: "Section 95 (9) provides that a ballot *includes* any system of voting by the members of a trade union or employers' organisation that is recorded and is in secret." Therefore, the Guidelines echo the LRA's use of the term "includes". Clause 5 proceeds to confirm that unions who have obtained section 12 LRA organisational rights (access to the employer's premises) are "entitled to conduct a ballot of its members at the employers' premises", subject to it being reasonable and safe to do so and also in a manner to "prevent undue disruption of work".[4502] Clause

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[4497] 215.

[4498] See "Labour Relations Amendment Act, 2018 Guidelines issued in terms of Section 95(9)" in GN R1397 *GG* 42121 of 19-12-2018.

[4499] Mention must be made regarding the extent to which, in similar fashion to that of the various Codes, Guidelines as published by the Minister – whilst deriving some form of authority from their various empowering provisions within the LRA – do not enjoy a specific provision of their own, unlike the Codes do, as per s 203 of the LRA. As such, the question might be posed as to what their status entails? This aspect is discussed in more detail within the section on the role of the Registrar below at § 12 4 5, given that it touches on a number of cases requiring further interpretation of the Guidelines issued in terms of subs 95(8) – but suffice it to state at this point, that since the Guidelines usually provide practical guidance regarding *how* a specific provision(s), or even Code, is to be implemented, they are duly taken into consideration by the Courts. In short, whilst they too – like Codes, are not considered at the same level as the overarching statute, and do not specifically lay down binding rules of law, they can nonetheless be persuasive to a court.

[4500] As is to be demonstrated below, whilst the Guidelines might *pertain* to what is referenced within the new subs 95(9), they are published/issued in terms of the amendment to the existing subs 95(8) of the LRA.

[4501] In other words, Guidelines cl 2's reference to subsection 95(5)(q), should refer instead to subsection 95(5)(p), whilst Guidelines cl 3's reference to subsection 95(5)(p), should instead refer to subsection 95(5)(q) LRA.

[4502] Notably, the latter appears to be tied to s 19 of the LRA, which deals with "[c]ertain organisational rights for trade union party to a council". It is submitted that s 19 should rather be applied to the sentence that follows, this being the final sentence of Clause 5. Regardless, what is apparent from the above, is

8 is of interest, in that it confirms that a "ballot *must* be conducted in accordance with the provisions of this Act and the constitution of the trade union".[4503] Presumably, "this Act" is in reference to the LRA.

Clause 9, is of specific importance and deals with: "Notice";[4504] "Ballot papers";[4505] "Voter's roll";[4506] "Scrutineers and observers";[4507] "Balloting and counting";[4508] and, finally, "Records of ballot".[4509]

Clause 9 introduces these aspects of balloting as "indicative of the procedures that should be followed when conducting a secret ballot".[4510] A recommended three day notice period of the place and time of the ballot is suggested.[4511] Furthermore, the question to be decided by the ballot "must be clearly phrased, and must be consistent with the terms of the dispute referral"[4512] and must be "prepared in accordance with any applicable union… [c]onstitutional provisions".[4513] Under the sub-heading "Voter's roll", clause 9.7 provides insight into the expected role to be fulfilled by the CCMA:

> "In the case of an electronic ballot conducted by email or SMS, the voters' roll must reflect the email address or mobile phone number of the members concerned and *must* be scrutinized and conducted by the CCMA or any independent organisations. The CCMA or any independent organisations *must* keep the records of balloting for three months and thereafter submit to the trade union for record keeping."[4514]

The Guidelines then deal with "Scrutineers and observers". Clause 9.11 is not overly problematic as it confirms that, barring agreement reached in an underlying

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that the actual ballot process is allowed to take place on the premises of the employer in question, should section 12 rights have been obtained by the union in question. Guidelines Cl 6 affirms that where a union does *not* have the access to workplace rights of sec 12, they can "nevertheless request" such access from the employer in question.

[4503] Guidelines Cl 8, [my emphasis].

[4504] Spanning Guidelines cl 9.1-9.2.

[4505] Cl 9.3-9.5.

[4506] Cl 9.6-9.9.

[4507] Cl 9.10-9.11.

[4508] Cl 9.12-9.13.

[4509] Cl 9.14-9.15.

[4510] Cl 9.

[4511] In addition, such notice can be given to employees either via email, SMS or the displaying of notices – Guidelines cl 9.1-9.2.

[4512] Guidelines cl 9.3.

[4513] Guidelines cl 9.4.

[4514] Guidelines cl 9.7, [my emphasis]. To this can be added, in terms of cl 9.8, that essentially the same requirements apply to a "postal ballot".

recognition or collective agreement, "there is no requirement on a trade union to permit employer observers at a ballot". However, clause 9.10 makes little sense. It reads as follows:

> "A union may employ independent scrutineers to conduct or observe the ballot. However, there is no obligation to do so, unless provided for in a collective agreement or the trade union's constitution. In all the ballots there will be a scrutineer."[4515]

The clause accordingly states that a union "may employ" independent scrutineers – but the proviso is added that, unless provided for in terms of either a collective agreement *or* the union's constitution, "there is no obligation to do so". Then comes the self-evident contradictory final sentence of the clause: "In *all* the ballots there *will be* a scrutineer".[4516] It is simply not possible, barring clarification from the Minister, to speculate on the meaning of this. There is no clarity on whether or not scrutineers are optional, or optionally dependent on a collective agreement or union constitution, or whether only independent scrutineers are optional, or simply, compulsory. Under the subsequent heading of "Balloting and counting", the Guidelines, after confirming the duty of the union to "provide ballot boxes for a secret ballot",[4517] state: "Ballots may be counted at the voting place, at a union office *or at another place determined by the Independent Scrutineer*."[4518] In other words, it would appear from clause 9.13 that a scrutineer *is* compulsory, at least in those instances where ballot counting is to occur "at another place" other than the voting place or union office.

The final heading of "Records of ballot" immediately calls to mind the wording of subsection 99(c) of the LRA, which outlines what is expected in terms of a union's duty to keep records in respects of ballots (this section is discussed below). Clause 9.14 states that "[r]ecords of voting must be retained for a period of three years" and must include "voters' rolls, ballots in sealed ballot boxes or other containers and any documents used to calculate the outcome of the ballot".[4519] Clause 9.15 simply adds that "[i]n the case of electronic ballots, appropriate records must be retained".

The final clauses of the Guidelines appear under the heading "Transitional

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[4515] Guidelines cl 9.10.
[4516] Cl 9.10, [my emphasis].
[4517] Cl 9.12.
[4518] Cl 9.13, [my emphasis].
[4519] Presumably the "other containers" referred to, must also be sealed.

provisions". Clauses 10 and 11 serve as a direct reference back to the very same section 19 of the LRAA discussed above and should be seen in the context of that discussion. However, clause 10 introduces further confusion. The complete clause (*sans* references to employer organisations and lockouts) reads as follows:

> "Section 19 (1) of the Labour Relations Amendment Act, 2018 requires the Registrar of Labour Relations, within 180 days of the Act coming into effect, to –
> 10.1 consult with the national office bearers of trade unions… which have constitutions that do not provide for the conducting of a secret ballot before calling a strike…;
> 10.2 issue a directive to those trade unions… as to the period within which their constitutions must be amended to ensure compliance with the requirement for conducting a secret ballot."[4520]

At the outset, clause 10.1 erroneously conflates subsections 19(1)(a) with subsection 19(2) of the LRA. While section 19(1)(a) does make provision for the Registrar to consult with unions, it makes no reference to a pre-strike ballot. Only section 19(2) does (although it could, of course, be *included* in the broader understanding of "a ballot"). Quite why the Guidelines include transitional provisions is not clear. Nor is the question why – if it was deemed unavoidable – reference was not simply made to the LRAA's transitional provisions. Be that as it may – and given that they are transitional – they will presumably not require clarification for much longer (if at all).

The last aspect of the Guidelines to consider stems from clause 12, which makes provision for a "model clause" (which "is attached as Annexure A") in order to "achieve compliance with the requirement to hold a secret ballot before engaging in a strike".[4521] There is no "Annexure A", but rather an "Annexure One". The latter is entitled "Draft clause for trade union/employers' organisation constitutions about secret ballots in respect of strikes or lockouts" – with a further sub-heading reading "Ballots about a strike/ lockout".

The model clause then commences, with clause 1.1 reading as follows: "Despite any other provision in this Constitution a strike/lockout may *only* be called in terms of this Constitution after a secret ballot has been conducted of those members in respect of whom the strike/lockout is called".[4522] Clause 1.2 effectively repeats the protection

[4520] Guidelines cl 10.
[4521] Cl 12.
[4522] Guidelines Annexure 1 cl 1-1.1, [my emphasis].

afforded in terms of subsection 95(5)(q) of the LRA, but with the notable addition of the word “secret” before each reference to “ballot”. Lastly, clause 2 effectively repeats what is contained in section 99(c) of the LRA.

As such, there is no definitive clarity whether the *sole* expected balloting mechanism is to be recorded and secret, or if it is to *include* same. Furthermore, there is no definitive clarity provided on whether or not scrutineers are optional, optional subject to further qualification, or compulsory. What the Guidelines do appear to confirm, at least, is the expected role of the CCMA in scrutinising and conducting electronic ballots (as per clause 9.7 above). Furthermore, the model clause as contained in Annexure A/One appears to confirm the Minister (and Department) of Labour’s expectation that a pre-strike ballot can “only” be a secret ballot.

12 4 4 4 7 Balloting amendments – conclusion

In summary, the discussion on trade union balloting firstly showed that section 67(7) of the LRA remains of central importance. The section owes its origins to South Africa’s past and the use of prior versions of balloting requirements by employers as a weapon against the right to strike. At the same time, the discussion showed that, while the absence of a prescribed ballot may not affect the status of a strike, it may have decided consequences in a trade union’s relationship with the Registrar (and its continued registration) as well as in a trade union’s relationship with its members (as a failure to comply with its constitution). In this regard, it will also be recalled from the discussion of the *Metropolitan Bus* decision (regarding subsection 158(1)(b)), and in earlier chapters (regarding subsection 158(1)(e)(i)), that the Labour Court has the power to intervene on behalf of applicants to respectively “order compliance with any provision” of the LRA, or to “determine a dispute between a registered trade union ... and any one of the members ... about any alleged noncompliance with – (i) the constitution of that trade union”.

This in mind, the amendments introduced by the LRAA seem to have changed very little and section 95(9), in particular, provides little clarity as to its requirements for a ballot in a trade union’s constitution – a confusion primarily grounded in that section’s use of the word “includes” with reference to a recorded and secret ballot.

At the same time, the Memorandum makes it abundantly clear that what was *intended* was for a ballot to “mean” (at the exclusion of/as replacement for all prior

approaches) a voting system that is recorded and in secret. The Code confirms that a pre-strike ballot must be in secret; that it flows from an obligation in the union's constitution and section 95(5); and, if a union does not comply with this obligation, section 67(7) of the LRA still insulates the strike. The Guidelines, apart from reiterating that a ballot must be conducted in accordance with the LRA and a union's constitution, does, at the very least, confirm that a pre-strike ballot is expected to be a secret vote (in its Annexure A/One).

No decision of our courts has as yet provided insight into the interpretation of section 95(9). In the context of the transitional provisions, available case law does at least confirm that, until such time as unions have made the necessary changes to their constitutions, a secret ballot must be held prior to a strike. And, as things stand, there is uncertainty about a range of issues associated with the finer mechanics of ballots – especially the role of the CCMA (or other scrutineers) in union ballots. What is also true is that, despite the obvious and clear disparities between what was intended at Memorandum stage and the actual LRAA, this is the most direct change to the regulation of union balloting, and, for that matter – the internal relations of unions – since the 1956 LRA provisions. At the very least, trade union democracy and accountability, ensured through responsible balloting of union members, have been placed on the future judicial agenda. It would appear that the LRAA, its history and its surrounding and supporting documents would require "ballot" to be equated with a recorded and secret vote. At the same time, as suggested, this does not require a pedantic and overly technical approach by the courts to the acceptability of a ballot. And, to be clear, this would *still* not overcome the shield of subsection 67(7), but what it does do is place the Registrar and union members/third parties on a far firmer footing to compel compliance with union constitutions.

In conclusion, we should also remind ourselves of the following note of caution issued by Benjamin and Cooper:

> "There seems to be a tendency to see a regulated ballot as a panacea for problems associated with the length and violence of strikes, and even for wildcat strikes. To view the ballot as an answer to these problems is to ignore the real underlying socio-economic causes of many strikes ... The reintroduction of a statutory ballot requirement cannot address the economic and social inequality that has underpinned the country's most prolonged strikes. As outlined above, the real function of a ballot is to allow those calling for a strike to gauge realistically the amount of grassroots support for it, and to reassess their bargaining strategy accordingly. It should not be used as a means of

constraining strike action arising from the very real dissatisfaction among workers over their terms and conditions of work."[4523]

12 4 4 5 The requirements relating to union records

Section 98 regulates the "[a]ccounting records and audits" of registered trade unions, requiring them to be kept "to the standards of generally accepted accounting practice, principles and procedures".[4524] Included is the requirement to keep "books and records of its income, expenditure, assets and liabilities"[4525] and to prepare financial statements within a prescribed period[4526] and in a prescribed format.[4527] The abovementioned documents and statements must, in terms of subsection 98(2), be audited annually, be made available to its "members for inspection" and (together with the auditor's report) be submitted to a meeting(s) of its members or their representatives (in terms of the union's constitution).[4528] Finally, these documents and statements must be preserved by the union for a period of three years, following the end of the applicable financial cycle.[4529]

Section 99 confirms a "[d]uty to keep records" on the part of unions, inclusive of a membership list,[4530] attendance registers, meeting minutes ("or any other prescribed record")[4531] and ballot papers ("or any documentary or electronic record of the ballot")[4532] (also for a period of three years each). It is noteworthy that section 99 was also amended by the LRAA. While section 99(a) – which requires a trade union to keep a list of its members – remained unchanged,[4533] section 99(b)[4534] now reads that

[4523] Benjamin & Cooper (2016) *AJLL* 225.
[4524] Subsection 98(1) of the LRA.
[4525] Subsection 98(1)(a).
[4526] Subsection 98(1)(b).
[4527] Subsection 98(1)(b)(i)-(ii).
[4528] Subsections 98(3)(a)-(b).
[4529] Subsection 98(4).
[4530] Subsection 99(a) of the LRA.
[4531] Subsection 99(b) of the LRA, as amended by s 9 of the LRAA.
[4532] Subsection 99(c) of the LRA, as amended by s 9 of the LRAA.
[4533] It simply provides that "a list of its members" must be kept. Compare the uncomplicated wording of this provision, with that of the requirements surrounding the membership register expected to be maintained by British unions, in terms of s 24 TULRCA (as discussed in chapter 6) – which includes (for the purposes of balloting) the involvement of an "assurer".
[4534] The original wording read as follows:

"[T]he minutes of its meetings, in an original or reproduced form, for a period of three years from the end of the financial year to which they relate".

"the *attendance register*, minutes *or any other prescribed record of its meetings*, in an original or reproduced form" must be kept for a period of three years.[4535] The amendment, particularly the inclusion of meeting "attendance registers", does provide for improved union accountability even if only to ensure, in hindsight, the validity (or not) of trade union decisions.[4536] Subsection 99(c), which regulates the keeping of ballot papers, was amended to reflect the new changes regarding the balloting requirements (discussed below). It should already be noted that the section now reads that "the ballot papers *or any documentary or electronic record of the ballot* for a period of three years from the date of every ballot" must be kept by the union in question.[4537]

Section 100 in turn, regulates the information that must be provided to the Registrar by unions. These include details of membership;[4538] a copy of the auditor's report (together with the financial statements);[4539] details pertaining to the names and addresses of *national* office-bearers (within 30 days of their appointment or election);[4540] and, any changes in the service-of-documents address of the union.[4541] There is also a requirement to provide information at the behest of the Registrar, in terms of subsection 100(c) – "within 30 days of receipt of a written request by the registrar, an explanation of anything relating to the statement of membership, the auditor's report or the financial statements".[4542]

While the LRAA brought about minor amendments to subsections 100(d)-(e),[4543] the LRAA introduced a new clause in the form of subsection 100(f),[4544] which at first blush appears to be an additional catch-all phrase in that it provides for "the records referred to in section 99" to be provided to the Registrar by trade unions (this is in

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[4535] Subsection 99(b) of the LRA, [my emphasis] illustrating the addition/amendment.

[4536] It can be mentioned that the examination of cases brought about as a result of decisions made by the Registrar (as discussed below), involved several where the court had to have regard to decisions made, and required clarity on who was present in those meetings. This is over and above the cases already discussed above (and in chapter 11), that saw the internal decision-making processes examined, in order to ascertain the validity and permissibility of decisions taken. As such, as minor as this amendment appears to be, the changes could be noticeable.

[4537] Subsection 99(c) of the LRA, [my emphasis] illustrating the addition/amendment.

[4538] Subsection 100(a).

[4539] Subsection 100(b).

[4540] Subsection 100(d).

[4541] Subsection 100(e).

[4542] As per subsections 100(a)-(b).

[4543] Section 10 of the LRAA simply moved the word "and" from the end of subs 100(d), and placed it at the end of subs 100(e) LRA.

[4544] This being in terms of s 10 of the LRAA.

addition to the other subsections in section 100 which are linked to specific records mentioned in sections 98 and 99). However, it must be noted that while subsections 100(a)-(e) all have time frames associated with them,[4545] this is not the case with subsection 100(f). Thus, when read together, what section 100 says is that "[e]very registered trade union… must provide to the *registrar* the records referred to in section 99".[4546] There is no clarity whether or not such records need to be provided on an annual basis (it is submitted that this would be the presumed frequency to be associated with subsection 100(f)). At face value, the new addition in effect compels a registered trade union to provide to the registrar, "the records referred to in section 99",[4547] along with the information (and associated timeframes) outlined in subsections 100(a)-(e). A casual reader of section 100 might be forgiven for querying the significance of the new subsection 100(f), which at first blush appears to be rather innocuous. However, when the changes made by the LRAA to sections 99 and 100 are viewed in light of section 106 of the LRA (and possible deregistration), these changes become more noteworthy. This issue is discussed below in the context of the role of the Registrar at § 12 4 5.

12 4 4 6 Miscellaneous provisions in respect of unions and union federations

The remainder of Part A of Chapter VI contains provisions focusing on a change of (or even, replacing) the constitution or name of registered trade unions;[4548] the procedures surrounding union amalgamations;[4549] their winding-up;[4550] the appointment of administrators;[4551] the winding-up of trade unions by reason of their insolvency;[4552] the issuing of a declaratory order (by the Labour Court) that the trade union is no longer independent[4553]; and finally, the cancellation of the registration of a

[4545] These are, respectively, prior to each 31 March (subs 100(a) of the LRA), within 30 days (subss 100(b)-(d) of the LRA) or 30 days before (subs 100(e) of the LRA).
[4546] This being s 100 read together with subs 100(f) of the LRA, [their emphasis].
[4547] Subsection 100(f) of the LRA, as introduced by s 10 of the LRAA.
[4548] Section 101 of the LRA.
[4549] Section 102.
[4550] Section 103 – given the potential seriousness of the consequences hereof, the Labour Court becomes involved.
[4551] Section 103A – again, at the instance of the Labour Court. This particular section is discussed in more detail below at § 12 4 5 2 4.
[4552] Section 104 – this procedure being different than that expressed in terms of s 103 of the LRA.
[4553] Section 105. Interestingly, this is triggered by an application from a registered trade union, claiming that another trade union "is no longer independent" – subs 105(1).

trade union.[4554] These provisions place the role of the Registrar of Labour Relations squarely in focus and it is in that context that these provisions will be discussed.

12 4 5 The role of the Registrar

12 4 5 1 The office of the Registrar and its importance

The LRA sets out the requirements for the appointment of the Registrar of Labour Relations,[4555] his functions,[4556] the scope of access to information held by the Registrar,[4557] and appeals from the Registrar's decisions.[4558] Interestingly, and apart from those sections that envisage an oversight role for the Registrar (for example, in the various provisions regulating the registration of trade unions), the LRA only dedicates four complete sections to this office, found in Part C and D of Chapter VI of the LRA. The first of these, section 108, provides for the establishment of the office in the Department of Labour. Importantly, and in light of the discussion to follow, the section recently saw the addition of two subsections – namely 108(4)-(5) (through section 11 of the LRAA). In terms of the first of these, the office of the Registrar is confirmed as "independent" and that, "subject only to the Constitution and the law" the Registrars "must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice".[4559] In addition, in terms of subsection 108(5), "[n]o person or organ of state may interfere with the functioning of the *registrar*."[4560]

Section 109 outlines the Registrar's functions, which include the keeping of a register of registered trade unions and federations of trade unions[4561] and a register of bargaining councils.[4562] Along with the requirement to keep these records updated,[4563] and while allowing for condonation in respect of certain time periods,[4564] the Registrar,

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[4554] Section 106.
[4555] Section 108.
[4556] Section 109.
[4557] Section 110.
[4558] As per s 111.
[4559] Subsection 108(4).
[4560] Subsection 108(5) [their emphasis].
[4561] Subsections 109(1)(a), 109(1)(c).
[4562] Subsection 109(1)(e)s.
[4563] In terms of subs 109(2), the Registrar must place notice in the *Government Gazette* within 30 days of having added to, or deleted from, any of the registers.
[4564] Subsection 109(3).

in general, "must perform all other functions conferred" on this office in terms of the LRA (this includes the duty to keep other documentation provided by trade unions as discussed earlier in this chapter).[4565]

Section 110 regulates access by persons to information under the control of the Registrar.[4566] It subjects such access to three qualifications: Firstly, "any person" may inspect the documents, or – subject to payment of a prescribed fee – the Registrar must provide a certified copy of, or extract from, any of these documents.[4567] Secondly, the Registrar is obliged to provide to "any person", free of charge, any of the information outlined in terms of subsection 110(5)(a)-(c), which includes the address at which a registered trade union or federation "will accept service of any document", along with the "names and work addresses of persons who are national office-bearers of any registered trade union" or federation.[4568] Thirdly, "any person who is a member, office-bearer or official of a registered trade union", may inspect "any document that has been provided to the Registrar in compliance with [the LRA] by that person's registered trade union".[4569]

Finally, appeals against any decision taken by the Registrar are regulated by subsections 111(1)-(3) of the LRA. A request for written reasons for the decision from the Registrar must be made within 30 days of the decision.[4570] The written reasons have to be provided within another 30 days (from receipt of the request),[4571] before – as a last option – an appeal can be directed to the Labour Court, within 60 days of receipt of the written reasons.[4572]

These provisions are important for this study and will be examined more closely below. At the outset, it may be mentioned that, given the significance of the effect of trade union registration in terms of the LRA not only on the union itself but also on its

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[4565] Subsection 109(4).

[4566] Subsection 110(1)(a)-(c) – these include, *inter alia*, the registers of registered trade unions and federations of trade unions; the certificates of registration and the registered constitutions of registered trade unions (and federations); and the auditors report in terms of s 98.

[4567] Subsections 110(1) read with 110(2).

[4568] Subsections 110(5)(a)-(c) – with the remaining referring to information of a trade union federation as contained in subss 107(1)(a),(c) or (e).

[4569] Subsection 110(3). In terms of subs 110(4), where such member, office-bearer or official pays the prescribed fee, the Registrar is obliged to provide a certified copy of, or extract from, the documents specified in subs 110(3).

[4570] Subsection 111(1).

[4571] Subsection 111(2).

[4572] Subsection 111(3).

members, office-bearers and officials (through the effect of section 97), cancellation of registration can have profound consequences for a trade union and its representatives.[4573] As such, the powers afforded the Registrar to either deregister a currently registered union[4574] or to refuse to register a new union,[4575] serve perhaps as the single biggest deterrent against union malfeasance in respect of requirements contained in Chapter VI Part A of the LRA. Section 106 of the LRA makes provision for cancellation of registration either by the Labour Court[4576] or through determination by the Registrar.[4577] Sections 106(2A) and 106(2B) were introduced into the LRA by the Labour Relations Amendment Act 12 of 2002. The goal was to empower the Registrar to deregister those trade unions who were deemed to be "non-genuine" unions, with the Registrar assisted by the guidelines issued by the Minister of Labour (in terms of subsection 95(8)). Subsection 106(2A)(a) provides that the Registrar "may cancel the registration" if the latter "is satisfied that the trade union … is not, or has ceased to function as, a genuine trade union". Section 106(2A)(a) ends with an "or" – which sees subsection 106(2A)(b) providing for an *alternative ground* for deregistration. This section provides that, where the Registrar has "issued a written notice requiring a trade union… to comply with sections 98, 99 and 100 within a period of 60 days of the notice and the trade union… has, despite the notice, not complied with those sections", the registration of that union can be cancelled[4578] (subject, however, to section 106(2B)).[4579] This, in turn, means that a failure to comply with its

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[4573] See for instance the views of Molahlehi J in *Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations* 2010 31 ILJ 2886 (LC) 2895B-C [para 35], where the following is stated:

> "It cannot be denied that the decision of the registrar to deregister a trade union has serious consequences for that union as an entity and its members. As an entity the decision of the registrar is likely to have a profound impact on its structures and its operations, including the right to represent its members in various dispute-resolution processes."

[4574] This being in terms of subs 106(2A) of the LRA.

[4575] This in terms of subs 95(7) read with subs 96(6).

[4576] This in terms of subss 106(a)-(b), where the Court has ordered the winding-up of the union (as per ss 103 or 104), or where the union has been declared not independent (as per s 105).

[4577] This being in terms of either subs 106(2A)(a), where the union is not (or no longer functioning as) a genuine trade union – or subs 106(2A)(b), where the union has failed to comply with its obligations in terms of ss 98-100.

[4578] See the discussion under § 12 4 5 below.

[4579] Subsection 106(2B) states that the Registrar cannot act in terms of subs 106(2A) unless a notice has been published in the Government Gazette, at least 60 days prior to any deregistration action being taken – and, in terms of subsections 106(2B)(a)-(b), the union in question has been informed by notice of the Registrar's intention to cancel its registration, and the union ("or any other interested parties) has been invited "to make written representations" as to why the deregistration should not take place.

record-keeping obligation may result in deregistration of a trade union. And, as explained above, subsection 100(f) now points back to section 99 in its entirety and section 99, in turn, now sees an increased obligation of record-keeping: a list of members, attendance registers, minutes (or other records of meetings) *and* the "ballot papers or any documentary or electronic record of a ballot for a period of three years".

The Registrar thus is important because of the apparent link between this office and trade union accountability (both external and internal). And this importance has been recognised by commentators and the courts alike. Marrian describes the current state of trade union administration as follows:

> "Registrar Lehlohonolo Molefe, whose office is independent of the labour department and is designated by the minister in terms of the Labour Relations Act (LRA), is brutal about the condition in which he found many unions on taking up the post last year. The registrar is effectively a 'watch-dog' which ensures unions comply with the LRA by holding regular conferences, having proper financial statements and submitting audited membership numbers to the department. The picture Molefe paints is bleak. There are 213 unions in SA, he says, and only 34% are fully compliant with the law ... '[The] standard of compliance when it comes to trade unions is very bad,' says Molefe, an advocate. 'I have to be frank. They do not comply with their own constitutions, they do not submit regular audited financial statements, which is a requirement in the LRA'."[4580]

The courts also have had occasion to express themselves on the importance of the office of the Registrar. One stark example of trade union abuse is found in *NEWU v Minister of Labour*[4581] (in the first of what was to be many matters involving this union and the Registrar) in which the court considered an earlier (and urgent) rule *nisi* issued against the Department of Labour in respect of the trade union's deregistration. In discharging the rule *nisi* (and issuing a punitive costs order against NEWU),[4582] the court considered the fact that NEWU's audited financial statements contained unexplained irregularities (including significant discrepancies between "compensation payments received from employers" compared with what was paid out to NEWU's

[4580] Marrian *Financial Mail* (3-9 October 2019) 24 26.

[4581] *NEWU v Minister of Labour* 2006 10 BLLR 951 (LC). The aforementioned, was to give rise – indirectly and directly, to the following matters over the course of several years thereafter: *National Entitled Workers Union v Ministry of Labour* 2010 31 ILJ 574 (LAC); *National Entitled Workers Union v Ministry of Labour* 2011 32 ILJ 1372 (LC); *National Entitled Workers Union v Director, Commission for Conciliation, Mediation & Arbitration* 2011 32 ILJ 2095 (LAC); and, *National Entitled Workers Union v Ministry of Labour* 2012 33 ILJ 2585 (LAC).

[4582] *NEWU v Minister of Labour* 2006 10 BLLR 951 (LC) 958I-959A.

members),[4583] significant expenditure on the purchase of "Lotto" tickets[4584] and the payment of unsecured loans (totalling R481,489.00) to NEWU's President.[4585] NEWU had also not disclosed the "qualified audits" received for the years 2002-2004 and furthermore failed to comply with the requirements of section 100(d) of the LRA.[4586] As far as the office of the Registrar is concerned, the court said the following:

> "The registrar is entrusted with a statutory responsibility to oversee the administration and scrutinise the financial controls that trade unions are required to maintain in respect of the funds they hold. *These are public funds for which trade unions are publicly accountable.* As the registrar points out, his justification is to protect the members of trade unions who are most vulnerable to abuse of their subscriptions. The registrar should be left to do his job. The courts should be slow to interfere and certainly should avoid doing so without giving him a hearing. To prevent him from doing his job has the effect that public funds could be at risk."[4587]

The decision of the Labour Court was taken on (an unsuccessful) appeal to the LAC,[4588] while the decision of the Registrar was (unsuccessfully) taken on appeal in terms of section 111.[4589]

In *Cape Agri Employers' Organization v Registrar of Labour Relations* the court stated that "[i]t is in the public interest that the office of the [Registrar] be permitted to

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[4583] 954B.

[4584] The total amount in question was that of R43,520.00 (with no details of the meeting where such expenditure was authorised, or reference to the applicable union constitution provision that would allow same) – *NEWU v Minister of Labour* 2006 10 BLLR 951 (LC) 954C.

[4585] 954B-D.

[4586] 954E-F. With the above being said, of equal importance is the point made by the court that what is problematic about the above examples (involving the lottery tickets and unsecured loans), is *not* that they happened at all – but *rather* that there was insufficient evidence that the general membership (or their designates) were aware of, and had authorised, such payments/acquisitions. Had that been found to be the case, then "that should be the end of the registrar's interest in the matter" [956E-G]. Of further interest, was the court's significant concern at the designation of the individual responsible for instituting the application before the court, in that the former was described as an office-bearer for the purposes of the application, but was described in various capacities associated with that of an official, in the supporting documents to the court papers – as per 954GH. This accordingly called into question whether the requisite *locus standi* was present [955D], with court stating further – after emphasising the difference between office-bearer and official – that "one of the reasons for separating office bearers from officials is that office bearers, as elected representatives, are accountable to the membership for proper governance of trade unions". In contrast to this, "[o]fficials are employees of trade unions accountable [to] their management" – 955B.

[4587] 956B-C, [my emphasis].

[4588] *National Entitled Workers Union v Ministry of Labour* 2010 31 ILJ 574 (LAC).

[4589] *National Entitled Workers Union v Ministry of Labour & Others* 2011 32 ILJ 1372 (LC).

exercise its powers conferred under the Act without undue interference by this court."[4590] In *CCMA v Registrar* it was reiterated that a "union occupies a position of trust as concerning the management of the funds contributed by members" and that "the provisions of s 106 of the LRA are protective in nature, intended to protect the vulnerable workers from abuse of their trust by unscrupulous union officials whose involvement in a union may be for no other reason but to advance their selfish business interest."[4591] In *NEWU v Ministry (2012)* the Labour Appeal Court stated that "that this was precisely the kind of organization which the drafters of the LRA had in mind when it empowered the registrar to examine its activities and to deregister it, so as to deny it the protections of the LRA, as its activities were not designed to promote the interests of its members but rather those of a few officebearers."[4592] Interestingly, one of the arguments raised by NEWU, in this case, was that the Registrar functions as "an accuser, investigator and prosecutor".[4593] This echoes the arguments put forward in relation to the increased powers of the Certification Officer in Britain in terms of TUA 2016, particularly that the CO's role was being politicised and transformed into that of an "instigator, investigator, prosecutor, adjudicator and sentencer."[4594] However, the differences between the South African and British situations are clear.[4595] This argument was dismissed by the Labour Appeal Court.

In the *Unica Plastic Moulders v National Union of SA Workers* decision the court spoke of a "shocking extent to which some trade unions have failed to comply with the

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[4590] *Cape Agri Employers' Organization v Registrar of Labour Relations* 2011 32 ILJ 2952 (LC) 2958F-G.

[4591] *Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations* 2010 31 ILJ 2886 (LC) 2895E-G.

[4592] *NEWU v Ministry (2012)* 2596F-G.

[4593] *NEWU v Ministry (2012)* 2592D. In the court *a quo*, the argument was made as the Registrar functioning as "the combination in one person of the accuser, investigator, witness, prosecutor, judge and executor of judgment" – *NEWU v Ministry (2012)* 1377G-J.

[4594] S Cavalier & R Arthur "A Discussion of the Certification Officer Reforms" (2016) 45 *ILJ* 363 363 – as quoted at § 6 3 2 7 7 above.

[4595] Further to this point, what must be kept in mind, is the differing contexts at play here: In the British case, academics (and even the outgoing CO himself – as discussed in chapter 6) were critical of the expanding role of the CO against the backdrop of the increasing powers being a solution for something that was not a problem, and the very real possibility of it being a further ploy by the government of the time to weaken the position of organised labour. By contrast, the South African context sees the argument being made by a labour association – duly overruled by both the LC and LAC – in an attempt to escape the consequences of its flagrant disregard of the LRA's transparency and accountability provisions.

prescribed accounting procedures and standards prescribed by the LRA".[4596] Furthermore, in commenting on the "important public policy consideration" that sees a union's rights ending upon deregistration despite a pending appeal,[4597] the Court explained that unions are "in a position of trust vis-à-vis its members" and that "public policy" dictates that "a trade union should not be able to enjoy the rights afforded to a registered trade union if it has flouted the very Act from which these rights are being derived."[4598]

Finally, in countering the argument raised by the union regarding the negative consequences of deregistration, the Labour Court stated (in *UPUSA v Registrar*)[4599] that the union "only has itself to blame" and, importantly, that "[t]rade unions are public institutions, not private businesses."[4600] The court went on to say:

> "The act of registration confers many benefits on those trade unions that seek to be registered. But these benefits come at the price of submission to the reporting requirements established by s 100 of the LRA, all of the requirements that are intended to provide a guarantee to union members that their membership subscriptions have been utilized to further their interests. A failure by a registered trade union to comply with s 100 and to keep books of account and records to the standard required by s 98 undermines this statutory guarantee. *Ultimately, it is the registrar who is the underwriter of this warranty, and like all underwriters, the registrar must protect the general interest at the expense of the particular when this is necessary*. The registrar is accountable to the public as a whole should a registered trade union (or employers' organization, for that matter) fail to implement the required financial and administrative controls".[4601]

These cases send out a strong message – that trade unions are public institutions, that they control public funds and that this justifies the office of the Registrar, through its functions, to protect the public and union members who are most vulnerable to abuse of their membership dues. The Registrar is accordingly accountable to the public (inclusive of trade union members) to protect their interest.

[4596] *Unica Plastic Moulders CC v National Union of SA Workers* 2011 32 ILJ 443 (LC) 449A.

[4597] To this can be added the comment made by Molahleli J, in stating that the "consequence of deregistration is simply that the rights and benefits given to the union by the very law which it had failed to obey are taken away" – *Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations* 2010 31 ILJ 2886 (LC) 2895J-2896A.

[4598] *Unica Plastic Moulders CC v National Union of SA Workers* 2011 32 ILJ 443 (LC) 450G-451A.

[4599] *United People's Union of SA v Registrar of Labour Relations* 2010 31 ILJ 198 (LC).

[4600] 203I-J.

[4601] 199C-F, [my emphasis].

12 4 5 2 The extent of the Registrar's union oversight function

The key sections in the LRA that regulate the office and functions of the Registrar are found in Parts C[4602] and D[4603] of Chapter VI (which regulates trade unions and employers' organisations). However, as the discussion (for example, of balloting) also showed, there are numerous other sections that speak to trade union regulation and see some form of involvement by the Registrar. At times, the courts have also grappled with provisions affecting the Registrar and have provided insight into the practical implementation of, or offered judicial commentary on, these provisions.

12 4 5 2 1 Sections 95 and 96 of the LRA

Section 95, in general, confirms the oversight of the Registrar by requiring a union wanting to register to submit its application to that office and to comply with certain requirements. However, it is subsections of 95(7) and 95(8) that provide for direct actions to be taken by the Registrar. In terms section 95(7), the Registrar "must not" register a union unless satisfied that union is a "genuine trade union".[4604] In doing so, and in terms of section 95(8), the Registrar must apply any guidelines published in terms of the subsection[4605] by the Minister of Labour (the Guidelines will be addressed in a separate section below.)

Section 96 of the LRA provides for the registration procedure of trade unions, a procedure in which the Registrar is centrally involved and during which the registration of the applicant union may be refused – in terms of section 96(4) - should it not comply with the requirements.[4606]

[4602] This Part (entitled "Registrar of Labour Relations") spans ss 108-110, regulating respectively the appointment and functions of the Registrar, and access to information (held by the Registrar).

[4603] This Part (entitled "Appeals from Registrar's Decision") spans the single s 111, and – as is to be expected – regulates appeals of the Registrar's decisions (as discussed below at § 12 4 5 2 7).

[4604] Subsection 95(7) LRA.

[4605] The relevant wording of subs 95(8) reads as follows:

> "The Minister, after consultation with NEDLAC, may by notice in the Government Gazette publish guidelines to be applied by the registrar in determining whether an applicant is a genuine trade union".

The aforementioned accordingly appears to be peremptory, in that upon the Guidelines being published, their application by the Registrar is assumed.

[4606] The leading case in this regard [despite it being overturned on appeal on procedural grounds – *Crouse NO v Workers Union of SA* 2008 29 ILJ 2571 (LAC)], remains that of *Workers Union of SA v Crouse NO* 2005 26 ILJ 1723 (LC), where Murphy AJ was critical of the reasoning of the Registrar, in refusing to register WUSA. It would possibly not be inaccurate to state that the Registrar, given the facts

In this regard, insight is provided by the 2015 decision in *SA Security & General Workers Union v Registrar of Labour Relations*[4607] where a trade union challenged the Registrar's refusal to register it.[4608] The union claimed that the Registrar "acted irrationally and/or unreasonably in refusing to register it"[4609] and launched its application on the basis of sections 158(1)(a)(iii)-(iv) and 158(1)(j) of the LRA. The Registrar had earlier informed the union that the initial application for registration was lacking and had notified it that it has 30 days to provide the necessary information.[4610] This did not happen and registration was refused. The Registrar's reasons included: (i) The initial meeting saw an interim leadership committee being elected, despite no provision for this in the union's constitution; (ii) Following a "site-visit and verification process conducted by the officials of the [Registrar]", it was found that the constitution was only voted for/approved by the Gauteng members, despite being circulated nationally and the union purportedly having a national footprint; (iii) No election of office-bearers by the general membership took place; (iv) No formal adoption of a union name was confirmed; (v) No evidence could be provided that membership dues had been deposited into the union's bank account – despite the existence of the account and, finally, (vi) There were significant discrepancies (as became apparent in the site visit) between the numbers alleged to have been at the "formation meeting" and the actual numbers present.[4611] After examination of the Registrar's reasons, the court held that "there was no wrong done by the registrar which undermined the

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of this matter playing out in mid-2004, was still proverbially "finding his feet" in terms of properly applying the Guidelines to his duties. Be that as it may, the court stated as follows: "[The Registrar] has assumed to himself an authority and power aimed at halting the proliferation of trade unions in general. He clearly disapproves of the formation of a new union as a result of dissatisfaction by employees with their existing union. These two considerations, in my view, are an evident misdirection resulting in the misapplication of the authority which he has. Under the previous dispensation, the registrar did indeed enjoy some power as a gatekeeper for the principle of majoritarianism in terms of an authority vested in him by earlier legislation to refuse registration of unions that are not sufficiently representative. While the principle of majoritarianism remains the favoured policy of our law, it no longer operates to prevent registration ... The right to freedom of association must be interpreted generously and the requirements of registration, insofar as they restrict that right, should be interpreted restrictively" – as per *Workers Union of SA v Crouse NO* 2005 26 ILJ 1723 (LC) 1734D-I.

[4607] *SA Security & General Workers Union v Registrar of Labour Relations* 2015 36 ILJ 3149 (LC).

[4608] The additional relief sought was that of a declaratory order, "to declare the registrar's decision not to grant [SASEGWU] a registration certificate null and void" – *SASEGWU* 3150D.

[4609] 3152F-G.

[4610] The information required is outlined at 3152I-3153B paras 2.1-2.4.

[4611] 3153F-G.

primary object of the LRA".[4612]

12 4 5 2 2 Section 97 of the LRA

Section 97 regulates the effect of registration. Upon registration (evidenced by the certificate of registration) [4613] a member of such an association is *not* "liable for any of the obligations or liabilities of the trade union".[4614] In addition, in terms of subsection 97(3), a member, official or office-bearer of a registered union, "is not personally liable for any loss suffered by any person as a result of an act performed or omitted in good faith by the member, office-bearer, official or trade union representative while performing their functions for the trade union".[4615]

The importance of these provisions is self-evident and presents one of the major advantages of the registration of a union. Absent such registration, persons associated with the union's functioning can be held personally liable for any damages suffered, or obligations incurred by the union or its representatives. In this regard, the court in *Adcock Ingram Critical Care v CCMA* considered alleged aggressive and threatening negotiating tactics with management during the course of negotiations and considered subsection 97(3) as offering protection only in instances of "bona fide acts",[4616] which it found not to be the case.[4617]

12 4 5 2 3 Sections 100 and 101 of the LRA

Section 100 regulates the "[d]uty to provide information to the registrar" (and was discussed earlier), while section 101[4618] prescribes the procedure should a union wish to change its constitution, or its name. One key provision is section 101(2), which requires that – along with submitting a copy of the resolution to the Registrar – a "certificate signed by its [general] secretary stating that the resolution complies" with

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[4612] 3154H-I.
[4613] Subsection 97(1) of the LRA.
[4614] Subsection 97(2).
[4615] Subsection 97(3).
[4616] *Adcock Ingram Critical Care v CCMA* 2001 9 BLLR 979 (LAC) 983 para 15.
[4617] See further *NUM v Black Mountain Mining (Pty) Ltd* 2010 3 BLLR 281 (LC) 290-291 paras 38-39, where the court considered, *inter alia*, *Adcock Ingram* 983 para 15, in reaching its conclusion regarding the actions of union officials during industrial action.
[4618] To this can be added the provisions of s 102 LRA, which regulates the "amalgamation" of unions.

the union's constitution must be submitted as well.[4619] Furthermore, in terms of subsection 101(3)(a) the Registrar is compelled to register the changed or new constitution, but subject to it meeting "the requirements for registration" (which points back to sections 95 and 96 of the LRA).

In *National Entitled Workers Union v Mtshali,*[4620] NEWU appealed the Registrar's decision not to accept a proposed amendment to NEWU's constitution.[4621] The amendment sought to both allow persons who were seeking employment to join as members[4622] and to charge members for disbursements and other expenses actually and reasonably incurred by the union in representing members.[4623] The court dismissed the appeal and found that the amendment would amount to the union changing its character and operate as an organisation for gain.[4624] This decision served (in effect) as a pointed precursor to clauses 18 to 21 of the Guidelines (introduced some three years later and discussed below at 12 4 5 3).[4625]

12 4 5 2 4 Section 103 of the LRA

In terms of subsection 103(1), the "Labour Court may order a trade union ... to be wound up", subject to the provisions outlined in subsection 103(1)(b). This process is triggered by an application by either the Registrar, or any member of the union and requires the court to be "satisfied that the trade union ... for some reason that cannot be remedied is unable to continue to function".[4626] Further mention must be made of

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[4619] Subsection 101(2) of the LRA.

[4620] *National Entitled Workers Union v Mtshali* 2000 21 ILJ 1166 (LC).

[4621] 1170D-E.

[4622] 1168F-G, 1169B-C. On this point, the LC agreed with the Registrar that the suggested amendments would allow as members those who do not fall within the definition of "employee" in terms of the LRA – 1172A-E.

[4623] 1168J-H, 1169D-E.

[4624] 1170G – this being in reference to subs 95(5)(a) LRA. Regarding the proposed fees to be charged, Ngenwya AJ at 1172G-J held as follows:

> "[I]f approved, [NEWU] would be entitled to charge fees which an attorney or advocate is entitled to charge and even more. If this were allowed there is no prescribed tariff which will bind appellant. Its aggrieved members will have no recourse in the event of a dispute as to the appropriateness of any of the charges to the members. Appellant seems to restrict its objectives to labour litigation on behalf of its members".

[4625] In particular, clause 21 – which speaks to the "financial arrangements made with members of a trade union on behalf of whom litigation, particularly dismissal disputes, is instituted" – as being a key factor in indicating a union is possibly not genuine. See Guidelines cl 21 (as below).

[4626] Subsection 103(1)(b) of the LRA.

subsection 103(1A), which provides that where the Registrar has cancelled a union's registration in terms of subsection 106(2A) "any person opposing its winding-up is required to prove that the trade union… is able to continue to function".[4627]

This in mind, the 2016 dispute between the National Transport Movement ("NTM"), its warring internal factions, and SA Airways saw a particularly noteworthy confirmation of the role of the Registrar in this context. In *South African Airways SOC v National Transport Movement*[4628] the court outlined the complexities and challenges facing employers seeking to embark on meaningful collective bargaining in the face of internal factional fighting in a trade union.[4629] In this regard, in words that have been echoed in subsequent cases,[4630] the court stated as follows:

> "In addition, I am deeply concerned about the consequences of the power struggle for the rights and interests of the ordinary members of NTM, whose membership contributions I can only assume are being used up to fund the seemingly endless and ineffective campaign of 'lawfare' that the two camps have engaged in over the last three and a half years. As the East African proverb goes: 'when elephants fight, it's the grass that suffers'. It is time that the matter is brought to a head and resolved once and for all."[4631]

The suggested solution proffered by the court was as follows:

> "In my view, it would not be inappropriate in the current circumstances for the applicants, or ordinary members of NTM, to seek to prevail upon the Registrar of Labour Relations (who is a party to the current proceedings) to exercise the power – (a) to seek the winding-up of NTM in terms of s 103(1)(b) on the basis that it is 'unable to continue to function' and its deregistration in terms of s 106(2); or (b) to directly cancel NTM's registration (after following the required procedures) on the basis that, it 'has ceased to function as a genuine trade union' as envisaged in s 106(2A)(a)."[4632]

Two points need to be raised about these remarks. Firstly, the court clearly recognised that the Registrar is the obvious and best-placed office to approach in

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[4627] Subsection 103(1A). To this can briefly be added, in terms subs 103(2), that "[i]f there are any persons not represented before the Labour Court whose interests may be affected by an order in terms of subsection [103(1)]", those interests are to be considered in terms of deciding whether to grant to the requested order.

[4628] *SA Airways SOC Ltd v National Transport Movement* 2016 37 ILJ 2128 (LC).

[4629] 2132D-G.

[4630] See the earlier discussion in chapter 11 of *SAMWU v Qina* 12 para 30.

[4631] *SA Airways SOC Ltd v National Transport Movement* 2016 37 ILJ 2128 (LC) 2139C-E, [footnotes omitted].

[4632] 2139E-G.

these circumstances. Secondly, the less obvious but more important point needs to be made that the choice of options mentioned by the court (that is, how to involve the Registrar) is, with respect, flawed. An order in terms of subsection 103(1)(b) to wind-up the union would certainly bring about peace, but only because there no longer is any union left to fight for control over.[4633] Similarly, an order sought in terms of subs 106(2A) to bring about deregistration of the union (discussed below), would not necessarily serve as the "magic elixir" in instances involving a bitter dispute for internal power and control.[4634]

It is accordingly submitted that the ideal solution in these circumstances is *not* provided by sections 103(1)(b) or 106(2A). Rather, section 103(A) of the LRA, introduced by the 2014 amendments and which provides for placing a union under an administrator's control, is the better option.

12 4 5 2 5 Section 103A of the LRA

In terms of the broader purpose of this study, section 103A is the most significant provision introduced by the 2014 LRA Amendment Act.[4635] In essence, where the requirements outlined in subsections 103A(1)(a)-(c) apply, the Labour Court "may order that a suitable person ... be appointed to administer a trade union ... on such conditions as the Court may determine".[4636] These requirements are that the court deems it "just and equitable to [appoint the administrator]" and that the application for appointment is made by a trade union that has "resolved that an administrator be appointed"[4637] or by the Registrar.[4638] Section 103A(2) makes it clear (without limiting

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[4633] Although, that is on the assumption that there is no protracted "lawfare" regarding the division of the assets and the like (in terms of subs 103(5), read with subs 103(6)(a) LRA) – assuming there would still be any left.

[4634] The reason for this becomes apparent from consideration of the *Unica Plastic* decision – as touched on at § 12 4 5 1 above but discussed in more detail again at § 12 4 5 2 7 below. Here is demonstrated that the "mere" deregistration of a union, does not mean it automatically loses *all* of its organisational rights.

[4635] In the words of cl 17 of the Explanatory Memorandum to Act 6 of 2014, the 103A mechanism "provides an alternative to the winding-up procedure in section 103 of the Act and provides for a more appropriate process if the circumstances facing the trade union or employers' organisation are capable of being remedied" – see the "Memorandum on the Objects of the Labour Relations Amendment Bill, 2012", as annexed to B16D-2012.

[4636] Subsection 103A(1) of the LRA.

[4637] Subsections 103A(1)(a)-(b).

[4638] Subsection 103A(1)(c).

section 103A(1)) that "it may be just and equitable" to make such an order[4639] where the union either "fails materially to perform its functions",[4640] or "there is serious mismanagement of the finances of the trade union".[4641]

In *Solidarity v Metal & Engineering Industries Bargaining Council* matter[4642] the Labour Court was requested to approve the appointment of an administrator for the MEIBC[4643] (this despite there being no express provision in the LRA to allow for the appointment of an administrator for bargaining councils).[4644] After consideration of whether or not the court had the necessary jurisdiction[4645] and powers to make such an order[4646] (including applicable case law),[4647] the court did refer to section 103A of the LRA and acknowledged that it provides for unions and employers' organisations to be placed under administration.[4648] The court made the following remarks about administration:

> "Administration is intended to save the organisation concerned from being wound up or liquidated. It recognises that there is still a viable entity serving a legitimate purpose, which is just in need of proper intervention and assistance to bring it back on track so that the organisation can fulfil the purpose for which it was established. That would be in the interest of all stakeholders, as it would avoid all the negative consequences that are bound to follow from liquidation or windingup."[4649]

The court then found that there is "no reason why" the court should not similarly be permitted to "remedy the dysfunction" in the MEIBC.[4650] The court found it would be

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[4639] Subsection 103A(2).
[4640] Subsection 103A(2)(a).
[4641] Subsection 103A(2)(b).
[4642] *Solidarity v Metal & Engineering Industries Bargaining Council* 2017 38 ILJ 2109 (LC).
[4643] 2113B.
[4644] 2120C-D sees the court confirm "[a]ll that the LRA provides for is the winding-up of a bargaining council."
[4645] 2177C.
[4646] 2177D-2118D.
[4647] 2118D-2119C, 2119E-H.
[4648] 2120E-H. Central herein, was the examination of the *Public Servants Association of SA v Minister of Labour* 2016 37 ILJ 185 (LC) decision (as discussed below), and the comparison that was drawn between an administrator in this context, and that of the business rescue practitioner, as made allowance for in the Companies Act 71 of 2008 – 2121A-D.
[4649] 2121D-G. Further consideration was also made of the concept of a "curator", as applied in the context of the Financial Institutions (Protection of Funds) Act 28 of 2001 – 2122I-2123F.
[4650] 2126B-C. Once this point was reached, what was then to be emphasised is how the winding-up process "is a measure of last resort", and that "common sense and logic" dictates that the LC be permitted to appoint an administrator in an attempt to "save a bargaining council from extinction" –

just and equitable to appoint an administrator (this being in reference to subsection 103A(1)(a) of the LRA) and made a lengthy and detailed order setting out the expected process.[4651] Given the absence of similar case law pertaining to trade unions, certain key aspects of the order are noteworthy: Firstly, the term of appointment of the administrator was for an initial period of six months, with the possibility of extension upon agreement between MEIBC's management committee and the Department of Labour;[4652] Secondly, the administrator was effectively placed "in chairmanship", or control,[4653] of the management committee, which effectively was to report to the administrator (albeit that MEIBC was still to be run "in collaboration" with the management committee);[4654] Thirdly, the administrator was tasked with "overseeing the recruitment of a new general secretary" with the intention that this person would then reprise the leadership and management role of the administrator upon termination of administration;[4655] Finally, the administrator – subject to specific requirements – was empowered to apply to court for an "amendment, amplification or clarification" of the powers granted in terms of the order.[4656]

If these points are considered in the context of a trade union, it is apparent that administration would entail the appointment of an administrator to manage the affairs of that union in collaboration with (but still in control of) the existing leadership structures. Included herein would be full managerial control (subject to delegation where appropriate) to the extent of binding the union, along with full control of the financial affairs of the union (including facilitating the approval of a new budget) and input into the new leadership of the trade union. In short then, a complete (albeit collaborative) take-over (albeit temporarily) of the union's executive and managerial functions. In this regard, the Registrar himself has expressed the following views:

> "New laws allow the registrar to place a union under administration for failing to comply with the LRA. This means the registrar will appoint an administrator to run the union until it holds a democratic congress. In the past, unions would be deregistered for failing to comply with the law. This meant they couldn't collect subscription payments or hold recognition rights. The difference now, says

2127D-F.
[4651] 2130A-2131E.
[4652] 2130C-D.
[4653] 2130G-H.
[4654] 2130E-G.
[4655] 2131A-B.
[4656] 2131C-D.

> Molefe, is that the ordinary members do not pay the price for the failure of union leaders to run the organisations as required by law."[4657]

At this stage, it may already be submitted that the mechanism of administration introduced by section 103A of the LRA – subject to it actually being utilised (although, recent media reports suggest this will be the case)[4658] – could see significant changes in terms of union accountability going forward. The notion of an independent and impartial statutory office (the Registrar) with the power of protecting the public and the rights of union members by applying to the Labour Court to have an independent and impartial administrator appointed, in order to remedy internal union issues while ensuring that the broader memberships' rights continue to be protected, simply is too powerful an option not to be utilised. There also seems to be little room for objection from the existing union leadership. They would, in theory, retain their positions and work in collaboration with the administrator, unless some further evidence comes to light that would warrant their removal. The associated transparency that such a process could entail, in terms of informing the membership of the true state of affairs, is also to be welcomed.

12 4 5 2 6 Section 106 of the LRA

Section 106 of the LRA regulates the cancellation of registration of a trade union, specifically through subsection 2A inserted by the 2002 LRA amendment. Firstly, it requires the Registrar to be "satisfied that the trade union ... is not, or has ceased to function as, a genuine trade union".[4659] Secondly, the Registrar may also cancel registration where the union has, despite notice from the Registrar requesting

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[4657] Marrian *Financial Mail* (3-9 October 2019) 24 26. See further evidence in the media, of recent developments in this area, under the auspices of the Registrar, in appointing administrators for certain unions: Mahlakoana *EWN Eyewitness News* (02-04-2019); T Mahlakoana "SAMATU to have independent administrator within 21 days, says labour registrar" (18-10-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/10/18/samatu-to-have-independent-administrator-within-21-days-says-labour-registrar> (accessed 18-10-2019) and T Mahlakoana "Court places SAMATU under administration following independence concerns" (18-10-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/10/18/samatu-to-have-independent-administrator-within-21-days-says-labour-registrar> (accessed 18-10-2019).

[4658] See Mahlakoana *EWN Eyewitness News* (02-04-2019) and Mahlakoana *EWN Eyewitness News* (18-10-2019).

[4659] Subsection 106(2A)(a) of the LRA.

compliance with sections 98, 99 and 100 of the LRA,[4660] failed to do so.

National Employer's Forum v Minister of Labour[4661] was the first case requiring consideration of section 106 following the 2002 amendments. Here the alleged contravention of sections 98-100 resulted in deregistration proceedings being initiated. The court described the background to the section 106 amendments as follows:

> "Prior to 1 August 2002 the Department, for a variety of reasons which are not strictly relevant for the purposes of this judgement, found it particularly difficult to fulfil its supervisory functions and, more particularly, to ensure that registered trade unions and registered employers' organisations comply with both their statutory duties and to ensure that such organisations were *bona fide* trade unions or employers' organisations established for the purposes of fulfilling functions in terms of the LRA. Pursuant to the enactment of the [LRA]… the proliferation of trade unions and employers' organisations occurred. The structure of the legislation was such that labour consultants and, to a lesser extent, practising attorneys and advocates were effectively denied the right of representation. This resulted in a number of unscrupulous individuals establishing what are, in effect, bogus trade unions and employers' organisations for the purposes of making a profit and gaining representation under the auspices of a registered trade union and/or registered employers' organisation to which they were not entitled. Such registered unions and employers' organisations are in effect a sham and are an attempt to circumvent provisions of the LRA. They are *in fraudem legis*."[4662]

The court subsequently confirmed that any "actions taken by the Registrar in terms of section 106 of the LRA amount to administrative actions[4663] which must be taken in

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[4660] In regards to the nature of such request, a useful example of the correspondence sent between the Registrar and a union, is provided by *NEWU v Ministry (2010)* 579I-581A. The correspondence provides useful insight into the degree of detail required from NEWU by the Registrar, following his reviewing the union's internal processes and financial situation. In short – the correspondence clearly indicates that the Registrar's overview of the financial activities of unions is in alignment with what should be expected of a regulatory body reviewing the financial activities of a "public institution" – as per *UPUSA v Registrar* 203C.

[4661] *National Employer's Forum v Minister of Labour* 2003 5 BLLR 460 (LC).

[4662] 462I-463C, [their emphasis]. It is in light of the abovementioned, that the Court affirms that the 2002 amendments to the LRA, were to, *inter alia*, "assist the Registrar in identifying and weeding out registered trade unions and registered employers' organisations which are not complying with their obligations in terms of the LRA and/or are not genuine" – *National Employer's Forum* 463D. In addition hereto, and in relevance to what will follow below, the Court furthermore confirmed that in light of the 2002 amendments, the Department of Labour "vigorously embarked on a process to identify and deregister organisations that either are considered not to be genuine or have failed to comply with the provisions of the Act" – *National Employer's Forum* 464B.

[4663] With due consideration to the Promotion of Administrative Justice Act 3 of 2000 [*National Employer's Forum* 467J], the Court held that the "degree" of fair administrative justice was dependent "on the circumstances of each case" [*National Employer's Forum* 467J] – and that, in regarding the facts presented to the Court (in particular the correspondence between the Registrar and NEF, and the

accordance with statutory requirements and the common law"[4664] (inclusive of the "rules of natural justice").[4665] The Registrar's findings that gave rise to the subsection 106(2B) notice were based on a failure to submit financial records between February 1997 and February 2002 (that is, non-compliance with section 100) and were found to be fair and reasonable.[4666]

In *CCMA v Registrar*,[4667] the court was tasked with examining aspects of the deregistration process (and appeals against deregistration). The court stated that section 106 of the LRA must be understood in the context of "freedom of association and the consequent rights, benefits and duties that flow from exercising of that freedom in the form of forming, joining and participating in trade union activities".[4668] However, an important proviso to this was expressed as follows:

> "The objects of s 106 read with s 111(3) of the LRA must also be understood in the context that the legislature having created an environment and a framework for the guarantee and enjoyment of the freedom of association in the form of trade unions, also sought to ensure that certain minimum duties of transparency and accountability are imposed on trade unions. *The need for accountability arises from the fact that trade unions, as public entities, depend largely on financial contributions from workers who are members of the public.*"[4669]

In 2011 the Labour Appeal Court crisply declared:

> "[T]he purpose of s 106 of the LRA [is] … the protection of vulnerable employees from abuse of the trust that had been placed in the 'union' by unscrupulous officials whose involvement in the 'union' is for no other reason than to advance their own selfish financial interests".[4670]

While it is not clear from the wording of the section what would trigger the actions that the Registrar may take in terms of subsections 106(2A)(a) and (b), disputes before the courts have provided some examples. In *National Employer's Forum* it was the

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latter's response thereto) – NEF *was* duly afforded the opportunity of *audi alteram partem* that it had alleged it was denied, as per *National Employer's Forum* 468D-E.

[4664] 467G.

[4665] 467G-H.

[4666] 469F-I.

[4667] *Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations* 2010 31 ILJ 2886 (LC).

[4668] 2894J.

[4669] 2895A-D, [my emphasis].

[4670] *NEWU v Director CCMA* 2103C-D.

Registrar's office becoming aware of incomplete financial records (and thereby, non-compliance with subsections 100(a)-(d) of the LRA).[4671] *Lowveld Allied & General Employer's Organization v Minister of Labour*[4672] concerned the deregistration of an employer's organisation which acted as a labour consultancy for purposes of representation at the CCMA.[4673] *Cape Agri*[4674] was similar to the *Lowveld* case and stemmed first from a complaint lodged by a trade union regarding the conduct of the labour consultants (who were members of Cape Agri) in appearing before the CCMA[4675] and thereafter by further complaints (including by a CCMA commissioner) with regards to the registration of Cape Agri as an employer's organisation and the "membership status" of their consultants.[4676] In *Retail & Allied Workers Union v Registrar of Labour Relations*[4677] it was apparent that the Registrar's decision to investigate RETAWU was triggered by an attorney's letter (allegedly at the request of an employer)[4678] and a complaint received by the Registrar from a member of the public.[4679]

A final point needs to be made regarding the powers afforded the Registrar by section 106. Section 106(2B) requires that the Registrar, before deregistration or cancellation, must first publish a notice to this effect in the Government Gazette and invite "written representations" from the affected union (or employers' organisation),[4680] "or any other interested parties", as to why the registration should

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[4671] *National Employer's Forum v Minister of Labour* 2003 5 BLLR 460 (LC) 468E-F.

[4672] *Lowveld Allied & General Employers' Organization v Minister of Labour* 2011 32 ILJ 340 (LC).

[4673] 344C-F.

[4674] *Cape Agri Employers' Organization v Registrar of Labour Relations* 2011 32 ILJ 2952 (LC).

[4675] 2954J.

[4676] 2955A.

[4677] *Retail & Allied Workers Union v Registrar of Labour Relations* 2012 33 ILJ 2149 (LC).

[4678] RETAWU argued that the letter was initiated by one of the employers against which it was representing its members – *RETAWU* 2168H-J.

[4679] 2171D-E.

[4680] Whilst not commented on directly, mention can be made of this point receiving a fair amount of attention in several of the matters between unions or employers' organisations, and the Registrar. Whilst the provision itself, and its procedure at face value is not controversial, since it entails a "public element", it appears to explain some of the attention so drawn. That said, in a number of the cases, arguments were presented to the court surrounding the extent to which same affords proper opportunity for the affected party to respond appropriately – which often resulted in arguments based on the absence of the *audi et alteram partem* principle, or that fair administrative action was lacking on the part of the Registrar. See for instance *National Employer's Forum* 465I-J, 466D-E; *RETAWU* 2156F-G, 2166D-E, 2169C-D; *National Entitled Workers Union v Ministry of Labour* 2012 33 ILJ 2585 (LAC) 2594G-H; and *Registrar of Labour Relations v Consolidated Association of Employers of South African*

not be cancelled.[4681]

12 4 5 2 7 Section 111 of the LRA

Section 111 regulates appeals against decisions made by the Registrar. The process first provides for a request for written reasons from the Registrar within 30 days of the written notice of the decision.[4682] The Registrar then has 30 days from receipt of the request to provide those reasons.[4683] Section 111(3) provides that "[a]ny person who is aggrieved by a decision" by the Registrar may appeal to the Labour Court, within a period of 60 days from the initial decision,[4684] or (assuming the request for reasons was made) from the date when the reasons for the decision were provided.[4685]

As early as 1998 the Labour Appeal Court defined the nature and scope of such an appeal. In *Staff Association for the Motor & Related Industries v Motor Industry Staff Association*[4686] two separate but concurring judgments were handed down. The majority confirmed that the "the appeal contemplated in s 111(3) is an appeal in the

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Region 2014 JOL 32429 1 (LAC) para 24.

[4681] Subsection 106(2B) of the LRA. For an example of such a notice, see "Labour Relations Act, 1995 Notice of Intention to Cancel the Registration of a Trade Union" (GN R1168 in *GG* 42700 of 12-09-2019), which contains the following text:

> "I, Lehlohonolo Daniel Molefe, Registrar of Labour Relations, hereby, in terms of section 106(2B) give notice of my intention to cancel the registration of Allied Workers and Transport Union (AWATU) (LR2/6/2/2520) for the following reasons:
> • The union ceased to function as a genuine trade union as envisaged by the Act[;]
> • The union ceased to function in terms of its constitution[;]
> • The union failed to comply with the provisions of section 98, 99 and 100 of the Act[.] The trade union and all interested parties are hereby invited to make written representations as to why the registration should not be cancelled. Only representations pertaining to this Notice will be considered. All correspondence should refer to case number: 2019/213. Objections must be lodged to me, c/o the Department of Employment and Labour, Laboria House, 215 Francis Baard Street, PRETORIA. [Postal address: Private Bag X117, PRETORIA, 0001 - Fax No. (012) 309 4156], within 60 days of the date of this notice."

[4682] Subsection 111(1) of the LRA. The full text of the provision reads as follows:
"Within 30 days of the written notice of a decision of the registrar, any person who is aggrieved by the decision may demand in writing that the registrar provide written reasons for the decision."

[4683] Subsection 111(2).

[4684] Subsection 111(3)(a).

[4685] Subsection 111(3)(b). Subsection 111(4) affirms that the Labour Court may extend the timeframes involving an appeal being initiated, on good cause being shown regarding the delay.

[4686] *Staff Association for the Motor & Related Industries v Motor Industry Staff Association* 1999 20 ILJ 2552 (LAC).

wide sense" given that it involves "the absence of the record, the lack of procedure for lodging objections with the second respondent, the absence of power on the part of the [the Registrar] to reconsider the decision in the light of objections, and the lack of discretion on the part of the [Registrar]".[4687] The minority (concurring) also confirmed that section 111:

> "[I]s not applicable only to a refusal by the registrar to register a trade union. Section 111(1) deals with any decision by the registrar. There may conceivably be disputes about decisions of the registrar in the fields of accounting records and audits (s 98), the duty to keep records (s 99) or the duty to provide information to the registrar (s 100)".[4688]

Mention must again be made of the *Unica Plastic* case.[4689] The matter involved an employer applying to court in an attempt to restrain NUSAW from exercising its rights on its premises, given that (despite a pending section 111 appeal) NUSAW had its registration cancelled by the Registrar by means of a section 106(2B) notice.[4690] The court ruled that whereas NUSAW had lost key organisational rights on account of it no longer being registered (including the right to appear in the CCMA)[4691] this does not deprive it, as an unregistered union, to exercise its other rights (such as recruiting or representing members in a workplace). Furthermore, the *RETAWU* decision[4692] provides an example of the court finding in favour of the union in reasoning that – given the particular facts surrounding the process – the Registrar had not acted in a fair and just administrative manner,[4693] nor was there compliance with the principle of *audi alteram partem*.[4694]

Lastly, subsection 111(5), added by the 2014 LRA amendments, provides that an appeal "does not suspend the operation of the registrar's decision". This subsection is significant given the appeals that might be lodged by trade unions and is in direct

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[4687] 2558D-E. In other words, it is "a complete rehearing and adjudication of the merits with or without additional evidence or information" – 2558E.

[4688] 2562J-2563A.

[4689] *Unica Plastic Moulders CC v National Union of SA Workers* 2011 32 ILJ 443 (LC).

[4690] 445I.

[4691] 453C.

[4692] *Retail & Allied Workers Union v Registrar of Labour Relations* 2012 33 ILJ 2149 (LC).

[4693] 2164E-F.

[4694] See 2169C-D. This in mind, the court specifically stated that its ruling does not in any way suggest that there are no genuine reasons for the [Registrar] to believe or to form an opinion that the applicant has ceased to operate as a genuine union as contemplated in the provisions of the LRA – 2169G.

response to a series of cases where unions argued that their section 111 appeal suspends the operation of the Registrar's decision (as made in terms of subsections 95(7) or 106(2A)).[4695] Subsection 111(5) therefore provides important clarity in this regard.[4696]

12 4 5 3 The Guidelines in terms of subsection 95(8)

In terms of subsection 95(8) of the LRA, the Minister is to publish guidelines "to be applied by the Registrar" in order to determine whether or not a union is "genuine".[4697] While their significance is self-evident for the purposes of this study, only specific provisions call for discussion.[4698]

The Guidelines were first gazetted in 2003[4699] and then again in 2018.[4700] At the

[4695] See for instance *Unica Plastic* 449F-450E and *General Domestic & Professional Employers' Organisation v Registrar of Labour Relations* 2011 32 ILJ 316 (LC) 318H-I. In *National Entitled Workers Union v Director, CCMA*, Davis, JA stated as follows in denying the requested order for abeyance by NEWU:

> "Assume that the registrar exercises a discretion in terms of s 106 of the LRA and deregisters the 'union', on the basis that he finds that it is not genuine and is ultimately no more than a mechanism to extract profits from a group of vulnerable workers. It would manifestly be in this 'union's' interest to lodge an appeal so that the decision to deregister could be suspended and its exploitative conduct could continue. Were the commonlaw rule to apply, the decision of the registrar to deregister this 'union' would be suspended, pending the exhaustion of appeals whether to the Labour Court or further, to the Labour Appeal Court and, with some measure of legal innovation, to the Supreme Court of Appeal and finally to the Constitutional Court. By the time these appeals had been exhausted and ultimately the decision of the registrar confirmed, a further lengthy period of exploitation of employees would have taken place. The prejudice to employees, whom the section seeks to protect, would thus be immense" – *NEWU v Director CCMA* 2102H-2103A.

[4696] A key case in this regard, was that of *CCMA v Registrar*. Briefly stated, the matter stemmed from the earlier *UPUSA v Registrar* decision, where the union had been deregistered. Given the significant number of matters involving UPUSA before the CCMA, the latter sought a declaratory order (following it obtaining independent legal advice) from the LC, in terms of confirming what the status was of UPUSA, as a possible representative at the CCMA, pending the appeal. The aforementioned case – whilst decided in favour of the Registrar, obviously caused some tension between the two entities [*CCMA v Registrar* 2891A], which again serves as affirmation to the importance of the subsection 111(5) addition.

[4697] Subsection 95(8) LRA.

[4698] Clauses 23 to 34 of the Guidelines, focus on employers' organisations – and effectively mimic the clauses speaking to unions, as adjusted.

[4699] The initial guidelines were published issued in 2003, following the 2002 amendment to the LRA (as per GN R1446 in *GG* 25515 of 10-10-2003).

[4700] The guidelines were effectively re-issued in December 2018, as per the "Guidelines issued in terms of section 95(8) of the Labour Relations Act, No. 66 of 1995" (GN R1395 in *GG* 42121 of 19-12-2018). In terms of the latter, the previous 2003 guidelines were accordingly withdrawn upon the gazetting of the 2018 guidelines [as per 20]. Due acknowledgement must be made to the fact that the wording of

outset, mention must be made that the Guidelines were already discussed at § 2 5 2 above, where clauses 18 and 21 were touched on. Clause 18 lists the factors that "may indicate that a trade union is operating in fact for the gain of certain individuals".[4701] Clause 21 focuses on instances where a union charges for its services in representing members in (particularly) "dismissal disputes" and that this would be a "strong indication" that the union is not a "genuine" labour association.[4702]

As far as the rest of its provisions are concerned, clause 1 of the Guidelines contains its purpose – they are "to be applied by the Registrar ... in determining whether an applicant for registration in terms of the [LRA] is a genuine trade union". Reference is also made to subsections 95(7) and 106(2A) of the LRA to confirm that the Registrar is only permitted to register a genuine union and may cancel the registration of a union that is not or has ceased to function as such.[4703]

Of interest is clause 4, which provides that the guidelines "are not concerned with evaluating whether the constitution of a trade union ... complies with section 95(5) of the LRA".[4704] Clause 11 outlines the primary purpose of a trade union, namely to "regulate relations between employees and employers" and provides that "in particular, this includes the regulation of these relationships through collective bargaining".[4705] Clauses 13 to 15 focus on the expected activities of genuine trade

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the clauses between the 2003 and 2018 guidelines, is identical. In other words, despite the 2018 guidelines officially withdrawing the prior version, there is effectively no difference between the guidelines as they were, and as they are now.

[4701] See the discussion at § 2 5 2 above – as per Guidelines cl 18. The examples provided, include (*inter alia*) where "[u]nrealistically high salaries and allowances" are paid to the union officialdom, or the latter receive "[i]nterest-free or low interest loans", or that the "[i]ncome earned" by the union, is used by the officialdom for personal gain (discussed further below).

[4702] Guidelines cl 21.

[4703] Cl 1, 22. In terms of clause 3 ("Approach"), to be able to make such a determination, "it will be necessary for the Registrar to examine the actual organisation" of the union – and in so doing, "take into account all relevant factors" and pay particular attention to the initial formation of the association, and "its actual activities and functioning". The latter clause was considered, in particular, by Murphy, AJ in *Workers Union of SA v Crouse NO* 2005 26 ILJ 1723 (LC) 1732A-B.

[4704] When the above point, regarding how the 2018/2019 version was essentially a re-issuing of the guidelines issued in 2003 (in response to the 2002) amendment – with its focus on assisting the Registrar in identifying a particular type of opportunistic (non-genuine) organisation, this provision makes plausible sense – particularly when being mindful of the fact that, in theory, unions were in any event required to comply with the requirements of subsection 95(5) in order to be registered.

[4705] Cl 12 touches on a primary objective of a union being to recruit members who are still in active employment – which is then contrasted against associations where the majority of members join *after* their employment has been terminated. The latter would then serve as an indication of an association that is "not a genuine trade union" – Guidelines cl 12.

unions. Clause 15 provides that where the main activity of an association revolves around "referring disputes and cases on behalf of its members to the CCMA, the Labour Courts or other courts" it is an indication of a non-genuine trade union.[4706]

Clause 17 ("Association of employees") confirms that a union must essentially "be" an association of workers and then proceeds to outline certain key indicators of this. Included are that the union holds regular meetings of members,[4707] that there are elections of shop stewards or other union representatives in the particular workplace[4708] and that elections are held to elect members as office-bearers.[4709]

Clause 19[4710] provides that it is not necessarily inappropriate for unions to "pay competitive salaries [in order] to attract competent and qualified officials and employees", which includes the provision of "loans on favourable terms to their officials, office-bearers or employees".[4711] Finally, clause 20 deals with union dues and states that "[u]sually the major source of revenue for trade unions is a subscription usually paid on a monthly basis" and that "unions may have other sources of income, such as investments".[4712]

From this overview it is apparent – in sharp contrast to the Balloting Guidelines issued (wrongly) in terms of subsection 95(9) – that there is nothing controversial or unclear in the guidelines provided to determine the genuineness of trade unions. They provide further insight into what the expected functions and roles of a typical trade union are.

The final point to be made relates to clause 18(d) of the Guidelines which gives rise to an important question. It reads as follows:

> "In terms of section 95(5)(a) of the LRA a trade union must state in its constitution that it is an association not for gain. The purpose of this requirement is to prevent trade unions from being used as vehicles for enriching individuals or as a cover for profit-making businesses. In evaluating whether a trade union is a genuine trade union, it is important to examine the actual financial operation of the trade union. Among the factors that may indicate that a trade union is operating in fact for the gain of certain individuals are the following: (a)… (d) Income earned by the trade union is not used for the benefit of the organisation and its members but is paid out to officials, office-bearers or

[4706] Guidelines cl 15.
[4707] Cl 17(b).
[4708] Cl 17(c).
[4709] Cl 17(d).
[4710] Cl 18 was discussed above.
[4711] Cl 19.
[4712] Cl 20.

employees."[4713]

This clause, introduced in 2003, no doubt has a very specific objective, namely, to prevent unwanted entities proliferating at the expense of ordinary workers. But it does beg the question about differences in treatment between a genuine trade union where there is misconduct by its representatives and *non*-genuine trade unions where its whole operation is tainted. Could the wording above – of how unions are not to be used as vehicles to enrich individuals[4714] – not be equally applicable to seemingly legitimate trade unions who simply have self-serving and potentially corrupt officials within their ranks?[4715] Would these union officials or leadership of otherwise genuine trade unions not equally fall foul of clause 18? Arguably, this mechanism – first introduced to combat the exploitative practices of entities masquerading as legitimate unions – may also be applied to *legitimate* unions and their representatives.

12 4 5 4 The independence of the Registrar

As was demonstrated in the discussion of both the offices of CROTUM and the CO in the context of Britain (at § 5 2 7 5 1 and § 6 3 2 7), one of the key aspects underlying the effectiveness of a statutory office such as the Registrar is that of "independence". If the office of the Registrar was to be seen as a mere puppet of the state, or, for that matter, of other interest groups such as employers' organisations, there would be far less likelihood of effective monitoring of trade unions.[4716] In this regard, sections

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[4713] Cl 18.

[4714] To this must be added the wording in sub-clause 18(d), of how union income is to be used for the union and its members, as opposed to being paid out to the officialdom.

[4715] See for instance, media reports of internal union issues in regards to corruption, including the following: S Mabena "Hawks probing Suid-Afrikaanse Onderwyser Unie" (2018) <https://citizen.co.za/news/south-africa/2035044/hawks-probing-suid-afrikaanse-onderwyser-unie/> (accessed 02-03-2019); C Barron "Something rotten in state of unions" (15-07-2018) *Business Live* <https://www.businesslive.co.za/bt/business-and-economy/2018-07-14-something-rotten-in-state-of-unions/> (accessed 03-03-2019); T Mahlakoana "SAMWU leaders sacked after years of corruption claims" (04-04-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/04/04/samwu-national-leadership-voted-out-of-office> (accessed 10-04-2019); Harper *Mail & Guardian* (17-10-2019); and, S Smit "'Jo'burg uses our fees for slush fund'" (24-10-2019) *Mail & Guardian* <https://mg.co.za/article/2019-10-24-00-joburg-uses-our-fees-for-slush-fund> (accessed 26-10-2019).

[4716] For the views of the current (at the time of writing) Registrar on this aspect, see S Smit "Registrar gets tough on unions" (31-05-2019) *Mail & Guardian* <https://mg.co.za/article/2019-05-31-00-registrar-gets-tough-on-unions> (accessed 02-06-2019), where he is quoted as saying:

"I know that there are people who will go around saying that it is politically motivated and what not.

108(4)-(5) of the LRA explicitly state that the Registrar and deputy-registrars "are independent … subject only to the Constitution and the law" and that they "must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice".[4717] There is also confirmation that "[n]o person or organ of state may interfere with the functioning of the registrar".[4718]

At face value, there is nothing unusual about these provisions. However, when one considers that these subsections were added to the LRA as recently as January 2019 (through the LRAA) and once one considers a series of court decisions where the Registrar's independence was directly impugned by the Minister of Labour, matters take on a different light.

Public Servants Association v Minister of Labour was only tangentially related to a trade union, namely the Chemical Energy Paper Printing Wood & Allied Workers Union ("CEPPWAWU").[4719] At the heart of the dispute was an application to overturn a decision made by the Minister of Labour to revoke the holding of office by the incumbent Registrar. The background facts were that events transpiring in CEPPWAWU came to a head in April of 2015[4720] prompting the Registrar to launch an urgent application to place CEPPWAWU under administration in terms of s 103A of the LRA,[4721] alternatively to wind it up in terms of s 103 of the LRA and place it in

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'Let me tell you this: I do not belong to any political party. I have never belonged to any political party ... I don't have time to be listening to what politicians have to say. I am an officer of the court and I am a public servant. That is the bottom line for me'".

[4717] Subsection 108(4) of the LRA.

[4718] Subsection 108(5).

[4719] The court describes the union as follows: "CEPPWAWU, an affiliate of COSATU, 4 has 66,000 members and funds of in excess of R4 billion" – *Public Servants Association of SA v Minister of Labour* 2016 37 ILJ 185 (LC) 191G-H, [footnotes omitted].

[4720] For the background and extent of the issues prevalent within CEPPWAWU, and the earlier attempts at ensuring statutory compliance – see the discussion at *PSA v Minister* 191G-192E.

[4721] Regarding the decision to place CEPPWAWU under administration, the Registrar was approached (in September 2014) by the deputy general secretary of the union, who – in claiming to represent the majority of the membership – indicated that "the only meaningful mechanism to salvage the union and secure its future would be to seek the assistance of an administrator" [*PSA v Minister* 192A-B]. Furthermore, the Registrar affirmed that whilst the initial plan was to cancel the registration of the union, in October 2014 – upon it becoming clear that the 2014 LRA amendments (which then included subs 103A) were going to be promulgated, it was decided to wait, and attempt further interventions in the interim [*PSA v Minister* 196B-D]. As an aside, it does not appear from the case at hand, that the application against CEPPWAWU was finalised – or at least, no such reported case can be found.

liquidation.[4722] The Registrar relied on several grounds for the application[4723] against the backdrop of ongoing internal "lawfare" between the leadership of the union and "the fact that it is in the interests of justice that the union's funds (of some R4 billion) are safeguarded".[4724] An internal dispute then arose between the Registrar and the Minister of Labour who wanted to suspend the process. This resulted in the revocation of the Registrar's designation as such[4725] and the appointment of an acting Registrar in his place.[4726] The court ordered the Minister to reinstate the former Registrar. For the purposes of exploring the role of the Registrar, along with the implementation of that role, certain aspects of the judgment are notable.

Regarding the powers of the Registrar and in consideration of section 208A of the LRA (providing for the delegation of powers), the court confirmed that the Registrar's powers are "original statutory powers, functions and duties vested in him or her by the LRA" and are not derived "from any delegation by the minister".[4727] The court furthermore reasoned that further delays in the process "would … be to the detriment of the workers and could encourage ongoing mismanagement of the union by its officials"[4728] and that a withdrawal of the application would "be tantamount to the department 'granting officials of the union a license to continue mismanaging the union' and 'condoning the union's noncompliance with the law'".[4729] In considering the "political interference"[4730], the court pointed to correspondence between the Registrar and the Director General of the Department of Labour ("DG"):

> "'In the 20 years of being registrar he has never been called upon by a [DG] or higher official to brief him/her on any matters of this nature. It is not clear what makes the CEPPWAWU matter different from the other cases that have been dealt with. (*Over the past five years the registrar has cancelled the registration of 81 trade unions without involvement from senior management*.)'"[4731]

[4722] *PSA v Minister* 192D-E.

[4723] These included, *inter alia*, CEPPWAWU's failure to prepare and submit the required audited financial statements of several years (and related financial records) and non-compliance with provisions of its constitution – *PSA v Minister* 192E-I.

[4724] 192E-I.

[4725] 198I-199A.

[4726] 199B.

[4727] 191D-F.

[4728] 195F-G.

[4729] 195I-196A.

[4730] 196B.

[4731] 1936C-E, [my emphasis].

Finally, the court confirmed that the Registrar "occupies an independent office (albeit accountable to the minister) and performs a critically important function under the LRA in the interests of, *inter alia*, hundreds of thousands of trade union members".[4732] In due consideration of the preamble to the LRA, the court stated that the Registrar is "responsible for the regulation of trade unions (and employers' organisations) 'to ensure democratic practices and proper financial controls'".[4733]

On appeal, in *Minister of Labour v Public Servants Association*,[4734] the matter was again resolved in favour of the Registrar. The Labour Appeal Court described as "lamentable" the fact that the court *a quo* "did not deal with the complaint raised by [the Registrar] that the minister sought to interfere with his statutory functions on a technical basis".[4735] After consideration of, among others, the relationship between the Minister and the LRA and between the Registrar and the Minister, the court concluded that it was not proven that the Minister of Labour has the power to either "call the registrar to account to her, or to intervene in, or assume the registrar's functions".[4736] This, according to the court, was especially so in the instant scenario where the Registrar's discretion was any event "very limited".[4737] The appeal was dismissed with costs.

12 4 6 A note on the Consumer Protection Act

One interesting question concerning the legislative regulation of trade unions in South Africa concerns the potential application of the Consumer Protection Act 68 of 2008 (hereafter CPA) to the activities of trade unions. The preamble to the Act states that it is necessary to develop and employ innovative means to… protect the interests of all consumers, ensure accessible, transparent and efficient redress for consumers who are subjected to abuse or exploitation in the marketplace". Subsection 3(1)(d) of the CPA lists one of the purposes of the CPA as protecting "consumers from … unconscionable, unfair, unreasonable, unjust or otherwise improper trade practices;

[4732] 204F-G.
[4733] 204G-H.
[4734] *Minister of Labour v Public Servants Association of SA* 2017 38 ILJ 1075 (LAC).
[4735] 1093G-I.
[4736] 1096G-H.
[4737] 1097A.

and … deceptive, misleading, unfair or fraudulent conduct".[4738] The reason why this can potentially be important for this study is that subsection 5(6)(a) CPA defines the basic scope of the Act as follows:

> "The supply of any goods or services in the ordinary course of business to any of its members by a club, *trade union*, association, society or other collectivity, whether corporate or unincorporated, of persons voluntarily associated and organised for a common purpose or purposes, whether for fair value consideration or otherwise, irrespective of whether there is a charge or economic contribution demanded or expected in order to become or remain a member of that entity".[4739]

Thus, it would appear that "any goods or services in the ordinary course of business to any of its members by a … trade union … whether for fair value consideration or otherwise", irrespective of the presence (or not) of membership dues, will be deemed a "transaction" that falls within the ambit of the CPA.[4740]

At the same time, subsection 5(2) of the CPA exempts certain transactions from the ambit of the Act, including (i) A transaction "pertaining to services to be supplied under an employment contract";[4741] (ii) A transaction "giving effect to a collective bargaining agreement within the meaning of section 23 of the Constitution and the Labour Relations Act, 1995 (Act No. 66 of 1995)";[4742] *or* (iii) A transaction "giving effect to a

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[4738] Subsections 3(1)(d)(i)-(ii) of the CPA.

[4739] My emphasis.

[4740] J Barnard & MM Botha "Trade Unions as Suppliers of Goods and Service" (2018) 30 *SA Merc LJ* 216 232 explain how the CPA is to be interpreted in light of both the common law, and existing legislation, as follows:

> "Due to its overarching purpose and aim, the CPA, in most instances, applies concurrently with existing legislation or law, including existing common-law principles."

The common law is therefore to be developed so as to "improve the realisation and employment of consumer rights generally" – and notwithstanding two statutory exceptions [Barnard & Botha (2018) *SA Merc LJ* 232 n114] – the CPA and any other legislation is to be applied concurrently "to the extent that it is possible", and should it not be, then "the provision that extends [the] greater protection to the consumer prevails" – as per Barnard & Botha (2018) *SA Merc LJ* 232.

[4741] Subsection 5(2)(e) of the CPA.

[4742] Subsection 5(2)(f). The relevant wording of s 23, reads as follows:

> "Labour relations– (1) Everyone has the right to fair labour practices. (2) Every worker has the right– (a) to form and join a trade union; (b) to participate in the activities and programmes of a trade union; and (c) to strike … (4) Every trade union and every employers' organisation has the right– (a) to determine its own administration, programmes and activities; (b) to organise; and (c) to form and join a federation. (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining … (6) National legislation may recognise union security arrangements contained in collective agreements".

collective agreement as defined in section 213 of the Labour Relations Act".[4743]

In this regard, Barnard and Botha, after analysing the reasoning of De Stadler,[4744] state as follows: "Nothing in any of the versions of the original Consumer Protection Bill, including the final version, or in the amendments to the Bill by the Portfolio Committee, gives any indication of the reasons for including trade unions as suppliers to their members under the Act".[4745] The authors provide a useful overview of the myriad of add-on services provided by trade unions in South Africa,[4746] before unpacking how the CPA may apply to these services. They argue that the CPA at best applies to the *additional* goods and services provided to trade union members as an ancillary benefit of membership and not to the "ordinary" duties of unions in the workplace. It is submitted that such a conclusion is warranted. In the absence of a matter to test the application of the CPA before the National Consumer Tribunal,[4747] it remains questionable whether the CPA applies to those services provided by unions ordinarily associated with the collective bargaining process and other labour-related matters.

12 5 Conclusion

Against the backdrop of historical developments, this chapter sought to provide an overview of the current legislative regulation of trade unions and their accountability to their members in South Africa. As such, the chapter built on the discussion in chapters 10 and 11 and described adoption of the 1995 LRA as the third period of adjustment to the regulation of trade unions, a discussion that also provided the platform for the

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[4743] Subsection 5(2)(g) of the CPA. The complete wording of the term, as per s 213, reads as follows: "'[C]ollective agreement' means a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand and, on the other hand– (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations".

[4744] Barnard & Botha (2018) *SA Merc LJ* 234-235, citing "De Stadler, 'Section 5' in Naudé & Eiselen, Commentary on the Consumer Protection Act (2016) 5–12 (De Stadler, 2016)".

[4745] Barnard & Botha (2018) *SA Merc LJ* 235.

[4746] 230. A selection of these – as listed by Barnard & Botha (2018) *SA Merc LJ* 230 – include, *inter alia*, the following: Discounted rates and access to specific holiday resorts and destinations; price reductions or discounts on various products, ranging from electronic & computing devices and food items, to motor vehicles; roadside assistance; and, various loyalty and discount programmes.

[4747] An examination of the reported cases before the Tribunal, for the period 2008 to 2019, sees no matters (to date) involving labour associations – available at <http://www.saflii.org/za/cases/ZANCT/> (accessed 19-07-2019).

more detailed consideration of the 1995 LRA as amended and augmented (by Codes and Guidelines) over time.

Broadly speaking, this chapter showed that the current dispensation is a system that built on a history where the common law regulation of voluntary organisations which was increasingly supplanted by legislative measures. These measures formalised the South African approach to trade unions, an approach where the traditional understanding of trade unions as organisations functioning in the interests, and at the behest of, its members is met with a good measure of scepticism. This meant that by the time the 1995 LRA was adopted there was broad acceptance of state interference in (or at least oversight of) internal union affairs. At the same time, the level of scepticism fluctuated over time and the 1995 LRA (at least initially) reflects an approach premised largely on the *non*-involvement with and the *non*-interference in the internal affairs of trade unions – an approach based on aspirational ILO ideals, the provisions of the Constitution and the powerful role of black trade unions in South Africa's recent past.

In particular, the chapter demonstrated how the powers afforded the Registrar (in terms of ICA/LRA 1956) were deemed to be incompatible with the principle of freedom of association. One particular bone of contention was the discretionary power bestowed upon the Registrar by the 1956 ICA/LRA (both in respect of investigating unions and refusing registration on grounds of what was thought should be included in their constitutions). The approach adopted was one of compliance on the part of unions subject to less intrusive oversight. At the same time, the discussion also showed that the past 25 years (since the adoption of the 1995 LRA) saw an increase in the scope and strengthening of this oversight function.

The chapter considered the regulation of trade unions by the LRA 1995 by considering three broad interrelated topics – the entrenchment of the representative role of trade unions through its promotion of collective bargaining, specific provisions regulating the representative role of trade unions, and, direct regulation of internal trade union functioning. While the institutional entrenchment of the role of trade unions in the process of collective bargaining perhaps does not directly affect trade union accountability, this discussion did serve to confirm (as specifically evidenced by the Code of Good Practice and its provisions relating to trade union accountability) that there is an inextricable link between sound labour relations, functional industrial action and external and internal trade union accountability.

The chapter also provided an overview of the specific provisions of the LRA catering for the representative role of trade unions in general (in section 200) and in specific settings (such as pre-dismissal procedures). Perhaps the best insights in this regard may be gleaned from the approach of the courts to the representative role of trade unions in specific settings, an approach often formulated in the context of subsection 158(1)(e) applications (which empowers the Labour Court to adjudicate on a trade union's non-compliance with its constitution). The discussion showed that the approach of the courts may be summarised with reference to three principles: firstly, recognition of majoritarianism (both in general and internal) and recognition that the general notion of majoritarianism is dependent on – or translates into – internal majoritarianism; secondly, formulation of a basic approach of non-interference and respect for a trade union's constitution; and, at the same time, recognition of the important role of trade unions also in broader society and a commitment to right wrongs where there are obvious injustices and disregard of proper governance within trade unions. As such, the courts remain a limited option to obtain redress where internal trade union accountability is at stake, a reality which compounds the already limited options offered by the common law (discussed in chapter 11).

The direct regulation of trade unions in the LRA rests on three foundations: the system of registration of trade unions (and its clear prescriptive link with the content of trade union constitutions, especially balloting procedures); the imposition of direct obligations on trade unions during the process of registration and afterwards (such as financial requirements and record-keeping); and the oversight role of the Registrar to ensure compliance with these obligations. All three of these foundations are important to the promotion of trade union accountability – also between a trade union and its members. In this regard, the discussion showed that, as a point of departure, due to continued trade union malfeasance trade union accountability is as important as ever. The discussion also showed that the provisions of the LRA have been strengthened over the years. Specifically, in 2002 the provisions relating to deregistration were strengthened, 2015 saw the introduction of a procedure for administration of trade unions (instead of their winding up), while 2019 saw new (and very clear) provisions confirming the independence of the office of the registrar, provision for secret ballots and extended record-keeping obligations on trade unions.

While it is not necessary to revisit all of these provisions and developments, a number of points may be made. Firstly, it is clear at this stage of the study that the

preferred (and best) way to ensure trade union accountability is through external and independent administrative oversight (such as through the office of the Registrar) subject to broad control of the courts over the functions of that office. This contrasts with direct recourse to the courts by disaffected trade union members. Secondly, the nature of that administrative oversight has to be mindful of the nature of trade unions as voluntary associations and the constitutional right to freedom of association, a recognition folded into basic respect for trade union constitutions. Thirdly, different powers may be assigned to an office such as that of the Registrar – to deregister (or refuse to register a) trade union, to apply for the winding-up of a trade union or to apply to have the trade union placed under administration. Of course, depending on the degree of deviation from the obligations of trade unions, different levels of intervention may be called for. Even so, of these different processes the section 103A mechanism – administration of unions that are in need of assistance as a result of, for example, internal strife or incompetent management – is a unique and interesting comparative example (and, perhaps, potential solution) which recognises the importance of accountability but with a limited and nuanced intervention and compromise of freedom of association. As such, it is well worthy of further consideration in the concluding chapter of this study.

CHAPTER THIRTEEN: CONCLUSION

13 1 Introduction: Broad overview of the study

This study has at its heart a simple question: How do members hold their trade unions accountable in South Africa? More specifically, how do members hold their unions accountable when things go wrong? And coupled to this – are there examples from Britain or the USA that provide guidance for what can be done in South Africa, in order to bring about greater accountability for members by their unions?

In order to answer the above, this study first considered what it is that unions actually do in the context of contemporary labour relations. As point of departure, this included a study of how trade unions are structured and how they perform their functions, chief of which is to use the inherent power of collectivisation to offset the bargaining power of employers. Hereafter, the internal organisation of unions (with specific emphasis on South Africa) was addressed. A key component of this part of the study was to contextualise trade union accountability as a subset of trade union democracy, with the former being centred on the practical consequences and failures of unionism relative to its members. A related question concerned the extent to which trade union constitutions could assist in effecting accountability, which saw analysis of a select group of South African trade union constitutions. This preliminary investigation presented a platform against which trade union assimilation and developments in trade union regulation could be examined in comparative context. Developments in Britain and the USA were considered, firstly by means of examining the historical development of trade unions in each country, secondly by considering the historical development of trade union regulation in each country and, thirdly, by evaluating the current regulation of trade unions and their accountability in both countries. The discussion was underpinned by the consideration of three specific, identified phases of the development of trade union regulation, namely the prohibition and proscription up to acknowledgement and assimilation of trade unions, the readjustment towards trade unions and the current position. It is especially the phases of readjustment and the current dispensation in these two countries which showed unique (and similar) examples of, and approaches to, union-accountability regulation. The same approach was followed in respect of South Africa. The unique history of South Africa's race-based industrial relations' past, however, saw differences which were explored and which served as a precursor for the examination of the transition to the current

regulation of trade unions in South Africa, with specific emphasis on the legislative regulation of trade union-member accountability post-1995.

13 2 The central hypothesis of this study

The central hypothesis of this study is that the default approach to the union-member relationship in South Africa post-1995 (underpinned by the Constitution) is one based on implicit acceptance of the traditional or historical perspective of trade unionism. According to this view trade unions and their members are viewed collectively as a single entity, with all the associated assumptions regarding how the union (by default) acts in the interests of its members and how the members control the union in terms of the principles of union democracy. This historical/ traditional view is amply illustrated in the historical analysis of the position in Britain and the USA (respectively, chapters 4 and 7), at least before the individual readjustment-phases that took place in those countries. This study also demonstrated how that readjustment took place in South Africa, but only in respect of the readjustment to the internal regulation of *white* trade unions (chapter 11), before a further readjustment was to herald racial uniformity in the South African labour relations system and a "reset" to the prior, historical position. Chapter 12 sees the examination of the current South African system as viewed against the backdrop of this "historical return" post-1995. This serves as the background against which the broader question of trade union-member accountability is to be examined, in order to determine, to the extent necessary, what is feasible and practical within the local industrial relations system.

13 3 The central aims of this study

The above in mind, the aims of this study are centred around eleven core objectives: In the first instance, to provide a clear perspective on the continued role and impact of trade unions both in the context of the workplace and broader society. Secondly, to clarify how unions typically function and how this impacts specifically on the question of the trade union-member relationship. Thirdly, to understand the impact of the union constitution on internal union affairs – with specific emphasis (by means of chapter 3) on South African trade union constitutions. Fourthly, to describe what the development of regulation of trade unions and their accountability across the comparative jurisdictions looks like, which is closely related to the fifth objective

namely that of examining the influences behind this development and the associated reasons for increased internal union intervention. Sixthly, to consider the impact of this historical development on *further* development of trade union regulation. Seventhly, to examine the current regulation of the union-member relationship in the comparative jurisdictions, with specific focus (as the eighth objective) on the interplay between the common law and legislative mechanisms to bring about such regulation. Coupled hereto, as the ninth objective, is to examine the continued viability of using the common law as a mechanism – enforced by the courts – to ensure trade union accountability. The tenth objective focuses on the direct use of legislative mechanisms (as opposed to the common law) in order to effect union-member accountability – with due consideration of the various statutory bodies/institutions that give effect thereto in the comparative jurisdictions. Finally, in specifically addressing South Africa again, to consider what the current state of the regulation of trade union accountability regulation is, whether it is appropriate and whether it may be improved (given what has been observed from the comparative jurisdictions).

13 3 1 Objective 1 – 3: investigating what unions do, how they function and the role of the trade union constitution

The first of these aims (that of what unions actually do) was addressed in chapter 2 where the origins, nature, value and functioning of trade unions were outlined. Chapter 2 explored the functions of contemporary trade unions and demonstrated the key and influential role they still play in the South African labour relations system, despite obvious challenges.

Chapter 3, in turn, built on the crucial distinction between trade union democracy and trade union accountability to address the role of trade union office bearers, officials and representatives (hereafter collectively referred to as officials). The complexity surrounding both the nature of the relationship between trade unions and their members and between the union leadership and a union's membership and external parties (such as employers) was demonstrated in an increasingly diversified industrial relations system. Hereafter, the centrality of the union constitution was brought to the fore, through an examination of selected South African trade union constitutions, which again provides detailed insight into the functioning and operation of trade unions in the current system.

The outcome of the examination whether trade union constitutions could and should serve as a (or the sole) means to ensure trade union-member accountability is that, whilst it can provide a basis for common law intervention through the courts or through subsection 158(1)(e) of the LRA, too much is dependent both on the actual wording of the constitution (and the extent to which it specifically defines member rights *vis-à-vis* their union) and the actual implementation of its provisions by the officials of the union (given the spectre of impartiality and objectivity). As such, while a union's constitution still remains central to the union-member relationship, it cannot be relied on *exclusively* as a means to bring about improved internal accountability. If anything, the constitutions examined affirm that whereas basic protection of member rights are provided for, the overall effect hereof is limited. Very little is available to members to compel accountability by the trade union, barring the use of elections to remove representatives from office. In short therefore, what is "good on paper" does not necessarily translate into practice, which also serves to highlight the apparent imbalance in power between members and their own unions.

13 3 3 Objectives 4 and 5 – examining the development of the regulation of trade unions and their accountability in the comparative jurisdictions

The fourth objective, namely to examine the development of the regulation of trade unions and their accountability across the three comparative jurisdictions, was done in chapters 4 to 5, 7 to 8 and 10 to 11. As indicated above, this examination is closely related to the fifth objective, namely that of identifying the driving forces behind these developments. This examination saw the different influences that played out in the different jurisdictions being closely connected to the particular socio-political and economic contexts of each jurisdiction.

Briefly stated, developments in Britain were characterised by an initial *laissez-faire* approach on the part of the state that saw little interference in the internal functioning of trade unions and their interaction with employers. This was set against the role of the respective British governments and the judiciary over time, with the study showing the interplay between a judiciary perceived to be anti-labour and the legislative response hereto in terms of the so-called "immunities". As was shown, given the increased prevalence of the closed-shop mechanism in the British industrial relations system, the courts were increasingly prepared to involve themselves in the internal

procedures of British trade unions. However, it was arguably the dramatic effects of powerful unions juxtaposed with a struggling economy in Britain in the late-1970s and early-1980s that was to give the greatest opportunity of “giving unions back to their members”. Over time, the common law was therefore increasingly supplanted by statutory regulation and bodies (CROTUM and the CO) in order to promote trade union accountability.

By contrast, chapters 7 and 8 showed very different influences resulting in the eventual assimilation of trade unions in the USA. Central to this was the onset of the Great Depression and resultant legislative measures, specifically NIRA and the NLRA. Thus, despite the noticeable effects of both World Wars, the collective response of employers in mobilising against organised labour was stronger – this being especially so through the use of injunctions (as permitted by a willing judiciary). Therefore, while the initial phases of development of trade union regulation saw organised labour at odds with the judiciary and a Conservative Government in Britain, the USA saw organised labour at odds with employers and the judiciary – and was most decidedly losing that battle. Accordingly, it was the extent of this imbalance of power that was initially to see public support and a government sympathetic to the plight of trade unions in the USA. In Britain it was the political lobbying and influence of collective labour that resulted in the various protections granted and guaranteed the place of unions as "an estate of the nation” far earlier than was the case in the USA.

As far as South Africa is concerned, chapters 10 and 11 followed chapters 4 to 5 and 7 to 8 by also examining the union-developmental phases, namely that of prohibition/proscription, acknowledgement/assimilation and readjustment within South Africa – albeit within the context of a race-based industrial relations system. The examination of the Van Reenen and Botha Commissions demonstrated how South Africa was, in many ways, first in terms of internal regulation of trade unions, albeit again only with regard to those unions recognised within the official (white) system. The examination of the work of these commissions also brought to light the point that, once a decision was reached to use external mechanisms to ensure increased internal accountability, it was the office of the Registrar that was used. The central role of the Registrar in relation to internal union relationships following the promulgation of the LRA 1956 was brought to the fore as an important benchmark for the Registrar’s role in the post-1995, new LRA era. Important context was also provided through examination of the internal democratic underpinnings of the so-called (black)

"independent unions" and their role in the overthrow of apartheid, as background to what was to transpire in the transition to the new dispensation.

13 3 4 Objective 6 – examining the impact of the historical development on the further development of union regulation

These remarks serve as preliminary points in considering the sixth objective – that of the impact of this historical development on *further* development of trade union regulation. All of the developments in Britain, the USA and South Africa illustrate the regulation of trade unions and their accountability through both the common law (focusing on the trade union constitution) and legislation. Britain and South Africa, however, stand in contrast to the situation in USA where there have been no primary legislative changes in the past 60 years and therefore remains heavily reliant on judicial interpretation of long-existing legislation. Britain and South Africa still see direct involvement by the judiciary, but again this remains notably different from the position in the USA, because the British and South African judiciary are tasked with developing trade union regulation in an environment of regular and recent legislative guidance (as recent as 2016 and 2018/2019 respectively). It may therefore be said that trade unions in Britain (especially) and South Africa are primarily regulated by the respective legislative frameworks, while in the USA unions are far more affected by the composition of the Supreme Court and NLRB, whose decisions on how they are to interpret and implement the legislative framework are far more prone to change.

This in mind, the historical examination of developments in Britain brought to light certain fundamental points that are of importance to this study. Firstly, in examining the IRA 1971, the primary lesson is from the reason for its failure, which was as a result of the flawed premise that the introduction of increased statutory regulation would see unions increasingly regulate their own officials and members. Coupled to this, an important outcome to be acknowledged is that the mere restriction of the ability of unions to function freely (in efforts to effect external accountability) may result in the alienation of the broader membership with potentially disastrous consequences in terms of further control. This is a particularly significant lesson in the context of post-Marikana South Africa – how caution needs to be exercised in terms of placing more restrictions on unions (or federations) at the risk of alienating the broader membership, which, in turn, may result in even less accountability and control. In addition, the

potential widespread negative effects on broader society of such alienation shows the importance of contextual sensitivity before commencing with wholesale changes to industrial relations' legislation and structures. In short, slow and steady remains far more advisable than abrupt change – particularly given the often unintended consequences of legislative amendments.

Second, the examination of CROTUM provided a functional example of a centralised body designed to assist members in holding their unions to account. A key question centred around what the potential use of the office would have been had its scope been extended to preside over "representation disputes" in case of members feeling aggrieved at the service they received from their union. Coupled to this are questions about the apparent scope for the office to have served as a type of union-member "ombudsman". Another important insight was how British unions increasingly referred their own members to CROTUM (given the latter's perceived role as an independent, third-party) to resolve internal disputes or factional issues. The study also considered an example of an inter-union dispute resolution mechanism, grounded as it was on the principle of a more collaborative and conciliatory means of resolving disputes, compared to the highly adversarial processes involved in the mainstream legal alternatives.

These developments in Britain were contrasted with the situation in the USA, with readjustment there taking place through the LMRA and LMRDA. This examination tracks the shift in legislative emphasis in the USA from protection *for* unions (NLRA), to protection *against* unions (LMRA), and finally, to protection *in* unions (LMRDA). The examination of the McClellan Committee hearings offered a further point of comparison between the USA, Britain and South Africa (with the Donovan and Botha Commissions in Britain and South Africa respectively). In sum, Britain was to see their readjustment triggered by unfavourable economic conditions exacerbated by prolonged (and frequently violent) industrial action at the instance of powerful unions; in the USA readjustment was triggered by increasingly hostile employers capitalising on the national awareness of union corruption; while in South Africa's (first) readjustment, it was triggered by malfeasance in some of its largest (white worker) unions. When the aforementioned conditions are overlaid upon contemporary South Africa and due recognition is given to the perception of powerful unions, frequently violent industrial action and internal trade union power struggles underpinned (frequently) by corruption, the judicial and legislative responses demonstrated in

chapters 11 and 12 takes on a different perspective. It would not be inappropriate to reason that South Africa is presently seeing a further readjustment playing out – one to ensure realignment of organised labour and its behaviour with the LRA and the expectations of broader society.

A further important point (given the point of departure in the USA to empower union members to hold their own officials/unions accountable) is that legislation cannot guarantee democratic self-government of trade unions. It can merely *create the opportunity* for this to be enforced by the membership. Therefore, and by implication, the single biggest challenge to the regulation of internal trade union accountability remains that of member apathy, or alternatively, an underlying system that makes it too difficult for the membership to exercise their rights (hence Britain's attempts at obviating same by means of IRA 1971 and CROTUM/CPAUIA).

But what of the influence of these historical developments on *future* development of trade union regulation? Future regulation remains heavily dependent on the myriad of factors that influenced and continue to influence collective labour in the respective countries. Currently, the Britain that is extricating itself from the EU might possibly be less focused on organised labour – but then again, this would remain dependent on the potential political points to be scored from the various constituencies in the "post-Brexit" climate (given the Labour Party's ostensible ties to worker support and the Conservative Party's traditional opposition thereto). Regarding the situation in the USA, it would be fair to state that organised labour, and for that matter the state of collective labour, remains in stasis, devoid of significant changes at a legislative level coupled with the continued politicisation of a key labour institution (the NLRB), subject to the gradual accretion of right to work laws at state-level and the suffering from an associated reduction in organised labour influence in the private and (increasingly, and more importantly) public sectors. By contrast, South Africa is arguably seeing renewed focus on internal regulation of trade unions. The period post 1995 saw a judiciary focused far more on the external relationships associated with trade unions, with only isolated examples of matters focusing on the relationship between members and their unions. Furthermore, the "traditional perspective" was at the centre of these initial cases with the South African courts initially reluctant to interfere too strongly in the realm of internal union-member relations. This has changed, at least in the civil courts. However, in similar fashion to developments in Britain, it has been in the legislative realm that the most noticeable changes have been effected. While the

suitability of legislative mechanisms over that of pure reliance on civil remedies will be explored below, South Africa's experience is one that tells the story of legislation being the accepted means of internal trade union regulation.

13 3 5 Objective 7 – examining current union-member regulation

In broad terms, Britain sees a judiciary still occasionally being required to consider the common law in terms of examining the representative duties of unions, *vis-à-vis* its members. However, Britain also serves as an example of a highly regulated industrial relations system, with a myriad of statutory provisions regulating organised labour in almost every aspect of its representative functioning. As such, union-member accountability sees significantly more regulation being enforced by the office of the CO and through the overarching requirements in TULRCA, as amended. In short, British unions, their officials and their members are required to adjust their manner of operation in order to comply with the statutory structures surrounding the functioning of trade unions, inclusive of the process of collective bargaining, rather than the other way around. Britain accordingly leans heavily towards legislative mechanisms, as opposed to common law remedies and enforcement, to ensure union-member accountability.

The USA, on the other hand, also sees a largely legislative approach to trade union accountability. Chapters 8 and 9 showed that legislative mechanisms were introduced by the LMRA and LMRDA (in particular) that sought to bring about increased union accountability, while simultaneously making provision for statutory institutions such as the NLRB and the OLMS, which play varying roles in regulating the functions of unions. This is of course set against the long-standing role of the American courts, in particular the Supreme Court (and the related Federal structures) to interpret and apply legislation. In short, trade unions see their functioning measured both by the NLRB and the OLMS (in terms of the statutory requirements associated with collective bargaining and their reporting commitments) and by the courts (in terms of being held accountable primarily against Titles I-VI of the LMRDA, and the DFR).

South Africa, as demonstrated in chapters 11 and 12, sees its union-member regulation increasingly being managed through legislation and the institutions it provides for, especially the office of the Registrar. With this being said, the common law is not completely absent, evidenced by recognition and use of the law of contract.

However, as will be evident from the discussion to follow – it is the contention of this study that union-member accountability is best ensured through statutory mechanisms, given issues surrounding access to justice for ordinary trade union members.

13 3 6 Objective 8 – considering the viability of the common law to ensure union-member accountability

The comparative discussion raised several important points regarding the viability of the common law as a basis to hold unions accountable to their members and the discussion showed a number of examples from the comparative jurisdictions of use of the common law to ensure accountability. One example is how in Britain the courts increasingly sought to assist individual members from the late-1950s onwards, as the unions and a strong closed-shop system saw the impact of union expulsion becoming increasingly onerous. And South Africa is an example where the courts have recognised reliance on the principles of contract law (in conjunction with the trade union constitution) to assist trade union members. Furthermore, and in principle, reliance on the common law through the (independent) courts provides an important counterbalance to that which might be introduced by legislation and which might be politicised. At the same time, however, if the hypothesis holds true that the need for accountability is founded on the need to protect typically the most vulnerable trade union member, it is unlikely that the pursuit of remedies through the courts will have the desired effect.

13 3 7 Objective 9 – considering the interplay between the regulation of collective bargaining, union representation and internal union functioning in order to ensure accountability

In the different chapters dealing with the current legislative dispensation in Britain (chapter 6), the USA (chapter 9) and South Africa (chapter 12), the discussion was based on consideration of three approaches to trade union regulation – the regulation of collective bargaining, the regulation of the representative function of trade unions and direct internal union regulation. Broadly stated, all three jurisdictions demonstrate a strong focus on the regulation of collective bargaining (with regulation of the representative functions of trade unions largely incidental to this and left to internal

regulation by trade unions themselves). This being said, direct regulation of trade union functioning is a different matter altogether. All three jurisdictions demonstrate legislation specifically focused on internal union procedures aimed at improving accountability – although Britain and America certainly provide more concrete examples of this than does South Africa post-1995. Regardless, it remains evident that statutory intervention remains the central mechanism by which union-member accountability is sought.

13 3 8 Objective 10 – evaluating the processes and institutions of direct legislative regulation of unions to ensure accountability

This study brought to light a series of examples of different processes and institutions provided for by legislation across the three jurisdictions to ensure internal trade union accountability. In this regard, Britain sees powers afforded to the CO to investigate complaints (both from members and external parties) regarding a union's non-compliance with statutory provisions. The office of the CO serves as an instructive example for the role to (potentially) be played by the Registrar in South Africa. Importantly, as is the case in South Africa, the CO is empowered to launch investigations into, *inter alia*, potential financial impropriety at its own instance and is not dependent on external complaints to trigger such investigations. To this may be added complaints in regards to balloting, union constitution non-compliance or union decision-making issues, or even union elections – along with the power of the CO to institute financial penalties on unions who are in non-compliance. A further significant example highlighted is the CO levy, which is to proportionately extract from employers and trade unions contributions to offset the cost of the CO's functioning. In addition, the complexity surrounding industrial action in Britain, including the use of scrutineers and the balloting process, serves as a useful yardstick against which to measure the recent balloting amendments introduced in South Africa – as discussed in chapter 12.

Guidance from the USA (as examined in chapter 9) relies on Titles I to V of the LMRDA as well as on the DFR. While the LMRDA, its provisions and their interpretation by the courts offer instructive examples of the possible benefits of a case-by-case interpretation of applicable legislation, so as to allow for tailor-made accountability, this remains dependent on potentially costly applications to the civil courts. This being said, it remains noteworthy that specific provisions within legislation,

that afford specific rights to members, may still serve as a useful yardstick to be judicially considered in the absence of specific union constitution provisions. Furthermore, in consideration of specific LMRDA provisions, § 481(h) (subsection 401(h) LMRDA), which empowers the Secretary of Labor to remove officials guilty of serious misconduct, is instructive. So too are the provisions found within Title V of the LMRDA, outlining the "highest standards of responsibility and ethical conduct" expected of union officials. The broad interpretation afforded to § 501(a) (subsection 501(a) LMRDA) by the courts, in not permitting officials to deal with their union as an adverse party, nor to gain any pecuniary or personal interest that would be in conflict with the union's interests, serves as a simple example of possible legislative provisions that could be adopted and against which the conduct trade union officials may be measured. Coupled to this, § 501(b) (subsection 501(b) LMRDA) permits the member to file suit against the union or its officials should the latter, subject to requirements, *not* proceed to recover (or the like) the outstanding monies (or the like) associated with the impropriety identified in terms of § 501(a), within a reasonable time. Lastly, § 502 (subsection 502 LMRDA) and its bonding requirements provides for a simple yet efficient mechanism to protect the trade union (and its members) against financial losses as a result of malfeasance on the part of an official.

Examination of the DFR brings to light the "hybrid suit", where the potential damages to be awarded to a member/employee is apportioned between the employer and trade union, assuming both have been found liable on the facts. Application of the DFR furthermore provides examples of the level of standards that a union's actions can be measured against, with the point of departure being that trade union conduct has to be in good faith and not arbitrary or capricious/discriminatory.

Of further significance is consideration of the office of the OLMS and the lessons to be taken from it regarding the effectiveness (or lack thereof) of union reporting requirements to bring about increased union accountability. Of key importance is the fact that more information, does not necessarily equate to more transparency and that the average member is still going to be hard-pressed to make much from the available information. This further emphasises the potential role to be played by any independent body (such as the Registrar in the South African context) in scrutinising the information so obtained and enforcing the desired accountability – but also affirms the LRA's approach in terms of requiring the financial records of South African unions to be audited.

The processes and institutions applicable in the context of South Africa are discussed in more detail below.

13 3 9 Objective 11 – examining the current state of union accountability in South Africa, its appropriateness, and recommendations for improvement

The eleventh and final aim of this study goes to the heart of the question this study examines and also speaks directly to the final recommendations that are to be made in light of the research conducted. In this regard, chapters 11 (common law) and 12 (legislation) examined the contemporary legal position in South Africa with regard to trade union accountability to its members.

13 4 Possible mechanisms to promote union-member accountability

Based on this analysis and against the backdrop of earlier chapters, it should immediately be mentioned that certain regulatory options to promote union-member accountability in the South African context are – for the reasons to be provided below – not suitable and are accordingly to be discounted. Other options, whilst not potentially suitable as *individual* solutions, might nonetheless be of use when used *collectively*, that is, in conjunction with other mechanisms. Finally, it is submitted that there are certain available regulatory mechanisms most favourable to promoting union-member accountability, the discussion (and adoption) of which also addresses the questions posed at the commencement of this chapter.

13 4 1 Possible mechanisms that stand to be discounted

First, the LRAB and its aim of holding unions directly to account for damages suffered during protected strike action falls to be discounted in light of the lessons that are provided by the IRA 1971. Such a mechanism, aimed at bringing about direct restrictions upon unions in the hopes of forcing unions to better manage its members, runs the risks of member alienation and a complete lack of control over what might transpire further. In the South African context, this argument becomes even more compelling in light of the events surrounding Marikana and the need to recognise the dangers of a greater disconnect between the general membership and the upper echelons of union management. However, due acknowledgement must also be given to the above aiming at *external* union accountability, which falls outside the scope of

this study.

Secondly, the study also considered various inter-/internal-union dispute mechanisms, discussed in the context of both Britain and the USA. The circumstances that gave rise to these mechanisms are significantly different to that which currently apply in South Africa. In the case of Britain, it arose in an industrial relations system that was characterised by the *laissez-faire* approach of the state (and initially, the judiciary) towards the internal affairs of trade unions. In short, British unions adopted this approach specifically because there was no alternative. In the context of the USA, the examples provided came about mostly due to the *threat* of external control. Therefore, and in consideration of the situation in South Africa, the question to be posed is whether or not there is currently enough of an external motivator to bring about such self-regulation, despite what it could potentially offer? The answer, it is submitted, is no. The context might change going forward, but as it stands presently, there is very little in terms of a compelling reason for unions, or union-federations, to reach agreement on arranging such a mechanism to resolve internal member (or union) disputes. As such, this option too is to be discounted.

13 4 2 Possible mechanisms that stand to be utilised collectively

The argument raised above regarding the LRAB (§ 13 4 1) – that direct control to ensure external accountability runs a risk of resulting in alienation between members and their union – raises the question whether this would also be true in case of endeavours to compel *internal* trade union accountability? In other words, were a provision(s) to be inserted into the LRA that effectively mimicked (for example) the Bill of Rights and similar provisions outlined in Titles I to V of the LMRDA, would union-member accountability be promoted, or would its effects be negligible? One approach to considering the above would be premised on the question of enforcement. Assuming such provisions were included in the LRA and a member was to allege non-compliance with such provision(s) – what recourse would be available to the member? Assuming it would require, in similar fashion to subsection 158(1)(e), an application to the LC alleging non-compliance with the LRA (effectively by means of subsection 158(1)(b)), much would depend (firstly) on the actual wording of the provision (as related to the ease in establishing the breach) and on the costs associated with such an application. Again, access to justice is a significant barrier to enforcement of these

types of provisions and remains a central component in any assessment of the effects of union-member accountability provisions. More importantly, what would the possible sanction be in such a scenario? A Labour Court order to comply with a provision in the LRA after the fact, would not necessarily be much of a deterrent since recalcitrant officials would presumably do as they please until such time that a member(s) was able to successfully launch the necessary application. In other words, the promotion of union-member accountability remains distinctly related to the forum of enforcement and the penalty for breach. In contrast, were a member allowed to approach the Registrar with their complaint regarding non-compliance, or possibly the CCMA, coupled (if justified) with a punitive fine (as demonstrated in Britain through section 22 TULRCA), union-member accountability would more likely be promoted.

Another possibility is to amend the LRA, or to issue guidelines to compel increased requirements with regard to trade union reporting. In other words, would legislative provisions that require unions to provide *more* detailed information regarding their internal, financial affairs and procedures, serve as a feasible solution? In this regard, the discussion surrounding the OLMS and CO showed that, while the use of online repositories is to be welcomed for the purposes of greater transparency towards the public in general, the return on such increased reporting for union-member accountability remains limited. It remains highly debatable whether increased financial information will empower the broader *membership* to actively hold unions to account, when much of this outcome remains completely dependent on the extent to which the membership would be able to interpret and understand the information being presented (not to mention the possibility of financial impropriety simply being hidden). Furthermore, the current requirement of having South African unions' financial information independently audited means that an important protection mechanism is already built-in to the system. What should rather be focused on, is the strengthening of the Registrar's Office to ensure that audited reports are filed as required on an annual basis and to ensure follow-up procedures should that not transpire. As such, an option to *increase* reporting requirements is discounted as not being necessary within the current system, while due focus on the improvement of the current capacity of the office of the Registrar to regulate the current requirements would nonetheless be welcomed.

It is also possible to amend the LRA to compel changes to trade union constitutions as required by section 95, in similar fashion to the recent balloting amendments. This

option too is not wholly viable and is discounted as a *sole* means of ensuring union-member accountability. As illustrated in chapter 3, despite the importance of the trade union constitution to evaluate the conduct of officials, where the constitution is silent, or open to interpretation, the courts would in any event be able to utilise the common law (as described in chapter 11) to bring about the necessary effect. The extent to which the judiciary would be prepared to do so is, of course, open to conjecture, but given what has been demonstrated in the chapters 11 and 12, this would probably come to pass. Regardless, a further point raised in chapter 3 is that the mere provision of rights within a trade union constitution does not mean that it is actually applied. Again, the question to be posed would be what remedies would be available to a member? Presumably, a member would again be reliant on an application in terms of subsection 158(1)(b) or (e) – with the associated costs of a labour court application needing to be factored in. As before, the question of access to justice features prominently in this instance. In short, while changes to union constitutions by means of requiring alignment with statutory provisions will not work if it is the *sole* mechanism available to the member, it could nonetheless fulfil a crucial role when viewed collectively with the possible powers of the Registrar, membership activism (in expecting fair treatment from their union, in compliance with that union's own constitution) and – as a last resort – the courts.

In the course of this study, the recent balloting amendments to the LRA were discussed in some detail and it has already been raised in the present context as a possible model for further regulation (using the LRA to force amendment of union constitutions). As was discussed in chapter 12, while the balloting amendments are to welcomed, this amounts to but *one* component of union-member accountability – albeit a potentially important one, dependent on the extent to which ballots end up being used internally by unions. However, a further point regarding enforcement must again be made. The member would again be required to apply in terms of subsections 158(1)(b) or (e) of the LRA – with the associated problems regarding costs being ever-present. A possible remedy in this regard would again involve a broadening of the expected powers of the Registrar to investigate unions where problems are brought to the attention of that office by union members.

All these different options are discounted, albeit for a variety of reasons – on account simply of their not being appropriate or because of difficulties in enforcement. Given the context of South Africa's current labour relations' environment, the ideal

mechanism to promote union-member accountability would be mindful of the economic realities of the overwhelming majority of South Africa's union membership. Cost-effectiveness, access, and efficiency (regarding the speed at which the dispute can be resolved) are key considerations. It is to these proposed changes to the current system that the study now turns.

13 4 3 Possible mechanisms most favourable to promoting union-member accountability in South Africa

13 4 3 1 Proposal one

It is submitted that in the interests of effecting improved relations between the various role-players within the South African industrial relations system – and in light of the various options outlined above – that the best mechanism to achieve improved union-member accountability lies with the Registrar and his office. The Registrar, as an independent body that is tasked, first and foremost, with ensuring that unions comply with their various statutory requirements and, by implication, to protect the union's members, is ideally placed to facilitate improved accountability within South Africa. Key to this, it is submitted, is section 103A of the LRA. In those instances where impropriety is identified and rather than cancelling the registration of the union in question or bringing about its winding-up, the Registrar should appoint on application to the labour court an administrator to take over the management of the union in collaboration with the existing leadership to bring about the necessary changes and to restore the union to normal functioning. This mechanism would ensure three outcomes: Firstly, the union would continue functioning and continue fulfilling the role of representing its members, which remains the ultimate purpose of organised labour. In short, under an administrator, the grass need not suffer unduly given the elephants' fighting. The interests of the membership, as separate from the malfeasance of the officials, will be placed first and membership dues or associated funds of the union will be placed under independent, objective control. Secondly, the threat of administration, which could be instigated at the request of the membership/group of members through the office of the Registrar, may serve as a powerful deterrent to recalcitrant or corrupt officials and will potentially limit the damage caused by internal power-struggles within unions. Coupled hereto, and no less important, the administration mechanism of section 103A of the LRA will allow for internal democracy measures to be restored to

ensure that properly elected officials are once again placed in control (following the administrative rehabilitation), to further carry out the wishes and serve the needs of the general membership. Furthermore, the requisite notices and opportunities for response from the unions in question – as provided for in terms of the LRA – together with the right of review by the LC (in terms of confirming the order) will ensure against any possible abuse, or misapplication of powers, on the part of the Registrar. The latter will also serve as adjudicator on the seriousness and veracity of any complaints that might be received from members, so as to ensure that frivolous or vexatious claims are not taken any further. In the third instance, this proposal is also attractive in that it impacts minimally (and only when justifiable) on the right to freedom of association and the concomitant right of trade unions to regulate their own affairs.

13 4 3 2 Proposal two

However, while the administration process provided for in section 103A fulfils a critical function in terms of broad-scale union-member accountability, the question arises about how best to deal with more individual cases. In other words, what if the problem that is presented is not the wholesale corruption of the leadership of the union as a whole, or internal power-struggles resulting in the non-functioning of the union, but pertains more directly to issues of representation? Put differently, what is to be done by individual members (or a group of members) in instances where a union that is otherwise functioning normally and within the parameters of the LRA, has failed to properly attend to a specific labour dispute, or settlement agreement, or wage negotiation, or managing of a strike that results in the dismissal of workers acting on the union's instruction? In other words, what is to be done if the problem that arises is not wholesale, but specific?

In this regard, the second proposal to be made is that due consideration should be given to the American DFR "hybrid-approach", which creates the possibility of holding both unions *and* employers liable for damages/ compensation (to be apportioned as appropriate) but with the *member's interests* front and centre. As the discussion showed, the DFR developed in circumstances of a strong system of majoritarianism in the USA. Given the South African system's pursuit of majoritarianism (and its recognition by our courts) there already seems to be a strong conceptual foundation for adoption of this approach. It is furthermore submitted that the latter procedure

should be administered through the CCMA, thereby allowing a union member that has suffered losses on account of the actions of the employer (who dismissed) and union (who gave bad advice), to seek recourse through the less-expensive and more expedient processes of the Commission and thereby avoiding the high costs associated with a LC application (or, even worse, approaching the ordinary civil courts on the basis of contract law). Of course, the decision awarded would be subject to review by the LC. This possible mechanism would then involve a member referring a dispute to the CCMA and serving the notice of the complaint on both employer and union. The same conciliation and arbitration procedures would then be followed as currently applicable, but with the CCMA assisting the member in properly airing the nature of the complaint, and with the enquiry also focusing on the respective roles of the employer and union in the matter. Should it be found that, had the union fulfilled its duty properly, the member would not have suffered its loss and that, had the employer not performed in the manner that it did, the dispute would not have arisen in the first place, then a DFR-like apportionment of compensation should be awarded against both employer and trade union. Symbolically, and practically-speaking, having a scenario where *both* employer and union are collectively held to task for their apportioned responsibilities, will no doubt send a powerful message to all the parties to the collective bargaining relationship regarding what is to be expected of their conduct in terms of the LRA. Of course, this proposal begs the question of what would entail “fair representation”. This does not necessarily need to be defined, but could be left open to develop on a case by case basis. Furthermore, in case of, for example, a dismissal by an employer followed by poor representation by a trade union events may be quite spread out over time, which would require reconsideration of the effect of current time limits in legislation.

13 4 3 3 Proposal three

The third proposal is built on a cumulative approach in order to bring about union-member accountability. By this is simply meant that due acknowledgement is given the fact that collective labour relations is a complex field and that singular proposals more often than not also face their own burdens or complications. A cumulative approach therefore speaks to more minor adjustments, but across more areas of the possible mechanisms suggested thus far. By way of example, amendments could be

made to the LRA to compel inclusion of specific provisions/clauses within union constitutions that would then serve as a possible ground against which union (and its officials) conduct could be measured – in similar fashion to Titles I-VI LMRDA as evidenced in the USA. The role of the Registrar, whilst not requiring wholesale statutory changes, could nonetheless be augmented through budgetary/capacity enhancement, to make the office more accessible and amenable to receiving complaints from union members, regarding the conduct (or lack thereof) on the part of the unions. Similarly, while reporting requirements need not be adjusted, capacity can be improved to ensure that the Registrar's office has the necessary manpower to follow-up with unions in order to ensure that all is in compliance with their various legislative duties. Proposals one and two discussed above could then be added to the abovementioned as further protection of trade union members. Statutory amendments could be made to the poorly worded and ambiguous provisions pertaining to the new balloting requirements, to improve transparency and clarity on what is to be understood by the proposed changes and to provide clarity (for instance) about the role of the CCMA in the balloting process and the use of scrutineers. Budgeting could be allocated to material that should be made publicly available, to remind members of their various rights as participants in organised labour, and what options would be available to them to enforce those rights. In similar fashion to that which has been done by the CCMA in publicising general worker rights, it should not be too prohibitive to see such literature made available to members.

13 7 Expected outcomes

The abovementioned, will, it is submitted, bring about improved relations within the broader South African industrial relations system. In considering proposal one, on the one hand, the Registrar is acting purely with the best interest of the members in mind and, as such, should be immune from claims to the contrary by unions impacted by his decisions. Provided this is done on justified grounds, with clear evidence of internal corruption or impropriety and the administrators so appointed are capable of doing the necessary to save the unions in question, then, it is submitted, the approach will offer a legitimate means to bring about the desired changes. On the other hand, the collective impact of trade unions being placed under administration in those circumstances where this is warranted will convey the necessary message to unions

of their obligation to act in a professional manner that aligns both with the LRA and the broader role of their function within the South African labour relations system.

Regarding proposal two, where the hybrid mechanism is utilised, the union and employer in question could be held liable collectively, leaving neither to bear the burden of the other's fault. In this scenario, the underlying message will be one of the process protecting the union member, with no favour being granted to *either* employer or union. The simple effect of having unions and employers finding themselves on the "same end", in terms of their culpability versus a member(s/) or employee(s), could very well yield unexpected (and positive) results in terms of breaking the traditional paradigm of the adversarial union-employer relationship. Furthermore, the emphasis will again be placed on the rights of the member as being most deserving of protection – and of receiving services commensurate with the sustained contribution of membership dues. Trade unions enjoy a protected status within the South African legal relations system – it is accordingly only fair that they provide efficient services in return.

Proposal three speaks to a broad-based information campaign that could be introduced, relatively simply, to further augment the fairly minor changes suggested over and above proposals one and two, proposals that would bring union-member rights to the forefront of collective bargaining processes. The upshot hereof would be increased union-member awareness of their rights and possibly increased accountability on the part of unions purely as a result of such awareness. This would then ultimately yield a more professional and efficient trade union system, which would thereby fulfil in an improved fashion its important role of counter-balancing the collective might of the employer.

13 8 Final thoughts

The length of this dissertation is evidence of the scope of its underlying question. It is however submitted that such a wide and detailed examination was necessary for a nuanced understanding of a topic that remains very complex. As has been pointed out above at § 10 1, by former Justice O'Regan, "[l]abour law is a strand tightly woven into the fabric of our society" – that "cannot be understood in the abstract".[4748]

One might be inclined to view the final recommendations centred around the (mere) continued role of the Registrar and a possible hybrid-system of dual employer-

[4748] O'Regan (1997) *ILJ* 890.

union liability as rather meagre, considering what was brought to light during the preceding chapters. However, the counterargument would be best served by what transpired in Britain during the 1970s and the cautionary reminder of the possible disastrous consequences of wholesale changes to an industrial relations system. South African labour relations is, by its very nature, volatile – due in no small part to our particular history and the significant effects of a wholly unequal society. As has been highlighted above, making changes to a system in order to deal with its symptoms, whilst ignoring the underlying causes of the problem – is never going to succeed. Ultimately, union-member accountability should not be focused on introducing wholesale punitive measures that seek to repeatedly punish trade unions and their officials without first attempting to remedy the underlying causes of such problems. And one small step in remedying such problems, is to at least allow union members – subject to what is fair and reasonable in light of the facts to present – to either be able to hold their unions to account for non-performance, or have the Registrar/CCMA do the same, in instances where such involvement is warranted.

BIBLIOGRAPHY

BOOKS:

Aidt T & Z Tzannatos *Unions and Collective Bargaining: Economic Effects in a Global Environment* (2002) The International Bank for Reconstruction & Development / The World Bank, Washington, D.C.

Alexander P *Workers, War & the Origins of Apartheid: Labour & Politics in South Africa, 1939-48* (2000) James Currey Publishers, Oxford.

Balfour C *Unions and the Law* (1973) Saxon House – Lexington Books, Lexington.

Bamford B *Bamford on the Law of Partnership and Voluntary Association in South Africa* 3 ed (1982) Juta & Co Ltd, Cape Town.

Barker F *The South African Labour Market: Theory & Practice* 5 ed (2008) Van Schaik Publishers, Pretoria.

Barrow C *Industrial Relations Law* 2 ed (2002) Cavendish Publishing Limited, London.

Bellace J, AD Berkowitz & BD Van Dusen *The Landrum-Griffin Act: Twenty Years of Federal Protection of Union Members' Rights 19* (1979) Industrial Research Unit, University of Pennsylvania, Philadelphia.

Bendix S *Industrial Relations in South Africa* 3 ed (1996) Juta & Company Ltd, Cape Town.

Bendix S *Industrial Relations in South Africa* 5 ed (2010) Juta & Company Ltd, Cape Town.

Benedictus R & B Bercusson *Labour Law: Cases and Materials* (1987) Sweet & Maxwell, London.

Bogg A & T Novitz (eds) *Voices at Work: Continuity & Change in the Common Law World* (2014) Oxford University Press, Oxford.

Bowers J *Bowers on Employment Law* 6 ed (2002) Oxford University Press, Oxford.

Bowers J, M Duggan & D Reade *The Law of Industrial Action & Trade Union Recognition* (2004) Oxford University Press, Oxford.

Brandeis LD *Other People's Money and How the Bankers Use It* (1914) Frederick A. Stokes Company, New York.

Budlender D & L Orr (eds) *The COSATU Worker Surveys of 2006 and 2012: What Do They Tell Us?* (2015) National Labour & Economic Development Institute (NALEDI), Johannesburg.

Chaison G & B Bigelow *Unions and Legitimacy* (2002) Cornell University Press, New York.

Christianson M, A Mischke & EML Strydom (eds) *Essential Labour Law: Individual Labour Law 1* 3 ed (2002) LLP Labour Law Publications, Houghton.

Christianson M, A Mischke & EML Strydom (eds) *Essential Labour Law: Collective Labour Law 2* 3 ed (2002) LLP Labour Law Publications, Houghton.

Cihon PJ & JO Castagnera *Employment & Labor Law* 7 ed (2011) South-Western Cengage Learning, Mason, Ohio.

Cleary RS, HZ Rosen & BJ Kearney (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act – 2001 Cumulative Supplement (covering 1999-2000) 1* 4 ed (2001) BNA Books, Washington D.C.

Cohen T, A Rycroft & B Whitcher *Trade Unions and the Law in South Africa* (2009) LexisNexis, Durban.

Collins H, K Ewing & A McColgan *Labour Law* (2012) Cambridge University Press, Cambridge.

Collins H, K Ewing & A McColgan *Labour Law: Text and Materials* 2 ed (2005) Hart Publishing, Oxford.

Cox A, DC Bok, RA Gorman & MW Finkin *Labor Law: Cases and Materials* 13 ed (2001) Foundation Press, New York.

Crouch C *Trade Unions: The Logic of Collective Action* (1982) Fontana Paperbacks, Glasgow.

Davies P & M Freedland *Labour Law: Text and Materials* 2 ed (1984) Weidenfeld and Nicolson, London.

Deakin S, A Johnston & B Markesinis *Markesinis and Deakin's Tort Law* 6 ed (2008) Clarendon Press, Oxford.

Deakin S & GS Morris *Labour Law* 2 ed (1998) Butterworths, London.

Deakin S & GS Morris *Labour Law* 6 ed (2012) Hart Publishing Ltd, Oxford.

Denning A *Landmarks in the Law* 1 ed (1984) Butterworths Law, London.

De Kock A *Industrial Laws of South Africa* (1956) Juta & Co Ltd, Cape Town.

Dray P *There is Power in a Union: The Epic Story of Labor in America* (2010) Doubleday, New York.

Du Toit D, D Woolfrey, J Murphy, S Godfrey, D Bosch & S Christie *The Labour Relations Act of 1995* 2 ed (1998) Butterworths Publishers (Pty) Ltd, Durban.

Du Toit D, D Woolfrey, J Murphy, S Godfrey, D Bosch, S Christie & J Rossouw *Labour Relations Law: A Comprehensive Guide* 3 ed (2000) Butterworths, Durban.

Du Toit D, S Godfrey, C Cooper, G Giles, T Cohen, B Conradie & A Steenkamp *Labour Relations Law: A Comprehensive Guide* 6 ed (2015) LexisNexis (Pty) Ltd, Durban.

Du Toit MA *South African Trade Unions: History, Legislation, Policy* (1976) McGraw-Hill Book Company (South Africa) (Pty) Ltd, Johannesburg.

Elias P & K Ewing *Trade Union Democracy, Members' Rights and the Law* (1987) Mansell Publishing Limited, London.

Elias P, B Napier & P Wallington *Labour Law: Cases and Materials* (1980) Butterworths, London.

Ewing KD *Trade Unions, the Labour Party and the Law* (1984) Edinburgh University Press, Edinburgh.

Feather V *The Essence of Trade Unionism: A Background Book* (1963) The Bodley Head, London.

Feldacker BS *Labor Guide to Labor Law* 4 ed (1999) Prentice Hall, Upper Saddle River.

Feldacker BS & M Hayes *Labor Guide to Labor Law* 5 ed (2014) ILR Press, Ithaca.

Finnemore M *Introduction to Labour Relations in South Africa* 11 ed (2013) LexisNexis (Pty) Ltd, Durban.

Fraser WH *A History of British Trade Unionism 1700-1998* (1999) MacMillan Press Ltd, Basingstoke.

Friedman G *State-Making and Labor Movements: France and the United States, 1876-1914* 1 ed (1999) Cornell University Press, Ithaca.

Godfrey S, J Maree, D Du Toit & J Theron *Collective Bargaining in South Africa: Past, Present and Future?* (2010) Juta & Co, Ltd, Claremont.

Goldman AL *Labor and Employment Law in the United States* (1996) Kluwer Law International, Boston.

Gorman RA & MW Finkin *Basic Text on Labor Law: Unionization and Collective Bargaining* 2 ed (2004) Thomson West, St. Paul, MN.

Gould WB *A Primer on American Labor Law* 4 ed (2004) The MIT Press, Cambridge, Massachusetts.

Grey Coetzee JA *Industrial Relations in South Africa: An Event-Structure of Labour* (1976) Juta & Co. Ltd, Cape Town.

Griffith J *Judicial Politics Since 1920: A Chronicle* (1993) Wiley-Blackwell, Oxford.

Grogan J *Workplace Law* 12 ed (2017) Juta & Co (Pty) Ltd, Cape Town.

Grunfeld C *Modern Trade Union Law* (1966) Sweet & Maxwell, London.

Hardin P, JE Higgins, CT Hexter & JT Neighbours (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 1* 4 ed (2001) BNA Books, Washington, DC.

Hardin P, JE Higgins, CT Hexter & JT Neighbours (eds) *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act 2* 4 ed (2001) BNA Books, Washington, DC.

Harper MC, S Estreicher & J Flynn *Labor Law: Cases, Materials, and Problems* 5 ed (2003) Aspen Publishers, New York.

Hardy S *Labour Law and Industrial Relations in Great Britain* 3 ed (2007) Kluwer Law International, Deventer.

Hay P *The Law of the United States: An Introduction* (2017) Routledge, New York.

Hayek FA *The Constitution of Liberty* (1960) University of Chicago Press, Chicago.

Heald G *Why is Collective Bargaining Failing in South Africa?: A Reflection on How to Restore Social Dialogue in South Africa* (2016) KR Publishing, Randburg.

Hepple B & S Fredman *Labour Law and Industrial Relations in Great Britain* 2 ed (1992) Kluwer Law and Taxation Publishers, Deventer.

Hogler RL *The End of American Labor Unions: The Right-to-Work Movement and the Erosion of Collective Bargaining* (2015) Praeger/ABC-CLIO, Santa Barbara.

Honeyball S & J Bowers *Textbook on Labour Law* 8 ed (2004) Oxford University Press, Oxford.

Honeyball S *Honeyball & Bowers' Textbook on Labour Law* 9 ed (2006) Oxford University Press, Oxford.

Horrell M *Race Relations as Regulated by Law in South Africa, 1948-1979* (1982) South African Institute of Race Relations, Johannesburg.

Howell C *Trade Unions and the State: The Construction of Industrial Relations Institutions in Britain, 1890-2000* (2005) Princeton University Press, Princeton.

Hyman R *Understanding European Trade Unionism: Between Market, Class and Society* (2001) Sage Publications, London.

Jones RA & HR Griffiths *Labour Legislation in South Africa* (1980) McGraw-Hill Book Company (South Africa), Johannesburg.

Justice BW *Unions, Workers, and the Law* (1983) BNA Books, Washington, D.C.

Kadalie C *My Life and the ICU: The Autobiography of a Black Trade Unionist in South Africa* (1970) Frank Cass & Co Ltd, London.

Kidner R *Trade Union Law* 1 ed (1979) Stevens & Sons, London.

Kidner R *Trade Union Law* 2 ed (1983) Stevens & Sons, London.

Laybourn K *A History of British Trade Unionism, c.1770-1990* (1997) Sutton Publishing Ltd, Stroud.

Levasseur AA & JS Baker (eds) *An Introduction to the Law of the United States* (1992) University Press of America, Inc., Lanham, Maryland.

Lewis J *Industrialisation and Trade Union Organization in South Africa, 1924-1955: The Rise and Fall of the South African Trades and Labour Council 42* (1984) Cambridge University Press, Cape Town.

Malin MH & LA Schmall *Individual Rights Within the Union* (1988) The Bureau of National Affairs, Inc., Washington, D.C.

Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

McLaughlin DB & ALW Schoomaker *The Landrum-Griffin Act and Union Democracy* (1979) The University of Michigan Press, Ann Arbor.

Millis HA & EC Brown *From the Wagner Act to Taft-Hartley: A Study of National Labor Policy and Labor Relations* 1 ed (1950) The University of Chicago Press, Chicago.

Nel PS (ed) *South African Employment Relations: Theory and Practice* 4 ed (2002) Van Schaik Publishers, Pretoria.

Osborne WW, JG Axelrod, VL Bor, H Datz, TT Green, R Matisoff, EO McNair, MC Satter & G Witlen (eds) *Labor Union Law and Regulation* (2003) BNA Books, Washington D.C.

Pitt G *Employment Law* 6 ed (2007) Thomson Sweet & Maxwell Ltd, London.

Ray DE, CW Sharpe & RN Strassfeld *Understanding Labor Law* 5 ed (2019) Carolina Academic Press, Durham.

Rosenfeld J *What Unions No Longer Do* (2014) Harvard University Press, Cambridge (Mass.).

Selwyn N *Selwyn's Law of Employment* 14 ed (2006) Oxford University Press, Oxford.

Selwyn N *Selwyn's Law of Employment* 16 ed (2011) Oxford University Press, Oxford.

Selznick P, P Nonet & H Vollmer *Law, Society, and Industrial Justice* (1969) Russel Sage Foundation, New York.

Schaeffer M, JF Heyne & GC Kachelhoffer *Industrial Law in South Africa* 2 ed (1973) Van Schaik, Pretoria.

Schiavone M *Unions in Crisis? The Future of Organized Labor in America* (2008) Praeger Publishers, Westport, Connecticut.

Sloane AA & F Witney *Labor Relations* 5 ed (1985) Prentice-Hall Inc., Englewood Cliffs.

Smith IT & A Baker *Smith & Wood's Employment Law* 10 ed (2010) Oxford University Press, Oxford.

Terreblanche S *A History of Inequality in South Africa, 1652-2002* (2002) University of Natal Press, Scottsville.

Thompson LM *A History of South Africa* 3 ed (2001) Yale University Press, New Haven.

Twomey DP *Labor & Employment Law: Text and Cases* 15 ed (2013) South-Western Cengage Learning, Mason, Ohio.

Undy R, P Fosh, H Morris, P Smith & R Martin *Managing the Unions: The Impact of Legislation on Trade Unions' Behaviour* (1996) Clarendon Press, Oxford.

Upex R, R Benny & S Hardy *Labour Law* 2 ed (2006) Oxford University Press, Oxford.

Van der Linden M *Transnational Labour History: Explorations* (2003) Ashgate Publishing Ltd, Aldershot.

Van Jaarsveld F & S Van Eck *Principles of Labour Law* 2 ed (2002) Butterworths, Durban.

Venter R (ed) *Labour Relations in South Africa* (2003) Oxford University Press, Cape Town.

Venter R, A Levy, M Conradie & M Holtzhausen (eds) *Labour Relations in South Africa* 3 ed (2009) Oxford University Press Southern Africa (Pty) Ltd, Cape Town.

Von Mehren AT & PL Murray *Law in the United States* 2 ed (2007) Cambridge University Press, New York.

Walker IL & B Weinbren *2000 Casualties: A History of the Trade Unions and the Labour Movement in the Union of South Africa* (1961) South African Trade Union Council, Johannesburg.

Webb S & B Webb *Industrial Democracy* (1902) Longmans, Green & Co., London.

Webb S & B Webb *The History of Trade Unionism* 3 ed (1920) Longmans Green and Co., London.

Wedderburn L *The Worker and the Law* 3 ed (1986) Penguin Books, Harmondsworth.

Weinstein M *Summary of American Law* (1988) Lawyers Co-Operative Publishing Company, New York.

Wood G & JK Coetzee *Trade Union Recognition: Cornerstone of the New South African Employment Relations* (1998) International Thomson Publishing, Johannesburg.

Wrigley C *British Trade Unions Since 1933* (2002) Cambridge University Press, Cambridge.

CHAPTERS IN EDITED COLLECTIONS:

Aaron B "Arbitration in a Non-Union Environment in the United States" in Engels C & M Weiss (eds) *Labour Law and Industrial Relations at the Turn of the Century – Liber Amicorum in Honour of Prof. Fr. Roger Blanpain* (1998) Kluwer Law International, The Hague.

Albertyn G "South African Industrial-Relations Legislation" in Jubber K (ed) *South Africa Industrial Relations and Industrial Sociology* (1979) Juta & Company Ltd, Cape Town.

Atleson J "Law and Union Power: Thoughts on United States and Canada" in Rogowski R & T Wilthagen (eds) Reflexive Labour Law (1994) Kluwer Law and Taxations Publishers, Deventer.

Bellace J "Labor Law for the Post-Industrial Workplace: Breaking the New Deal Model in the USA" in Bellace JR & MG Rood (eds) *Labour Law at the Crossroads: Changing Employment Relationships – Studies in Honour of Benjamin Aaron* (1997) Kluwer Law International, The Hague.

Benjamin P, H Cheadle & M Khoza "A Guide to the Labour Relations Amendment Act of 1981" in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Bezuidenhout A "Labour Beyond Cosatu, Other Federations and Independent Unions" in Bezuidenhout A & M Tshoaedi (eds) *Labour Beyond COSATU: Mapping the Rupture in South Africa's Labour Landscape* (2017) Wits University Press, Johannesburg.

Bezuidenhout A & M Tshoaedi (eds) *Labour Beyond COSATU: Mapping the Rupture in South Africa's Labour Landscape* (2017) Wits University Press, Johannesburg.

Bhorat H, K Naidoo & D Yu "Trade Unions in South Africa" in Monga C & JY Lin (eds) *The Oxford Handbook of Africa and Economics: Policies & Practices 2* (2015) Oxford University Press, Oxford.

Boyle K "Politics and Labor, Twentieth Century" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History* (2007) Routledge, New York.

Brody D "Collective Bargaining" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History* (2007) Routledge, New York.

Buhlungu S & M Tshoaedi "A Contested Legacy: Organisational & Political Challenges Facing COSATU" in Buhlungu S & M Tshoaedi (eds) *COSATU's Contested Legacy* (2012) HSRC Press, Cape Town.

Buhlungu S & S Ellis "The Trade Union Movement & the Tripartite Alliance: A Tangled History" in Buhlungu S & M Tshoaedi (eds) *COSATU's Contested Legacy* (2012) HSRC Press, Cape Town.

Case TA "'Yellow-Dog' Contract" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 3* (2007) Routledge, New York.

Cohen AW "Law and Labor" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 2* (2007) Routledge, New York.

Craver CB "The Historical Foundation of American Labor" in Craver CB (ed) *Can Unions Survive? The Rejuvenation of the American Labor Movement* (1995) New York University Press, New York.

Cunningham PW, JA Slabbert & AS De Villiers "The Historic Development of Industrial Relations" in Slabbert JA, JJ Prinsloo & W Backer (eds) *Managing Industrial Relations in South Africa* (RS 1994) DIGMA Publications, Waterkloof.

Dickens L "Deregulation and Employment Rights in Great Britain" in Rogowski R & T Wilthagen (eds) *Reflexive Labour Law: Studies in Industrial Relations and Employment Regulation* (1994) Kluwer Law International, Deventer; Boston.

Dike-Wilhelm S "Federal Mediation and Conciliation Service" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History* (2007) Routledge, New York.

Dike-Wilhelm S "Norris-LaGuardia Federal Anti-Injunction Act" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 2* (2007) Routledge, New York.

Dunn S "The Law and the Decline of the Closed Shop in the 1980s" in Fosh P & C Littler (eds) *Industrial Relations and the Law in the 1980's: Issues and Future Trends* (1985) Gower, Aldershot.

Fine B, F De Clercq & D Innes "Trade Unions and the State: The Question of Legality" in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Fisk CL & DC Malamud "The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform" in Eigen ZJ (ed) *Labor and Employment Law Initiatives and Proposals Under the Obama Administration: Proceedings of the New York University 62nd Annual Conference on Labor* (2011) Wolters Kluwer Law & Business, Alphen aan den Rijn.

Flynn M, C Brewster, R Smith & M Rigby "Trade Union Democracy: The Dynamics of Different Forms" in Wood G & M Harcourt (eds) *Trade Unions and Democracy: Strategies and Perspectives* (2006) Transaction Publishers, New Brunswick.

Giusto HS "Sherman Anti-Trust Act" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 3* (2007) Routledge, New York.

Goldberg MJ "Union Democracy, American Democracy, & Global Democracy: An Overview & Assessment" in Estreicher S, HC Katz & BE Kaufman (eds) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) Kluwer Law International, New York.

Hobbs R “Great Britain” in Blanpain R (ed) *The Actors of Collective Bargaining: A World Report* (2004) Kluwer Law International, The Hague.

Horner D “African Labour Representation up to 1975” in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Jordan GH “Clayton Antitrust Act (1914)” in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 1* (2007) Routledge, New York.

Jordan GH “Commonwealth v. Hunt (1842)” in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 1* (2007) Routledge, New York.

Kay M “The Settlement of Membership Disputes in Trade Unions” in Carby-Hall JR (ed) *Studies in Labour Law* (1976) MCB (Managerial Law) Ltd., Bradford.

Keeton GW “The Legal Status of the Trade Union” in Price TW & B Beinart (eds) *Butterworths South African Law Review 1956* (1956) Butterworth & Co. (Africa) Ltd, Durban.

Leader S “Configuring Union Democracy: The United Kingdom Experience” in Estreicher S, HC Katz & BE Kaufman (eds) *The Internal Governance & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) Kluwer Law International, New York.

Lewis J “Overview: The Registration Debate and Industrial Councils” in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Lewis N “The Solar Plexus” in Carby-Hall JR (ed) *Studies in Labour Law* (1976) MCB (Managerial Law) Ltd, Bradford.

Loftus JA “LMRDA in Retrospect” in Slovenko R (ed) *Symposium on LMRDA: The Labor-Management Reporting and Disclosure Act of 1959* (1961) Claitor’s Bookstore Publishers, Baton Rouge.

Logan J “Employer Opposition in the US: Anti-Union Campaigning from the 1950s” in Dundon T & G Gall (eds) *Global Anti-Unionism: Nature, Dynamics, Trajectories and Outcomes* 1 ed (2013) Palgrave MacMillan, London.

Logan J “Union Financial Reporting and Disclosure under the LMRDA: A Comparison of the Bush and Obama Administrations” in Lewin D (ed) *Advances in Industrial & Labor Relations 21* (2015) Emerald Group Publishing Ltd, Bingley.

Maree J “COSATU, Oligarchy & the Consolidation of Democracy in an African Context” in Buhlungu S & M Tshoaedi (eds) *COSATU’s Contested Legacy* (2012) HSRC Press, Cape Town.

Maree J & D Budlender “Overview: State Policy and Labour Legislation” in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Mendel R “National Industrial Recovery Act” in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 2* (2007) Routledge, New York.

Moody K “Beating the Union: Union Avoidance in the US” in Dundon T & G Gall (eds) *Global Anti-Unionism: Nature, Dynamics, Trajectories and Outcomes* 1 ed (2013) Palgrave MacMillan, London.

Murphy WP "The Background of the Bill of Rights and its Provisions" in Slovenko R (ed) *Symposium on LMRDA: The Labor-Management Reporting and Disclosure Act of 1959* (1961) Claitor's Bookstore Publishers, Baton Rouge.

Nthejane N, S Nomvete, B Malope & B Tame "Research in a Highly Charged Environment: Taking Democracy Seriously, 2014" in Bezuidenhout A & M Tshoaedi (eds) *Labour Beyond COSATU: Mapping the Rupture in South Africa's Labour Landscape* (2017) Wits University Press, Johannesburg.

O'Higgins P "The End of Labour Law as We Have Known It?" in Barnard C, S Deakin & GS Morris (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) Hart Publishing, Oxford.

Pienaar GJ "Associations" in Faris JA (ed) *Law of South Africa (LAWSA) 1* 3 ed (2014) LexisNexis Butterworths, Durban.

Piron J & PAK Le Roux "South Africa" in Blanpain R (ed) *International Encyclopedia for Labour Law and Industrial Relations 12* (1993) Kluwer Law & Taxation Publishers, Deventer.

Rees J "American Federation of Labor" in Arnesen E (ed) *Encyclopedia of U.S. Labor and Working-Class History 1* (2007) Routledge, New York.

Render E "United States of America" in Blanpain R (ed) *The Actors of Collective Bargaining: A World Report* (2004) Kluwer Law International, The Hague.

Rigby M, R Smith & C Brewster "The Changing Impact & Strength of the Labour Movement in Advanced Societies" in Wood G & M Harcourt (eds) *Trade Unions and Democracy: Strategies and Perspectives* (2006) Transaction Publishers, New Brunswick.

Rogowski R "Industrial Relations, Labour Conflict Resolution and Reflexive Labour Law" in Rogowski R & T Wilthagen (eds) *Reflexive Labour Law* (1994) Kluwer Law and Taxations Publishers, Deventer.

Schmidt F "Industrial Action: The Role of Trade Unions and Employers Associations" in Aaron B & KW Wedderburn (eds) *Industrial Conflict: A Comparative Legal Study* (1972) Crane, Russak & Company Inc., New York.

Schwab SJ "Union Raids, Union Democracy, & the Market for Union Control" in Estreicher S, HC Katz & BE Kaufman (eds) *The Internal Governance & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) Kluwer Law International, New York.

Simons HJ "Trade Unions" in Hellmann E (ed) *Handbook on Race Relations in South Africa* (1949) Oxford University Press, Cape Town.

Simpson B "Trade Disputes Legislation and the Economic Torts" in Arvind TT & J Steele (eds) *Tort Law and the Legislature – Common Law, Statute and the Dynamics of Legal Change* (2013) Hart Publishing, Oxford.

Simpson R "Economic Torts" in Jones MA, AM Dugdale, M Simpson, RA Buckley, AS Burrows, HF Carty, G Davies, K Duodu, J Murphy, R Simpson, J Steele & A Tettenborn (eds) *Clerk & Lindsell on Torts* 20 ed (2010) Sweet & Maxwell/Thomson Reuters, London.

Southall R "The Changing Social Characteristics of Cosatu Shop Stewards" in Satgar V & R Southall (eds) *COSATU in Crisis: The Fragmentation of an African Trade Union Federation* (2015) KMM Review Publishing Company (Pty) Ltd, Sandton.

South African Labour Bulletin "Critique of the Wiehahn Commission and the 1979 Amendments to the Industrial Conciliation Act" in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Strauss G "The Present State of National Union Democracy" in (ed) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) Kluwer Law International, New York.

Summers CW "From Industrial Democracy to Union Democracy" in Estreicher S, HC Katz & BE Kaufman (eds) *The Internal Governances & Organizational Effectiveness of Labor Unions: Essays in Honor of George Brooks* (2001) Kluwer Law International, New York.

Summers CW "Measuring the Union's Duty to the Individual: An Analytic Framework" in McKelvey JT (ed) *The Changing Law of Fair Representation* (1985) ILR Press, Ithaca.

Taft P "Rank-and-File Unrest in Historical Perspective" in Seidman J (ed) *Trade Union Government and Collective Bargaining: Some Critical Issues* (1970) Praeger Publishers, New York.

Thompson W "Introduction: International Labor, 1800-2000" in Schlager N (ed) *St. James Encyclopedia of Labor History Worldwide: Major Events in Labor History and their Impact 1* (2004) St. James Press, Detroit.

Van der Horst S "Labour" in Hellmann E (ed) *Handbook on Race Relations in South Africa* (1949) Oxford University Press, Cape Town.

Van Jaarsveld SR, JD Fourie & MP Olivier "Labour Law" in Faris JA (ed) *Law of South Africa (LAWSA) 13(1)* 2 ed (2014) LexisNexis Butterworths, Durban.

Webster E & G Adler "Introduction: Consolidating Democracy in a Liberalizing World – Trade Unions and Democratization in South Africa" in Adler G & E Webster (eds) *Trade Unions and Democratization in South Africa, 1985-1997* (2000) St Martin's Press, Cambridge, Mass.

Webster EC "Prologue" in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Wedderburn L "Labour Law and the Individual in Post-Industrial Societies" in Wedderburn KW, M Rood, G Lyon-Caen, W Däubler & P Van Der Heijden (eds) *Labour Law in the Post-Industrial Era: Essays in Honour of Hugo Sinzheimer* (1994) Dartmouth Publishing Company, Aldershot.

Western Province General Workers' Union "Comments on the Question of Registration" in Maree J (ed) *The Independent Trade Unions, 1974-1984: Ten Years of the South African Labour Bulletin* (1987) Ravan Press, Johannesburg.

Williams K "Trade Unionism in South African History" in Jubber K (ed) *South Africa Industrial Relations and Industrial Sociology* (1979) Juta & Company Ltd, Cape Town.

Wood G "Trade Unions & Theories of Democracy" in Wood G & M Harcourt (eds) *Trade Unions and Democracy: Strategies and Perspectives* (2006) Transaction Publishers, New Brunswick.

Wood G & P Dibben "Broadening Internal Democracy with a Diverse Workforce: Challenges & Opportunities" in Buhlungu S (ed) *Trade Union & Democracy: Cosatu Workers' Political Attitudes in South Africa* (2006) HSRC Press, Cape Town.

JOURNAL ARTICLES:

Aaron B "A Half-Century of Labor Relations Law and Collective Bargaining" (1998) 13 *The Labor Lawyer* 551.

Aaron B "Amending the Taft-Hartley Act: A Decade of Frustration" (1958) 11 *Industrial & Labor Relations Review* 327.

Aaron B "Some Aspects of the Union's Duty of Fair Representation" (1961) 22 *Ohio State Law Journal* 39.

Aaron B "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 73 *Harvard Law Review* 851.

Aaron B "The Union Member's 'Bill of Rights': First Two Years" (1962) 1 *Industrial Relations: A Journal of Economy & Society* 47.

Aaron B "United States Report" (1964) 18 *Rutgers Law Review* 279.

Aaron B & MI Komaroff "Statutory Regulation of Internal Union Affairs – I" (1949) 44 *Illinois Law Review* 425.

Aaron B & MI Komaroff "Statutory Regulation of Internal Union Affairs – II" (1949) 44 *Illinois Law Review* 631.

Abbott B "Determining the Significance of the Citizens' Advice Bureau as an Industrial Relations Actor" (2006) 28 *Employee Relations* 435.

Abbott B, E Heery & S Williams "Civil Society Organizations and the Exercise of Power in the Employment Relationship" (2011) 34 *Employee Relations* 91.

Abelow R "Management experience under the Taft-Hartley Act" (1958) 11 *Industrial & Labor Relations Review* 360.

Abrahms A "Could Employee Choice End Labor Unions' Influence?" (2017) 43 *Employee Relations Law Journal* 33.

Adams ACG & JFB Prassl "Vexatious Claims: Challenging the Case for Employment Tribunal Fees" (2016) 80 *The Modern Law Review* 412.

Adams R "The Employee Free Choice Act: A Skeptical View and Alternative" (2007) 31 *Labor Studies Journal* 1.

Adams RJ "EFCA, Alas, Is Not the Answer" (2010) 7 *Labor: Studies in Working-Class History of the Americas* 9.

Adams W & JW Brock "Industrial Policy and Trade Unions" (1985) 29 *Journal of Economic Issues* 497.

Addison JT "What Do Unions Really Do? A Review Article" (1985) 6 *Journal of Labor Research* 127.

Addison JT & JB Chilton "Can We Identify Union Productivity Effects?" (1993) 32 *Industrial Relations: A Journal of Economy & Society* 124.

Adell BL "The Duty of Fair Representation – Effective Protection for Individual Rights in Collective Agreements?" (1970) 25 *Relations Industrielles/Industrial Relations* 602.

Alexander P "Coal, Control and Class Experience in South Africa's Rand Revolt of 1922" (1999) 19 *Comparative Studies of South Asia, Africa and the Middle East* 31.

Alexander P "Marikana, Turning Point in South African History" (2013) 40 *Review of African Political Economy* 605.

Alexander P & R Halpern "Introduction: Comparing Race and Labour In South Africa and The United States" (2004) 30 *Journal of Southern African Studies* 5.

Allen VL "The Year-long Miners' Strike, March 1984–March 1985: A Memoir" (2009) 40 *Industrial Relations Journal* 278.

Amster GJ "Labor Union Bankruptcy" (1978) 2 *Washington University Law Quarterly* 341.

Anderson DR "Landrum-Griffin and the Trusteeship Imbroglio" (1962) 71 *The Yale Law Journal* 1460.

Anderson JC "A Comparative Analysis of Local Union Democracy" (1978) 17 *Industrial Relations: A Journal of Economy & Society* 278.

Andrias K "An American Approach to Social Democracy: The Forgotten Promise of the Fair Labor Standards Act" (2019) 128 *The Yale Law Journal* 616.

Andrias K "The New Labor Law" (2016) 126 *The Yale Law Journal* 2.

Anonymous "AFL-CIO Ethical Practices Codes 5 and 6" (1957) 80 *Monthly Labor Review* 838.

Anonymous "Codes of Ethical Practices of the Labor Movement" (1957) 80 *Monthly Labor Review* 350.

Anonymous "Employer Interference with Lawful Union Activity" (1937) 37 *Columbia Law Review* 816.

Anonymous "Diversity Jurisdiction Under Section 303 (b) of the Taft-Hartley Act" (1950) 59 *The Yale Law Journal* 575.

Anonymous "Facial Adjudication of Disciplinary Provisions in Union Constitutions" (1981) 91 *The Yale Law Journal* 144.

Anonymous "Fair Representation and Union Discipline" (1970) 79 *The Yale Law Journal* 730.

Anonymous "Historical Review of Trade-Union Incorporation" (1935) 40 *Monthly Labor Review* 38.

Anonymous "Individual Control over Personal Grievances under *Vaca v. Sipes*" (1968) 77 *The Yale Law Journal* 559.

Anonymous "Industrial Relations Law Commentary: The Employment Act 1982 – Statutory Sick Pay" (1983) 14 *Industrial Relations Journal* 87.

Anonymous “Interpretation and Application of Section 301(a) of the Labor-Management Relations Act” (1955) 103 *University of Pennsylvania Law Review* 902.

Anonymous “Judicial Control of Actions on Private Associations” (1963) 76 *Harvard Law Review* 983.

Anonymous “Judicial Intervention in Revolts against Labor Union Leaders” (1942) 51 *The Yale Law Journal* 1372.

Anonymous “Labor and the Sherman Act” (1940) 49 *The Yale Law Journal* 518.

Anonymous “Labor Law: Fifth Circuit Determines That Breach of Duty of Fair Representation Constitutes an Unfair Labor Practice” (1967) 1967 *Duke Law Journal* 1037.

Anonymous “Labor Relations – Decisions of Courts – Administrative Agencies” (1949) 1 *Labor Law Journal* 133.

Anonymous “Notes – Labor Law: Damage Suits as a Means of Controlling Union Unfair Labor Practices Under the Taft-Hartley Act” (1959) *Washington University Law Quarterly* 69.

Anonymous “Notes: Sections 8(b)(4) and 303: Independent Remedies Against Union Practices under the Taft-Hartley Act” (1952) 61 *The Yale Law Journal* 746.

Anonymous “Public Review Boards: A Check on Union Disciplinary Power” (1958) 11 *Stanford Law Review* 497.

Anonymous “Responsibility of Labor Unions for Acts of Members” (1938) 38 *Columbia Law Review* 454.

Anonymous “Rights of Workmen against Union Officials during Collective Bargaining Negotiations” (1941) 51 *The Yale Law Journal* 331.

Anonymous “Standing to Sue for Treble Damages under Section 4 of the Clayton Act” (1964) 64 *Columbia Law Review* 570.

Anonymous “Summaries of Studies and Reports: Findings From the Second Report of the McClellan Committee” (1959) 82 *Monthly Labor Review* 981.

Anonymous “The Coronado Coal Case” (1922) 32 *The Yale Law Journal* 59.

Anonymous “The Duty of Fair Representation in the Administration of Grievance Procedures under Collective Bargaining Agreements” (1968) *Washington University Law Quarterly* 437.

Anonymous “The Labor Provisions of the Clayton Act” (1917) 30 *Harvard Law Review* 632.

Anonymous “The New Federal Law of Labor Injunctions” (1970) 79 *The Yale Law Journal* 1593.

Anonymous “The Royal Commission on Trade Unions and Employers’ Associations, 1965-1968: A Summary of the Report and Recommendations” (1968) 6 *British Journal of Industrial Relations* 275.

Anonymous “The Westinghouse Case: Union’s Right to Sue under Section 301 of Taft-Hartley” (1955) 50 *Northwestern University Law Review* 289.

Anonymous “U. S. Conciliation Service, 1913-47” (1947) 65 *Monthly Labor Review* 172.

Anonymous “Union Administration and Procedure” (1987) 3 *The Labor Lawyer* 478.

Anonymous “Unions as Juridical Persons” (1957) 66 *The Yale Law Journal* 712.

Anstey M “Marikana – and the Push for a New South African Pact: Forum Section” (2013) 37 *South African Journal of Labour Relations* 133.

Arden DM “Economic Torts in the Twenty-first Century” (2006) 40 *The Law Teacher* 1.

Atleson JB “The Circle of Boys Market: A Comment on Judicial Inventiveness” (1985) 7 *Industrial Relations Law Journal* 88.

Auerbach S “Mrs Thatcher’s Labour Laws: Slouching Towards Utopia?” (1993) 64 *The Political Quarterly* 37.

B. R. S. “Rights of Union Members: The Developing Law under the LMRDA” (1962) 48 *Virginia Law Review* 78.

Bagley Jr CF “Suits Against Labor Organizations Under Section 301 of the Labor Management Relations Act” (1952) 9 *Washington & Lee Law Review* 29.

Baird CW “American Union Law: Sources of Conflict” (1990) 11 *Journal of Labor Research* 269.

Baldwin III JJ “The Duty of Fair Representation and Its Applicability When a Union Refuses to Process an Individual’s Grievance” (1968) 20 *South Carolina Law Review* 253.

Ball C “The Resolution of Inter-union Conflict: The TUC’s Reaction to Legal Intervention” (1980) 9 *Industrial Law Journal* 13.

Banks RF “The Reform of British Industrial Relations: The Donovan Report and the Labour Government’s Policy Proposals” (1969) 24 *Relations Industrielles/Industrial Relations* 333.

Barenberg M “The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation” (1993) 106 *Harvard Law Review* 1379.

Barnard J & MM Botha “Trade Unions as Suppliers of Goods and Service” (2018) 30 *SA Mercantile Law Journal* 216.

Barnett GE “Growth of Labor Organization in the United States, 1897-1914” (1916) 30 *The Quarterly Journal of Economics* 780.

Barnett GE “The Dominance of the National Union in American Labor Organization” (1913) 27 *The Quarterly Journal of Economics* 455.

Barrett JT “The FMCS Contribution to Nonlabor Dispute Resolution” (1985) 108 *Monthly Labor Review* 31.

Bartlett AF & DR Lowry “Collective Agreements in the United States and Britain: Status and Consequences” (1979) *Utah Law Review* 469.

Basak SC “Principles of Liability for Interference With Trade, Profession or Calling I” (1911) 27 *The Law Quarterly Review* 399.

Basak SC “Principles of Liability for Interference With Trade, Profession or Calling II” (1911) 27 *The Law Quarterly Review* 399.

Bassett DL "The Hidden Bias in Diversity Jurisdiction" (2003) 81 *Washington University Law Quarterly* 119.

Befort SF "Demystifying Federal Labor and Employment Law Preemption" (1998) 13 *The Labor Lawyer* 429.

Befort SF "Labor and Employment Law at the Millennium: A Historical Review and Critical Assessment" (2001) 43 *Boston College Law Review* 351.

Belzer MH & R Hurd "Government Oversight, Union Democracy, and Labor Racketeering: Lessons from the Teamsters Experience" (1999) 20 *Journal of Labor Research* 343.

Bendix R "The Lower Classes and the 'Democratic Revolution'" (1961) 1 *Industrial Relations: A Journal of Economy & Society* 91.

Benedictus R "Employment Protection: New Institutions and Trade Union Rights" (1976) 5 *Industrial Law Journal* 12.

Benjamin P "Beyond Dispute Resolution: The Evolving Role of the Commission for Conciliation, Mediation & Arbitration" (2014) 35 *Industrial Law Journal* 1.

Benjamin P "Labour Law Beyond Employment" (2012) *Acta Juridica* 21.

Benjamin P & H Cheadle "South African Labour Law Mapping the Changes – Part 1: The History of Labour Law and its Institutions" (2019) 40 *Industrial Law Journal* 2189.

Benjamin P & C Cooper "Strike Ballots in South Africa" (2016) 29 *Australian Journal of Labour Law* 210.

Bennett JT & BE Kaufman "What Do Unions Do?: A Twenty-Year Perspective" (2004) 25 *Journal of Labor Research* 339.

Benson H "Union Democracy and the Landrum-Griffin Act" (1982) 11 *Review of Law & Social Change* 153.

Berchem RL "Labor Democracy in America: The Impact of Titles I & IV of the Landrum-Griffin Act" (1967) 13 *Villanova Law Review* 1.

Bernstein I "Labor and the Recovery Program, 1933" (1946) 60 *The Quarterly Journal of Economics* 270.

Bernstein I "The Historical Significance of the CIO" (1985) 36 *Labor Law Journal* 654.

Bhorat H, S Goga & C Van Der Westhuizen "Institutional Wage Effects: Revisiting Union and Bargaining Council Wage Premia in South Africa" (2012) 80 *South African Journal of Economics* 400.

Blakey GR & B Gettings "Racketeer Influenced and Corrupt Organizations (RICO): Basic Concepts-Criminal and Civil Remedies" (1980) 53 *Temple Law Quarterly* 1009.

Blanchflower DG & A Bryson "What Effect Do Unions Have on Wages Now and Would Freeman and Medoff Be Surprised?" (2003) 25 *Journal of Labor Research* 383.

Blumrosen AW "Group Interests in Labor Law" (1958) 13 *Rutgers Law Review* 432.

Blumrosen AW "The Worker and Three Phases of Unionism: Administrative and Judicial Control of the Worker-Union Relationship" (1962) 61 *Michigan Law Review* 1435.

Bock RA "Secondary Boycotts: Understanding NLRB Interpretation of Section 8 (b)(4)(b) of the National Labor Relations Act" (2004) 7 *University of Pennsylvania Journal of Labor & Employment Law* 905.

Bogg A "Beyond Neo-Liberalism: The Trade Union Act 2016 and the Authoritarian State" (2016) 45 *Industrial Law Journal* 299.

Bogg A "'Individualism' and 'Collectivism' in Collective Labour Law" (2017) 46 *Industrial Law Journal* 72.

Bogg AL "Employment Relations Act 2004: Another False Dawn for Collectivism?" (2005) 34 *Industrial Law Journal* 72.

Bogg A, A Forsyth & T Novitz "Worker Voice in Australia and New Zealand: The Role of the State Reconfigured?" (2013) 34 *Adelaide Law Review* 1.

Bogg A & T Novitz "Investigating Voice at Work" (2011) 33 *Comparative Labor Law & Policy Journal* 323.

Bolt M & D Rajak "Introduction: Labour, Insecurity and Violence in South Africa" (2016) 42 *Journal of Southern African Studies* 797.

Botha MM "Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?" (2015) 48 *De Jure* 328.

Botha MM & W Germishuys "The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court (1)" (2017) 80 *Journal of Contemporary Roman-Dutch Law* 351.

Botha MM & W Germishuys "The Promotion of Orderly Collective Bargaining and Effective Dispute Resolution, the Dynamic Labour Market and the Powers of the Labour Court (2)" (2017) 80 *Journal of Contemporary Roman-Dutch Law* 531.

Botha MM "Responsible Unionism During Collective Bargaining and Industrial Action: Are We Ready Yet?" (2015) 48 *De Jure* 328.

Bowker AL "Trust Violators in the Labor Movement: A Study of Union Embezzlements" (1998) 19 *Journal of Labor Research* 571.

Boyle T "The Labor Bill of Rights and the Doctrine of Exhaustion of Remedies – A Marriage of Convenience" (1964) 16 *Hastings Law Journal* 590.

Bradley H "Divided We Fall – Unions and Their Members" (1994) 16 *Employee Relations* 41.

Brassey M "Fixing the Laws that Govern the Labour Market" (2012) 33 *Industrial Law Journal* 1.

Brassey M "Labour Law After Marikana: Is Institutionalized Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" (2013) 34 *Industrial Law Journal* 823.

Brassey MSM "The New Industrial Court" (1980) 1 *Industrial Law Journal* 75.

Brazier R "The Downfall of Margaret Thatcher" (1991) 54 *The Modern Law Review* 471.

Brodtkorb T "Statutory Union Recognition in the UK: A Work in Progress" (2012) 43 *Industrial Relations Journal* 70.

Brogan DD "Less Mischief, Not None: Respecting Federalism, Respecting States and Respecting Judges in Diversity Jurisdiction Cases" (2015) 51 *Tulsa Law Review* 39.

Brooks JH "Impartial Public Review of Internal Union Disputes: Experiment in Democratic Self-Discipline" (1961) *Ohio State Law Journal* 65.

Brown LC "The Duty of Fair Representation and Exclusive Representation in Grievance Administration: The Duty of Fair Representation" (1976) 27 *Syracuse Law Review* 1199.

Brown R "The Temperton v. Russell Case (1893): The Beginning of the Legal Offensive Against the Unions" (1971) 23 *Bulletin of Economic Research* 50.

Brown W "International Review: Industrial Relations in Britain under New Labour, 1997-2010: A Post Mortem" (2011) 53 *Journal of Industrial Relations* 402.

Brudney JJ "Collateral Conflict: Employer Claims of RICO Extortion against Union Comprehensive Campaign" (2009) 83 *Southern California Law Review* 731.

Brudney JJ "Gathering Moss: The NLRA's Resistance to Legislative Change" (2011) 26 *ABA Journal of Labor & Employment Law* 161.

Brudney JJ "Of Labor Law and Dissonance" (1998) 30 *Connecticut Law Review* 1353.

Budd JW "The Effect of Unions on Employee Benefits: Updated Employer Expenditure Results" (2005) 26 *Journal of Labor Research* 669.

Budeli M "Workers' Right to Freedom of Association and Trade Unionism in South Africa: An Historical Perspective" (2009) 15 *Fundamina* 57.

Buhlungu S "Rebels Without a Cause of Their Own?:The Contradictory Location of White Officials in Black Unions in South Africa, 1973-94" (2006) 54 *Current Sociology* 427.

Buhlungu S "The Building of the Democratic Tradition in South Africa's Trade Unions after 1973" (2004) 11 *Democratization* 133.

Buhlungu S "The Rise and Decline of the Democratic Organizational Culture in the South African Labor Movement, 1973 to 2000" (2009) 34 *Labor Studies Journal* 91.

Buhlungu S, M Brookes & G Wood "Trade Unions and Democracy in South Africa: Union Organizational Challenges and Solidarities in a Time of Transformation" (2008) 46 *British Journal of Industrial Relations* 439.

Buhlungu S "Whose Cause and Whose History?: A Response to Maree" (2006) 54 *Current Sociology* 469.

Buhlungu S, M Brookes & G Wood "Trade Unions and Democracy in South Africa: Union Organizational Challenges and Solidarities in a Time of Transformation" (2008) 46 *British Journal of Industrial Relations* 439.

Burton JF "Editor's Introduction: Review Symposium – What Do Unions Do? By Richard B. Freeman and James L. Medoff" (1984) 38 *Industrial & Labor Relations Review* 244.

Burton SM "The Principles and Factors Guiding the CAC" (2002) 24 *Employee Relations* 606.

Butcher KF & CE Rouse "Wage Effects of Unions and Industrial Councils in South Africa" (2001) 54 *Industrial & Labor Relations Review* 349.

Calitz K "Violent, Frequent and Lengthy Strikes in South Africa: Is the Use of Replacement Labour Part of the Problem" (2016) 28 South African Mercantile Law Journal 436.

Campbell DC "U.S. Firms and Black Labor in South Africa: Creating a Structure for Change" (1986) 7 *Journal of Labor Research* 1.

Campbell WC "Section 6 of the Norris-La Guardia Act: A Statute Whose Time Has Come and Gone" (1980) 3 *George Mason University Law Review* 207.

Cane Jr PW "Parent Union Liability for Strikes in Breach of Contract" (1979) 67 *California Law Review* 1028.

Carby-Hall JR "'The Commissioner for The Rights of Trade Union Members' An Evaluation of Her Work and Achievements" (1992) 34 *Managerial Law* 4.

Carey JB "The Betrayal of Trade Unionism – Racketeering and Corruption Must Be Eliminated" (1957) 23 *Vital Speeches of the Day* 395.

Carty H "The Employment Act 1990: Still Fighting the Industrial Cold War" (1991) 20 *Industrial Law Journal* 1.

Carty H "Unlawful Interference with Trade" (1983) 3 *Legal Studies* 193.

Cavalier S & R Arthur "A Discussion of the Certification Officer Reforms" (2016) 45 *Industrial Law Journal* 363.

Chafee Jr Z "The Internal Affairs of Associations Not for Profit" (1930) 43 *Harvard Law Review* 993.

Chaison G "The AFL-CIO Split: Does it Really Matter?" (2007) 28 *Journal of Labor Research* 301.

Charish D "Union Neutrality Law or Employer Gag Law? Exploring NLRA Preemption of New York Labor Law Section 211-A" (2006) 14 *Journal of Law & Policy* 779.

Cheit EF "Public Policy Towards Trade Unions: Antimonopoly Laws" (1958) 9 *Labor Law Journal* 705.

Christianson M "Sueing the Union for Losses After an Unprotected Strike: Rustenburg Platinum Mines Limited v The Mouthpeace Workers Union" (2001) 11 *Contemporary Labour Law* 29.

Christie S "Majoritarianism, Collective Bargaining and Discrimination" (1994) 15 *Industrial Law Journal* 708.

Churchill W "From the Pinkertons to the PATRIOT Act: The Trajectory of Political Policing in the United States, 1870 to the Present" (2004) 4 *CR: The New Centennial Review* 1.

Clarke HD, MC Stewart & P Whiteley "Tory Trends: Party Identification and the Dynamics of Conservative Support since 1992" (1997) 27 *British Journal of Political Science* 299.

Cleary MM "Conduct of Union Officer Which Violates § 501(a) of Landrum–Griffin Act (29 U.S.C.A. § 501(a))" (1992) 107 *American Law Reports Federal* 448.

Clements RV "Trade Unions and Emigration, 1840-80" (1955) 9 *Population Studies* 167.

Cohen J & L Cohen "The National Labor Relations Board in Retrospect" (1948) 1 *Industrial & Labor Relations Review* 648.

Cohen S "An Analytical Framework for Labor Relations Law" (1961) 14 *Industrial & Labor Relations Review* 350.

Cohen S "The 1968–1974 Labour Upsurge In Britain and America: A Critical History, and a Look at What Might Have Been" (2008) 49 *Labor History* 395.

Cohen T "Limiting Organisational Rights of Minority Unions: POPCRU v Ledwaba 2013 11 BLLR 1137 (LC)" (2014) 17 *Potchefstroom Electronic Law Journal* 2209.

Cohn SL "Problems in Establishing Federal Jurisdiction Over an Unincorporated Labor Union" (1958) 47 *Georgetown Law Journal* 491–530.

Cole N "The Civil Suability, at Law, of Labor Unions" (1939) 8 *Fordham Law Review* 29.

Coleman JR "The Compulsive Pressures of Democracy in Unionism" (1956) 61 *American Journal of Sociology* 519.

Colling T "What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights" (2006) 35 *Industrial Law Journal* 140.

Commons JR "Labor Organization and Labor Politics, 1827-37" (1907) 21 *The Quarterly Journal of Economics* 323.

Conradie M "The Constitutional Right to Fair Labour Practices: A Consideration of the Influence and Continued Importance of the Historical Regulation of (Un)Fair Labour Practices Pre-1977" (2016) 22 *Fundamina* 163.

Cook AH "Dual Government in Unions: A Tool for Analysis" (1962) 15 *Industrial & Labor Relations Review* 323.

Corbett WR "The More Things Change: Reflections on the Stasis of Labor Law in the United States" (2011) 56 *Villanova Law Review* 227–249.

Corby S "British Employment Tribunals: From the Side-Lines to Centre Stage" (2015) 56 *Labor History* 161.

Countouris N & M Freedland "Injunctions, Cyanamid, and the Corrosion of the Right to Strike in the UK" (2010) 1 *European Labour Law Journal* 489.

Cox A "Internal Affairs of Labor Unions Under the Labor Reform Act of 1959" (1960) 58 *Michigan Law Review* 819.

Cox A "Labor Law Preemption Revisited" (1972) 85 *Harvard Law Review* 1337.

Cox A "Some Aspects of the Labor Management Relations Act, 1947" (1947) 61 *Harvard Law Review* 1.

Cox A "Some Aspects of the Labor Management Relations Act, 1947: II. The Negotiation and Administration of Collective Agreements" (1947) 61 *Harvard Law Review* 274.

Cox A "The Duty of Fair Representation" (1957) 2 *Villanova Law Review* 151.

Cox A "The Landrum-Griffin Amendments to the National Labor Relations Act" (1959) 44 *Minnesota Law Review* 257.

Cox A "The Legal Nature of Collective Bargaining Agreements" (1958) 57 *Michigan Law Review* 1.

Cox A "The Right to Engage in Concerted Activities" (1951) 26 *Indiana Law Journal* 319–347.

Cox A "The Role of Law in Preserving Union Democracy" (1959) 72 *Harvard Law Review* 609.

Crain M & K Matheny "Labor's Identity Crisis" (2001) 89 *California Law Review* 1767.

Crain M & K Matheny "The New Labor Regime" (2017) 126 *The Yale Law Journal Forum* 478.

Crain MG & K Matheny "Beyond Unions, Notwithstanding Labor Law" (2014) 4 *UC Irvine Law Review* 561.

Craver CB "The Labor Movement Needs a Twenty-First Century Committee for Industrial Organization" (2005) 23 *Hofstra Labor & Employment Law Journal* 69.

Creighton B & S McCrystal "Strike Ballots and the Law in Comparative Perspective" (2016) 29 *Australian Journal of Labour Law* 121.

Cummings E "A Collectivist Philosophy of Trade Unionism" (1899) 13 *The Quarterly Journal of Economics* 151.

Darlington R "Strike Waves, Union Growth and the Rank-and-File/Bureaucracy Interplay: Britain 1889–1890, 1910–1913 and 1919–1920" (2014) 55 *Labor History* 1.

Dau-Schmidt KG & BC Ellis "The Relative Bargaining Power of Employers and Unions in the Global Information Age: A Comparative Analysis of the United States and Japan" (2010) 20 Indiana International & Comparative Law Review 14.

Davies ACL "The Trade Union (Wales) Act 2017/Y Ddeddf Yr Undebau Llafur (Cymru) 2017" (2018) 47 *Industrial Law Journal* 135.

Daykin WL "The Status of Unions Under Our Antitrust Laws" (1960) 11 *Labor Law Journal* 216.

Deakin S "The Contribution of Labour Law to Economic Development and Growth" (2016) 92 *Bulletin for Comparative Labour Relations* 19.

Deakin S & J Randall "Rethinking the Economic Torts" (2009) 72 *The Modern Law Review* 519.

Deeny RJ "The Duty of Fair Representation" (1970) 20 *Catholic University Law Review* 271–311.

Dempsey MD "Employee's Remedy for a Union Breach of the Duty of Fair Representation: Vaca v. Sipes" (1966) 14 *UC Los Angeles Law Review* 1351–1360.

Devinatz VG "The Crisis of US Trade Unionism and What Needs to be Done" (2013) 64 *Labor Law Journal* 5.

Devinatz VG "U.S. Trade Unionism under Globalization: The Death of Voluntarism and the Turn to Politics" (2011) 62 *Labor Law Journal* 16.

Devinatz VG "Right-to-Work Laws, the Southernization of U.S. Labor Relations and the U.S. Trade Union Movement's Decline" (2015) 40 *Labor Studies Journal* 297.

Dewey D "The Common-Law Background of Antitrust Policy" (1955) 41 *Virginia Law Review* 759.

Dibben P, G Klerck & G Wood "The Ending of Southern Africa's Tripartite Dream: The Cases of South Africa, Namibia and Mozambique" (2015) 57 *Business History* 461.

Dibben P, G Wood & K Mellahi "Is Social Movement Unionism Still Relevant? The Case of the South African Federation COSATU" (2012) 43 *Industrial Relations Journal* 494.

Dix G & SB Barber "The Changing Face of Work: Insights from ACAS" (2015) 37 *Employee Relations* 670.

Donnelly E & S Dunn "Ten Years After: South African Employment Relations Since the Negotiated Revolution" (2006) 44 *British Journal of Industrial Relations* 1.

Doyle B "A Substitute for Collective Bargaining – The Central Arbitration Committee's Approach to Section 16 of the Employment Protection Act 1975" (1980) 9 *Industrial Law Journal* 154.

Drake CD "The Trade Union and Labour Relations (Amendment) Bill" (1976) 5 *Industrial Law Journal* 2.

Drummonds HH "Reforming Labor Law by Reforming Labor Law Preemption Doctrine to Allow the States to Make More Labor Relations Policy" (2009) 70 *Louisiana Law Review* 97.

Dubofsky M "Legal Theory and Workers' Rights" (1981) 4 *Industrial Relations Law Journal* 496.

Du Toit D "An Ill Contractual Wind Blowing Collective Good-Collective Representation in Non-Statutory Bargaining and the Limits of Union Authority" (1994) 15 *Industrial Law Journal* 39.

Du Toit D "Collective Bargaining and Worker Participation" (2000) 21 *Industrial Law Journal* 1544.

Dukes R "The Right to Strike under UK Law: Not Much More than a Slogan? Metrobus v Unite The Union [2009] EWCA Civ 829" (2010) 39 *Industrial Law Journal* 82.

Dukes R "The Statutory Recognition Procedure 1999: No Bias in Favour of Recognition?" (2008) 37 *Industrial Law Journal* 236.

Dukes R & N Kountouris "Pre-strike Ballots, Picketing and Protest: Banning Industrial Action by the Back Door" (2016) 45 *Industrial Law Journal* 337.

Dunbar WH "Government by Injunction" (1897) 13 *The Law Quarterly Review* 347.

Eaton J "Union Democracy and Union Renewal: The CAW Public Review Board" (2006) 61 *Relations Industrielles/Industrial Relations* 201.

Earnshaw J & S Hardy "Assessing an Arbitral Route for Unfair Dismissal" (2001) 30 *Industrial Law Journal* 289.

Elgar J & B Simpson "The Impact of the Law on Industrial Disputes Revisited: A Perspective on Developments over the Last Two Decades" (2017) 46 *Industrial Law Journal* 6.

Elias P & K Ewing "Economic Torts and Labour Law: Old Principles and New Liabilities" (1982) 41 *The Cambridge Law Journal* 321.

Elias P & K Ewing *Trade Union Democracy, Members' Rights and the Law* (1987) Mansell Publishing Limited, London.

Engleman SR & AWJ Thomson "Experience Under the British Industrial Relations Act" (1974) 13 *Industrial Relations: A Journal of Economy & Society* 130.

Ensor L "The Problems of Established Trade Unions" (2004) 28 *South African Labour Bulletin* 25.

Epstein RA "A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation" (1983) 92 *The Yale Law Journal* 1357.

Epstein RA "Labor Unions: Saviors or Scourges" (2013) 41 *Capital University Law Review* 1.

Esitang TG & S Van Eck "Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions" (2016) 37 *Industrial Law Journal* 763.

Estlund C "The Ossification of American Labor Law and the Decline of Self-governance in the Workplace" (2007) 28 *Journal of Labor Research* 591.

Estlund CL "The Ossification of American Labor Law" (2002) 102 *Columbia Law Review* 1527.

Estreicher S "Deregulating Union Democracy" (2000) 21 *Journal of Labor Research* 247.

Estreicher S "Disunity within the House of Labor: Change to Win or to Stay the Course?" (2006) 27 *Journal of Labor Research* 505.

Estreicher S "The Dunlop Report and the Future of Labor Law Reform" (1996) 12 *The Labor Lawyer* 117.

Ewing KD "Employment Act 2008: Implementing the ASLEF Decision – A Victory for the BNP?" (2009) 38 *Industrial Law Journal* 50.

Ewing KD "Freedom of Association and the Employment Relations Act 1999" (1999) 28 *Industrial Law Journal* 283.

Ewing KD "Judicial Control of Union Rule-Book – Expulsion of Member" (1983) 42 *The Cambridge Law Journal* 207.

Ewing KD "The Function of Trade Unions" (2005) 34 *Industrial Law Journal* 1.

Ewing K "The Golden Formula: Some Recent Developments" (1979) 8 *Industrial Law Journal* 133.

Ewing KD "The Strike, the Courts and the Rule-Books" (1985) 14 *Industrial Law Journal* 160.

Ewing KD & WM Rees "The TUC Independent Review Committee and the Closed Shop" (1981) 10 *Industrial Law Journal* 84.

Fahlbeck R "The Demise of Collective Bargaining in the USA: Reflections on the Un-American Character of American Labor Law" (1994) 15 *Berkeley Journal of Employment & Labor Law* 307.

Fairbrother P, G Williams, R Barton, E Gibellieri & A Tropeoli "Unions Facing the Future: Questions and Possibilities" (2007) 31 *Labor Studies Journal* 31.

Falkin JC "Union's Duty to Fairly Represent Its Members in Contract Grievance Procedures – The Impact of Vaca v. Sipes" (1967) 19 *Syracuse Law Review* 66.

Fanning JH "The Duty of Fair Representation" (1978) 19 *Boston College Law Review* 813.

Fick BJ "Not Just Collective Bargaining: The Role of Trade Unions in Creating and Maintaining a Democratic Society" (2009) 12 *Journal of Labor and Society* 249.

Findlay P & C Warhurst "Union Learning Funds and Trade Union Revitalization: A New Tool in the Toolkit" (2011) 49 *British Journal of Industrial Relations* 115.

Finkin MW "The Meaning and Contemporary Vitality of the Norris-LaGuardia Act" (2014) 93 *Nebraska Law Review* 6.

Fischer B "Collective Bargaining and Fifty Years of the CIO" (1985) 36 *Labor Law Journal* 659.

Fisk C "Still "Learning Something of Legislation": The Judiciary in the History of Labor Law" (1994) 19 *Law & Social Inquiry* 151.

Fisk C & DC Malamud "The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform" (2009) 58 *Duke Law Journal* 2013.

Flanagan RJ "Has Management Strangled U.S. Unions?" (2005) 26 *Journal of Labor Research* 33.

Floyd M "Administrative Enforcement of the Right to Fair Representation: The Miranda Case" (1964) *University of Pennsylvania Law Review* 711.

Flynn J "A Quiet Revolution at the Labor Board: The Transformation of the NLRB 1935-2000" (2000) 61 *Ohio State Law Journal* 1361.

Fones-Wolf E & K Fones-Wolf "Rank-and-file rebellions and AFL interference in the affairs of national unions: The Gompers era" (1994) 35 *Labor History* 237.

Forbath WE "The Shaping of the American Labor Movement" (1989) 102 *Harvard Law Review* 1109.

Ford M "Citizenship and Democracy in Industrial Relations: The Agenda for the 1990s?" (1992) 55 *The Modern Law Review* 241.

Ford M "Employment Tribunal Fees and the Rule of Law: R (Unison) v Lord Chancellor in the Supreme Court" (2018) 47 Industrial Law Journal 1.

Ford M "The Effect of Brexit on Workers' Rights" (2016) 27 *King's Law Journal* 398.

Ford M & T Novitz "Legislating for Control: The Trade Union Act 2016" (2016) 45 *Industrial Law Journal* 277.

Forkosch MD "The Legal Status and Suability of Labor Organizations" (1954) 28 *Temple Law Quarterly* 1.

Forrester K "'The Quiet Revolution'? Trade Union Learning and Renewal Strategies" (2004) 18 *Work, Employment & Society* 413.

Fortunato MJ "Lingle v. Norge Division of Magic Chef, Inc.: Revolutionizing the Application of Substantive State Labor Law to Unionized Employees" (1989) 38 *Catholic University Law Review* 769.

Fosh P, H Morris, R Martin, P Smith & R Undy "Politics, Pragmatism and Ideology: The 'Wellsprings' of Conservative Union Legislation (1979-1992)" (1993) 22 *Industrial Law Journal* 14.

Frankel TG "Judicial Review of Union Discipline" (1955) 4 *Journal of Public Law* 464.

Frankfurter F & N Greene "The Use of the Injunction in American Labor Controversies. I. – The Allowable Area of Economic Conflict" (1928) 44 *The Law Quarterly Review* 164.

Frankfurter F & N Greene "The Use of the Injunction in American Labor Controversies. II. – The Procedure and Proof Underlying Labor Injunctions" (1928) 44 *The Law Quarterly Review* 353.

Frankfurter F & N Greene "The Use of the Injunction is American Labor Controversies. III. – The Scope of Labor Injunctions and their Enforcement" (1929) 45 *The Law Quarterly Review* 19.

Fredman S "The Ideology of New Labour Law" in Barnard C, S Deakin & GS Morris (eds) *The Future of Labour Law: Liber Amicorum Bob Hepple QC* (2004) Hart Publishing, Oxford.

Fredman S "The New Rights: Labour Law and Ideology in the Thatcher Years" (1992) 12 *Oxford Journal of Legal Studies* 24.

Freeman RB "What Do Unions Do? – The 2004 M-Brane Stringtwister Edition" (2005) 26 *Journal of Labor Research* 641.

Freeman RB & JL Medoff "The Two Faces of Unionism" (1979) 57 *Public Interest* 69.

Freeman RB & JL Medoff "Trade Unions and Productivity: Some New Evidence on an Old Issue" (1984) 473 *ANNALS of American Academy of Political & Social Science* 149.

Friedman S "Why the Employee Free Choice Act Deserves Support: Response to Adams" (2007) 31 *Labor Studies Journal* 15.

Frost AC "Union Involvement in Workplace Decision Making: Implications for Union Democracy" (2000) 21 *Journal of Labor Research* 265.

Gall G "Injunctions as a Legal Weapon in Collective Industrial Disputes in Britain, 2005-2014: Injunctions as a Legal Weapon" (2016) 55 *British Journal of Industrial Relations* 187.

Gall G "Unions in Britain: Merely on the Margins or on the Cusp of a Comeback?" (2012) 23 *Management Revue* 323.

Gay J "Freezing of Labor in Wartime" (1943) 18 *Washington Law Review & State Bar Journal* 137.

Garbarino JW "The British Experiment with Industrial Relations Reform" (1972) 26 *Industrial & Labor Relations Review* 793.

Gennard J "UK Industrial Relations State Agencies" (2010) 32 *Employee Relations* 5.

Gentle L "What About the Workers? The Demise of COSATU and the Emergence of a New Movement" (2015) 42 *Review of African Political Economy* 666.

Gericke SB "Revisiting the Liability of Trade Unions and/or Their Members During Strikes: Lessons to be Learnt from Case Law" (2012) 75 *Journal of Contemporary Roman-Dutch Law* 566.

Getman J "Of Labor Law and Birdsong" (1998) 30 *Connecticut Law Review* 1345.

Getman J "The National Labor Relations Act: What Went Wrong; Can We Fix It?" (2003) 45 *Boston College Law Review* 125.

Getman JG & TC Kohler "The Common Law, Labor Law, and Reality: A Response to Professor Epstein" (1983) 92 *The Yale Law Journal* 1415.

Gibbons S & D Brown "Research and Reports – Commissioner for Protection Against Unlawful Industrial Action" (1995) 24 *Industrial Law Journal* 190.

Gibson GS "The NLRB and the Duty of Fair Representation: The Case of the Reluctant Guardian" (1976) 29 *University of Florida Law Review* 437.

Ginsburg M "Nothing New under the Sun: 'The New Labor Law' Must Still Grapple with the Traditional Challenges of Firm-Based Organizing and Building Self-Sustainable Worker Organizations" (2017) 126 *The Yale Law Journal Forum* 488.

Gitlow AL "Ebb and Flow in America's Trade Unions: The Present Prospect" (2012) 63 *Labor Law Journal* 123.

Godard J "What Has Happened to Strikes?" (2011) 49 *British Journal of Industrial Relations* 282.

Godfrey S, D Du Toit & M Jacobs "The New Labour Law Bills: An Overview and Analysis" (2018) 39 *Industrial Law Journal* 2161.

Goldberg MJ "An Overview and Assessment of the Law Regulating Internal Union Affairs" (2000) 21 *Journal of Labor Research* 15.

Goldberg MJ "Derailing Union Democracy: Why Deregulation Would Be a Mistake" (2002) 23 *Berkeley Journal of Employment & Labor Law* 137.

Goldberg MJ "Present at the Creation: Clyde Summers and the Field of Union Democracy Law" (2010) 14 *Employee Rights & Employment Policy Journal* 121.

Golden CS "New Patterns of Democracy" (1943) 3 *The Antioch Review* 391.

Goldstein RJ "Labor History Symposium: Political Repression of the American Labor Movement During its Formative Years – A Comparative Perspective" (2010) 51 *Labor History* 271.

Goodhart AL "The Legality of the General Strike in England" (1927) 36 *The Yale Law Journal* 464.

Gordon ME, JW Philpot, RE Burt, CA Thompson & WE Spiller "Commitment to the Union: Development of a Measure and an Examination of Its Correlates" (1980) 65 *Journal of Applied Psychology* 479.

Gospel H & G Lockwood "Disclosure of Information for Collective Bargaining: The CAC Approach Revisited" (1999) 28 *Industrial Law Journal* 233.

Gould WB "Taft-Hartley Comes to Great Britain: Observations on the Industrial Relations Act of 1971" (1972) 81 *The Yale Law Journal* 1421.

Gould WB "The Emergence of Black Unions in South Africa" (1987) 5 *Journal of Law & Religion* 495.

Grabiner AS "There Is a Tort of Interference with Contractual Relations" (1969) 32 *The Modern Law Review* 435.

Grant B "In Defence of Majoritarianism: Part 1 – Majoritarianism & Collective Bargaining" (1993) 14 *Industrial Law Journal* 305.

Grant B "In Defence of Majoritarianism: Part 2 – Majoritarianism and Freedom of Association" (1993) 14 *Industrial Law Journal* 1145.

Gregory CO "The Law of the Collective Agreement" (1959) 57 *Michigan Law Review* 635.

Gregory DL "The Right to Unionize as a Fundamental Human and Civil Right" (1988) 9 *Mississippi College Law Review* 135.

Gregory DL "Union Liability for Damages After Bowen v. Postal Service: The Incongruity Between Labor Law and Title VII Jurisprudence" (1983) 35 *Baylor Law Review* 237.

Gregory DL, MK Zitelli & CE Papadopoulos "The Fiftieth Anniversary of the Steelworkers Trilogy: Some Reflections on Judicial Review of Labor-Arbitration Decisions – Will Gold Turn to Rust" (2010) 60 *Catholic University Law Review* 47.

Green W "The Taft-Hartley Act: A Critical View" (1951) 274 *ANNALS of American Academy of Political & Social Science* 200.

Greene J "'The Strike at the Ballot Box': The American Federation of Labor's Entrance Into Election Politics, 1906–1909" (1991) 32 *Labor History* 165.

Gross JA "Worker Rights as Human Rights: Wagner Act Values and Moral Choices" (2001) 4 *University of Pennsylvania Journal of Labor & Employment Law* 479.

Grunfeld C "British Report" (1964) 18 *Rutgers Law Review* 343.

Grunfeld C "Trade Unions and the Individual: A Study of Recent Developments in England" (1958) 7 *Journal of Public Law* 289.

Hadley SJ, TS Hardy, HJ Kwalwasser & LL Tedeschi "Union Elections and the LMRDA: Thirteen Years of Use and Abuse" (1972) 81 *The Yale Law Journal* 409.

Hakime SA & L Steynberg "The Delictual Liability of a Union for Advice Given to its Members" (2002) 65 *Journal of Contemporary Roman-Dutch Law* 446.

Hamson CJ "A Further Note on Rookes v. Barnard" (1964) 22 *The Cambridge Law Journal* 159.

Hamson CJ "A Note on Rookes v. Barnard. Intimidation. Joint Tortfeasors. Trade Disputes Act, 1906" (1961) 19 *The Cambridge Law Journal* 189.

Hanson CG *Taming the Trade Unions: A Guide to the Thatcher Government's Employment Reforms, 1980-1990* (1991) Macmillan in association with the Adam Smith Institute, London.

Harcourt M & G Wood "Is There a Future for a Labour Accord in South Africa?" (2003) 27 *Capital & Class* 81.

Harcourt M, G Gall, RV Kumar & R Croucher "A Union Default: A Policy to Raise Union Membership, Promote the Freedom to Associate, Protect the Freedom not to Associate and Progress Union Representation" (2019) 48 *Industrial Law Journal* 66.

Hardman JBS "Interrelationships in the Regulation of Internal Union Affairs" (1959) 10 *Labor Law Journal* 496.

Harper CY "Origin and Nature of the Duty of Fair Representation" (1996) 12 *The Labor Lawyer* 183.

Hartley RC "The Framework of Democracy in Union Government" (1982) 32 *Catholic University Law Review* 13.

Harris H "Between Convergence and Exceptionalism: Americans and the British Model of Labor Relations, c. 1867–1920" (2007) 48 *Labor History* 141.

Hartley RC "The Framework of Democracy in Union Government" (1982) 32 *Catholic University Law Review* 13.

Hayes MJ "It's Now Persuasion, Not Coercion: Why Current Law on Labor Protest Violates Twenty-First Century First Amendment Law" (2018) 47 *Hofstra Law Review* 563.

Heinecken L & L Du Plessis "Trade Unions in Politics: South African Trends" (1994) 14 *Industrial Relations Journal* 19.

Hellrung GL "The National Labor Relations Board and the Duty of Fair Representation: National Labor Relations Board v. Miranda Fuel Co., 326 F. 2d 172 (2nd Cir. 1963)" (1964) 13 *Catholic University Law Review* 171.

Hepple A "Labour and Labour Laws in South Africa" (1956) 1 *Africa South* 24.

Hepple B "Back to the Future: Employment Law under the Coalition Government" (2013) 42 *Industrial Law Journal* 203.

Hepple B "Is South African Labour Law Fit for the Global Economy?" (2012) *Acta Juridica* 1.

Hepple B "The Role of Trade Unions in a Democratic Society" (1990) 11 *Industrial Law Journal* 645.

Hepple B "Union Responsibility for Shop Stewards" (1972) 1 *Industrial Law Journal* 197.

Hepple B & GS Morris "The Employment Act 2002 and the Crisis of Individual Employment Rights" (2002) 31 *Industrial Law Journal* 245.

Herberg W "Bureaucracy and Democracy in Labor Unions" (1943) 3 *The Antioch Review* 405.

Herzfelder BA & EE Schriever "The Union Judgment Rule" (1987) 54 *University of Chicago Law Review* 980.

Hickey R, S Kuruvilla & T Lakhani "No Panacea for Success: Member Activism, Organizing and Union Renewal" (2010) 48 *British Journal of Industrial Relations* 53.

Hickling MA "Restoring the Protection of the Trade Disputes Act: Some Forgotten Aspects" (1966) 29 *The Modern Law Review* 32.

Hirsch BT "The Dunlop Commission's Premise: A Tilted Playing Field?" (1996) 17 *Journal of Labor Research* 15.

Hirsch BT "What Do Unions Do for Economic Performance?" (2004) 25 *Journal of Labor Research* 415.

Hirschsohn P "The 'Hollowing-Out' of Trade Union Democracy in COSATU? Members, Shop Stewards and the South African Communist Party" (2011) 15 *Law Democracy & Development* 279.

Hirschsohn P "Union Democracy and Shopfloor Mobilization: Social Movement Unionism in South African Auto and Clothing Plants" (2007) 28 *Economic & Industrial Democracy* 6.

Hogler RL "The Historical Misconception of Right to Work Laws in the United States: Senator Robert Wagner, Legal Policy, and the Decline of American Unions" (2005) 23 *Hofstra Labor & Employment Law Journal* 101.

Holdt KV & E Webster "Organising on the Periphery: New Sources of Power in the South African Workplace" (2008) 30 *Employee Relations* 333.

Houseman GL "American Labor Unions: Dependent Upon But Not Fairly Protected by the Law" (1985) 36 *Labor Law Journal* 716.

Hovenkamp H "Regulatory Conflict in the Gilded Age: Federalism and the Railroad Problem" (1988) 97 *The Yale Law Journal* 1017.

Howarth D "Against Lumley v Gye" (2005) 68 *The Modern Law Review* 195.

Howarth D "The Autonomy of Labour Law: A Response to Professor Wedderburn" (1988) 17 *Industrial Law Journal* 11.

Howell C "Is There a Third Way for Industrial Relations?" (2004) 42 *British Journal of Industrial Relations* 1.

Hoxie RF "Trade Unionism in the United States" (1914) 22 *Journal of Political Economy* 201.

Hurd RW & TL Lee "Public Sector Unions Under Siege: Solidarity in the Fight Back" (2014) 39 *Labor Studies Journal* 9.

Hutt WH "The Face and Mask of Unionism" (1983) 4 *Journal of Labor Research* 197.

Ieronimo ST "RICO: Is it a Panacea or a Bitter Pill for Labor Unions, Union Democracy and Collective Bargaining?" (1994) 11 *Hofstra Labor Law Journal* 499.

Imwinkelried EJ "Substantive and Procedural Due Process in Union Disciplinary Proceedings" (1969) 3 *University of San Francisco Law Review* 385.

Jacobs E "Something Old, Something New: The New Tribunal System" (2009) 38 *Industrial Law Journal* 417.

Jacobs JB & DD Portnoi "Administrative Criminal Law & Procedure in the Teamsters Union: What Has Been Achieved after (Nearly) Twenty Years" (2007) 28 *Berkeley Journal of Employment & Labor Law* 429.

Jacobs JB "Is Labor Union Corruption Special?" (2013) 80 *Social Research* 1057.

Jacobs JB & E Peters "Labor Racketeering: The Mafia and the Unions" (2003) 30 *Crime and Justice* 229.

Jaffe LL "Inter-Union Disputes in Search of a Forum" (1940) 49 *The Yale Law Journal* 424.

James EN "Union Democracy and the LMRDA: Autocracy and Insurgency in National Union Elections" (1978) 13 *Harvard Civil Rights-Civil Liberties Law Review* 247.

James P "US Labour Law Reform: A Note on the Dunlop Debate" (1995) 17 *Employee Relations* 43.

Johnson JL "Government Regulations of Internal Union Affairs" (1954) 5 *Labor Law Journal* 807.

Jensen BB "Woodrow Wilson's Intervention in the Coal Strike of 1914" (1974) 15 *Labor History* 63.

Jones DL "The Enigma of the Clayton Act" (1956) 10 *Industrial & Labor Relations Review* 201–221.

Kahn LM "Introduction to the U.S. Department of Labor Centennial Symposium" (2014) 67 *Industrial & Labor Relations Review* 563.

Kahn-Freund O "Industrial Relations and the Law — Retrospect and Prospect" (1969) 7 *British Journal of Industrial Relations* 301.

Kahn-Freund O "The Illegality of a Trade Union" (1944) 7 *The Modern Law Review* 192.

Kahn-Freund O "Trade Union Democracy and the Law" (1961) 22 *Ohio State Law Journal* 4.

Kahn-Freund O "Trade Unions, the Law and Society" (1970) 33 *The Modern Law Review* 241.

Kalis PJ "Recent Cases – Trade Union Law: The Bridlington Principles and the Awards of the T.U.C. Disputes Committee" (1976) 5 *Industrial Law Journal* 246.

Kalis PJ "The Adjudication of Inter-union Membership Disputes: The T.U.C. Disputes Committee Revisited" (1977) 6 *Industrial Law Journal* 19.

Kalis PJ "The Effectiveness and Utility of the Disputes Committee of the Trades Union Congress" (1978) 16 *British Journal of Industrial Relations* 41.

Kamin A "The Union as Litigant: Personality, Pre-Emption, and Propaganda" (1966) *Supreme Court Review* 253.

Katz HA & IM Friedman "Members' Control Over Officers, Elections, and Finances: Equitable Remedies and Modern Developments" (1961) 22 *Ohio State Law Journal* 97.

Kaufman BE "The Early Institutionalists on Industrial Democracy and Union Democracy" (2000) 21 *Journal of Labor Research* 189.

Kaufman BE "The Future of U.S. Private Sector Unionism: Did George Barnett Get It Right After All?" (2001) 22 *Journal of Labor Research* 433.

Kaufman BE "What Do Unions Do? – Evaluation and Commentary" (2005) 26 *Journal of Labor Research* 555.

Kaufman BE "What Unions Do: Insights From Economic Theory" (2004) 25 *Journal of Labor Research* 351.

Kaynard SM "Deregulation and Labor Law in the United States" (1988) 6 *Hofstra Labor Law Journal* 1.

Kelley TA "Labor Law Gap-Filling: Federal Common Law Ideals Versus Litigation Realities" (2011) 72 *Ohio State Law Journal* 437.

Kelly J "Conflict: Trends and Forms of Collective Action" (2015) 37 *Employee Relations* 720.

Kelly J "The Decline of British Trade Unionism: Markets, Actors and Institutions" (2012) 43 *Industrial Relations Journal* 348.

Kemmerer D & ED Wickersham "Reasons for the Growth of the Knights of Labor in 1885-1886" (1949) 3 *Industrial & Labor Relations Review* 213.

Kidner R "Lessons in Trade Union Law Reform: The Origins and Passage of the Trade Disputes Act 1906" (1982) 2 *Legal Studies* 34.

Kidner R "The Development of the Picketing Immunity: 1825-1906" (1993) 13 *Legal Studies* 103.

Kidner R "The Individual and the Collective Interest in Trade Union Law" (1976) 5 *Industrial Law Journal* 90.

Kidner R "Trade Union Democracy: Election of Trade Union Officers" (1984) 13 *Industrial Law Journal* 193.

Kidner R "Trade Union Law – Implied Contracts between Members and Unions: Bourne v. Colodense Ltd." (1985) 14 *Industrial Law Journal* 124.

Kilpatrick C "Has New Labour Reconfigured Employment Legislation?" (2003) 32 *Industrial Law Journal* 135.

Kilroy-Silk R "The Royal Commission on Trade Unions and Employers' Associations" (1969) 22 *Industrial & Labor Relations Review* 544.

Kirschner R & M Walfoort "The Duty of Fair Representation: Implications of Bowen" (1985) 1 *The Labor Lawyer* 19.

Kisicki M "Federal Regulations Update" (2012) 39 *Employment Relations Today* 55.

Klarman MJ "The Judges Versus the Unions: The Development of British Labor Law, 1867-1913" (1989) 75 *Virginia Law Review* 1487.

Klaus I "The Taft-Hartley Experiment in Separation of NLRB Functions" 11 *Industrial & Labor Relations Review* 371.

Kochan "A Silver Anniversary Not Worth Celebrating: The Impasse Over American Labor and Employment Policies" (2003) 25 *Comparative Labor Law & Policy Journal* 79.

Kovner J "The Legal Protection of Civil Liberties within Unions" (1948) 1 *Wisconsin Law Review* 18.

Kovner J & HJ Lahne "Shop society and the Union" (1953) 7 *Industrial & Labor Relations Review* 3.

Kruger J & CI Tshoose "The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective" (2013) 16 *Potchefstroom Electronic Law Journal* 285.

KWW "Will NIRC Expand Vicarious Liability?" (1973) 36 *The Modern Law Review* 226.

Lagrange R "SAMWU v S Jada & Others (Witwatersrand Local Division, Case A3038/00)" (2003) 24 *Industrial Law Journal* 1314.

Lambert R "SACTU and the Industrial Conciliation Act" (1983) 8 *South African Labour Bulletin* 25.

Landman A "No Place to Hide – A Trade Union's Liability for Riot Damage: A Note on Garvis & Others v SA Transport & Allied Workers Unions (Minister for Safety & Security, Third Party) (2010) 31 ILJ (WCC) 2521" (2011) 32 *Industrial Law Journal* 834.

Landman AA "A Trade Union's Delictual Liability Regarding its Members: Jada & Others v SA Municipal Workers Union" (2000) 21 *Industrial Law Journal* 101.

Landman AA "Trade Union Democracy and the Law in South Africa" (1987) *Modern Business Law* 92.

Landsberger HA & CL Hulin "A Problem for Union Democracy: Officers' Attitudes Toward Union Members" (1961) 14 *Industrial & Labor Relations Review* 419.

Lane J "The Threat to Facility Time in the Trade Union Act 2016 – A Necessary Austerity Measure?" (2016) 46 *Industrial Law Journal* 134.

Latreille PL, JA Latreille & KG Knight "Making a Difference? Legal Representation in Employment Tribunal Cases: Evidence from a Survey of Representatives" (2005) 34 *Industrial Law Journal* 308.

Laube HD "The Right of an Employee Discharged for Cause" (1935) 20 *Minnesota Law Review* 597.

Lenz Jr L "Carbon Fuel Company v United Mine Workers of America – An Unfortunate Departure from Vigorous Enforcement of the Proarbitration Policy of the Labor Management Relations Act" (1980) 6 *Journal of Corporation Law* 195.

LeRoy MH & P Feuille "The Steelworkers Trilogy and Grievance Arbitration Appeals: How the Federal Courts Respond" (1991) 13 *Industrial Relations Law Journal* 78.

Lewis TP "Fair Representation in Grievance Administration: Vaca v. Sipes" (1967) *Supreme Court Review* 81.

Lewis R & B Simpson "Disorganising Industrial Relations: An Analysis of Sections 2-8 and 10-14 of the Employment Act 1982" (1982) 11 *Industrial Law Journal* 227.

Lichtenstein A "Making Apartheid Work: African Trade Unions and the 1953 Native Labour (Settlement of Disputes) Act in South Africa" (2005) 46 *Journal of African History* 293.

Lichtenstein N "Despite EFCA's Limitations, Its Demise Is a Profound Defeat for U.S. Labor" (2010) 7 *Labor: Studies in Working-Class History of the Americas* 29.

Lichtenstein N "Taft-Hartley: A Slave-Labor Law" (1998) 47 *Catholic University Law Review* 763.

Lieberwitz RL "Due Process and the LMRDA: An Analysis of Democratic Rights in the Union and at the Workplace" (1987) 1 *Boston College Law Review* 21.

Linde B & H Henderson "Expectations and Obligations Governing the Member-union Relationship: A Psychological Contract Perspective" (2010) 34 *South African Journal of Labour Relations* 68.

Lipset SM "The Law and Trade Union Democracy" (1961) 47 *Virginia Law Review* 1.

Lloyd D "Damages for Wrongful Expulsion from a Trade Union" (1956) 19 *The Modern Law Review* 121.

Lloyd D "Notes of Cases – Damages for Wrongful Expulsion From a Trade Union" (1954) 17 *The Modern Law Review* 360.

Lockwood G "An Epitaph to CROTUM and CPAUIA" (2000) 31 *Industrial Relations Journal* 471.

Lockwood G "Trade Union Governance: The Development of British Conservative Thought" (2005) 10 *Journal of Political Ideologies* 355.

Lockwood G "The Administration of Union Business: The Role of the Certification Officer" (2006) 37 *Industrial Relations Journal* 209.

Lund J "Financial Reporting and Disclosure Requirements for Trade Unions: A Comparison of UK and US Public Policy" (2009) 40 *Industrial Relations Journal* 122.

Lund J & J McLuckie "Labor Organization Financial Transparency and Accountability: A Comparative Analysis" (2007) 58 *Labor Law Journal* 251.

Lund J & BJ Roovers "Through the Looking Glass – Does the Labor Department's New Form LM-2 Really Deliver Greater Transparency?" (2008) 33 *Labor Studies Journal* 309.

Lyddon D "The Changing Pattern of UK strikes, 1964-2014" (2015) 37 *Employee Relations* 733.

Lyons DA "Recent Regulation: Dept. of Labor Increases Union Financial Reporting Requirements" (2004) 117 *Harvard Law Review* 1734.

Lynk M "Denning's Revenge: Judicial Formalism and the Application of Procedural Fairness to Internal Union Hearings" (1997) 23 *Queen's Law Journal* 115.

Mackie K "Law Commentary: Three Faces of Democracy and Three Missing Persons: The Trade Union Act 1984" (1984) 15 *Industrial Relations Journal* 83.

Mackie KJ "New Feature — Trends and Developments in Industrial Relations Law. One More Time: How Do We Democratise Organisations?" (1987) 18 *Industrial Relations Journal* 155.

MacMillan JK "Employment Tribunals: Philosophies and Practicalities" (1999) 28 *Industrial Law Journal* 33.

MacShane D "Politics: Adieu to Trade Unions?" (1999) 41 *Critical Quarterly* 165.

Macun I "Does size matter? The Labour Relations Act, Majoritarianism and Union Structure" (1997) 1 *Law, Democracy & Development* 69.

Macy JE "Rights of Collective Action by Employees as Declared in § 7 of National Labor Relations Act (29 USCA § 157)" (2019) 6 *American Law Reports* 416.

Magnani E & D Prentice "Did Lower Unionization in the United States Result in More Flexible Industries?" (2010) 63 *Industrial & Labor Relations Review* 662.

Magrath CP "Democracy in Overalls: The Futile Quest for Union Democracy" (1959) 12 *Industrial & Labor Relations Review* 503.

Malin MH "The Supreme Court and the Duty of Fair Representation" (1992) 27 *Harvard Civil Rights-Civil Liberties Law Review* 127.

Mangan D "Employment Tribunal Reforms to Boost the Economy" (2013) 42 *Industrial Law Journal* 409.

Manley JF "Marx in America: The New Deal" (2003) 67 *Science & Society* 9.

Maree J "Rebels with Causes: White Officials in Black Trade Unions in South Africa, 1973-94: A Response to Sakhela Buhlungu" (2006) 54 *Current Sociology* 453.

Maree J "Similarities and Differences Between Rebels With and Without a Cause" (2006) 54 *Current Sociology* 473.

Maree J "Trends in the South African Collective Bargaining System in Comparative Perspective" (2011) 35 *South African Journal of Labour Relations* 7.

Marine FJ "The Effects of Organized Crime on Legitimate Businesses" (2006) 13 *Journal of Financial Crime* 214–234.

Marks AP "Fair Representation By a Union: A Federal Right in Need of a Federal Statute of Limitations" (1983) 51 *Fordham Law Review* 896.

Martin R "Union Democracy: An Explanatory Framework" (1968) 2 *Sociology* 205.

Martinez Lucio M "Beyond Consensus: The State and Industrial Relations in the United Kingdom from 1964 to 2014" (2015) 37 *Employee Relations* 692.

Masiya T "Social Movement Trade Unionism: Case of the Congress of South African Trade Unions" (2014) 41 *Politikon* 443.

Mason AT "The British Trade Disputes Act of 1927" (1928) 22 *American Political Science Review* 143.

Masters MF & JT Delaney "Organized Labor's Political Scorecard" (2005) 26 *Journal of Labor Research* 365.

Mathews D "Post-VACA Standards of the Union's Duty of Fair Representation: Consolidating Bargaining Units" (1974) 19 *Villanova Law Review* 885–918.

McCabe DA "The Effects of the Recovery Act upon Labor Organization" (1934) 49 *The Quarterly Journal of Economics* 52.

McClendon JA, HN Wheeler & RD Weikle "The Individual Decision to Unionize" (1998) 23 *Labor Studies Journal* 34.

McDonough JB "Liability of an Unincorporated Labor Union under the Sherman Law" (1924) 10 *Virginia Law Review* 304.

McIlroy J "Ten Years of New Labour: Workplace Learning, Social Partnership and Union Revitalization in Britain" (2008) 46 *British Journal of Industrial Relations* 283.

McIlroy J & A Campbell "Still Setting the Pace? Labour History, Industrial Relations and the History of Post-War Trade Unionism" (1999) 64 *Labour History Review* 179.

McKendrick E "The Rights of Trade Union Members – Part I of the Employment Act 1988" (1988) 17 *Industrial Law Journal* 141.

McKendrick E "Trade Unions and Non-Striking Members" (1986) 6 *Legal Studies* 35.

McLennan K "What Do Unions Do? – A Management Perspective" (2005) 26 *Journal of Labor Research* 597.

McMurry DL "The Legal Ancestry of the Pullman Strike Injunctions" (1960) 14 *Industrial & Labor Relations Review* 235.

Metochi M "The Influence of Leadership and Member Attitudes in Understanding the Nature of Union Participation" (2002) 40 *British Journal of Industrial Relations* 87.

Mikva AJ "The Changing Role of the Wagner Act in the American Labor Movement" (1986) 38 *Stanford Law Review* 1123.

Milkman R "Back to the Future? US Labour in the New Gilded Age" (2013) 51 *British Journal of Industrial Relations* 645.

Miller EB & WS Ryza "Suits By and Against Labor Organizations Under the NLRA" (1955) *University of Illinois Law Forum* 101.

Miller N "An Empirical Study of Forum Choices in Removal Cases Under Diversity and Federal Question Jurisdiction" (1991) 41 *American University Law Review* 369.

Miller P & C Mulvey "What Do Australian Unions Do?" (1993) 69 *Economic Record* 315.

Miller PW "Trade Unions and Job Satisfaction" (1990) 29 *Australian Economic Papers* 226.

Millis HA "The British Trade Disputes and Trade Unions Act, 1927" (1928) 36 *Journal of Political Economy* 305.

Minkin L "The British Labour Party and the Trade Unions: Crisis and Compact" (1974) 28 *Industrial & Labor Relations Review* 7.

Mitchell DJB & CL Erickson "De-Unionization and Macro Performance: What Freeman and Medoff Didn't Do" (2005) 26 *Journal of Labor Research* 183.

Modjeska LM "The Supreme Court and the Duty of Fair Representation" (1991) 7 *Ohio State Journal on Dispute Resolution* 1.

Mohr P "On Inflation" (2008) 76 *South African Journal of Economics* 1.

Moll PG "Black South African Unions: Relative Wage Effects in International Perspective" (1993) 46 *Industrial & Labor Relations Review* 245.

Moll P "Compulsory Centralization of Collective Bargaining in South Africa" (1996) 86 *The American Economic Review* 326.

Moody K "Contextualising Organised Labour in Expansion and Crisis: The Case of the US" (2012) 20 *Historical Materialism* 3.

Moore S "The Relationship Between Legislation and Industrial Practice: A Study of the Outcome of Trade Union Recognition" (2006) 28 *Employee Relations* 363.

Moore S, S Wood & P Davies "Research and Reports. Recognition of Trade Unions – Consultation Over the Access Code and Method of Bargaining" (2000) 29 *Industrial Law Journal* 406.

Morris D "The Commissioner for the Rights of Trade Union Members – A Framework for the Future?" (1993) 22 *Industrial Law Journal* 104.

Morris GS "Britain's New Statutory Procedures: Routes to Resolution or Barriers to Justice?" (2004) 25 *Comparative Labor Law & Policy Journal* 477.

Morris H & P Fosh "Measuring Trade Union Democracy: The Case of the UK Civil and Public Services Association" (2000) 38 *British Journal of Industrial Relations* 95.

Mulvey C "The Impact of Unions: On Economic Welfare: A Short Survey" (1991) 2 *Economic & Labour Relations Review* 45.

Murphy WP "The Duty of Fair Representation under Taft-Hartley" (1965) 30 *Missouri Law Review* 373.

Naar BR "The Exhaustion of Intra-Union Procedures in Duty of Fair Representation Cases" (1979) 32 *Rutgers Law Review* 520.

Nash D "Recent Industrial Relations Developments in the United Kingdom: Continuity and Change under New Labour 1997-2005" (2006) 48 *Journal of Industrial Relations* 401.

Nattrass N "Wage Strategies and Minimum Wages in Decentralized Regions: The Case of the Clothing Industry in Phuthaditjhaba, South Africa" (2000) 24 *International Journal of Urban & Regional Research* 873.

Nelles W "The First American Labor Case" (1931) 41 *The Yale Law Journal* 165.

Nelson MJ "Slowing Union Corruption: Reforming the Landrum-Griffin Act to Better Combat Union Embezzlement" (2000) 8 *George Mason Law Review* 527.

Neufeld MF "Structure and Government of the AFL-CIO" (1956) 9 *Industrial & Labor Relations Review* 371.

Newell D "The Status of British and American Trade Unions as Defendants in Industrial Dispute Litigation" (1983) 32 *International and Comparative Law Quarterly* 380.

Newell D "Trade Union Lay Representatives and Trade Union Rules" (1984) 35 *Northern Ireland Legal Quarterly* 52.

Nicholson N "Mythology, Theory and Research on Union Democracy" (1978) 9 *Industrial Relations Journal* 32.

Nock RS "Trade Unions, Advice and Limitation" (1968) 31 *The Modern Law Review* 456.

Nofer MS "Preemption of State Law Claims after Lingle v. Norge" (1989) 34 *Villanova Law Review* 1035.

Northrup HR "The Dunlop Commission Report: Philosophy and Overview" (1996) 17 *Journal of Labor Research* 1.

Novitz T "A Revised Role for Trade Unions as Designed by New Labour: The Representation Pyramid and 'Partnership'" (2002) 29 *Journal of Law & Society* 487.

Novitz T "Collective Bargaining, Equality and Migration: The Journey to and from Brexit" (2017) 46 Industrial Law Journal 109.

Novitz T "UK Regulation of Strike Ballots and Notices – Moving Beyond 'Democracy'?" (2016) 29 *Australian Journal of Labour Law* 226.

Nowak P "The Past and Future of Trade Unionism" (2015) 37 *Employee Relations* 683.

O'Dair R "Recent Cases – The Law of Industrial Conflict: Trade Union Liability" (1986) 15 *Industrial Law Journal* 271.

O'Higgins P "Trade Disputes Act, 1965" (1966) 24 *The Cambridge Law Journal* 34.

O'Higgins P & M Partington "Industrial Conflict: Judicial Attitudes" (1969) 32 *The Modern Law Review* 53.

O'Meara D "Analysing Afrikaner Nationalism: The 'Christian-National' Assault on White Trade Unionism in South Africa, 1934-1948" (1978) 77 *African Affairs* 45.

O'Regan C "1979-1997: Reflecting on 18 Years of Labour Law in South Africa" (1997) 18 *Industrial Law Journal* 889.

Ocasio KMS & L Gertner "Fighting for the Common Good: How Low-Wage Workers' Identities Are Shaping Labor Law" (2017) 126 *The Yale Law Journal Forum* 503.

Oppenheim AM "Trade-Union Democracy" (1951) 1 *Duke Bar Journal* 243.

Oswalt MM & CFR Marzán "Organizing the State: The 'New Labor Law' Seen from the Bottom-Up" (2018) 39 *Berkeley Journal of Employment & Labor Law* 415.

Parfitt S "A Nexus Between Labour Movement and Labour Movement: The Knights of Labor and the Financial Side of Global Labour History" (2016) 58 *Labor History* 288.

Paret M "Failed Redistribution or Failed Administration? Official Union Narratives of Community Protest in South Africa" (2015) 42 *Politikon* 345.

Parr Jr WH "The Taft-Hartley Law" (1947) 23 *Indiana Law Journal* 12.

Parrish ME "The Great Depression, The New Deal, and the American Legal Order" (1984) 59 *Washington Law Review* 723.

Patmore G & D Coates "Labour Parties and the State in Australia and the UK" (2005) *Labour History* 121.

Perez T "The Fair Labor Standards Act at Seventy-Seven: Still "Far-Reaching, Far-Sighted"" (2015) 30 *ABA Journal of Labor & Employment Law* 299.

Perusek G "The Internal Politics of Trade Unions: The Neglected View of Sidney and Beatrice Webb" (1993) 18 *Labor Studies Journal* 32.

Pfander JE "Federal Jurisdiction over Union Constitutions after *Wooddell*" (1992) 37 *Villanova Law Review* 443.

Phillips JA & C Wetherell "The Great Reform Act of 1832 and the Political Modernization of England" (1995) 100 *American Historical Review* 411.

Pierson FC "The Government of Trade Unions" (1948) 1 *Industrial & Labor Relations Review* 593.

Pillay D "Between Social Movement and Political Unionism: Cosatu and Democratic Politics in South Africa" (2013) 2 *Rethinking Development and Inequality* 10.

Pittard M "Reflections on the Commission's Legacy in Legislated Minimum Standards" (2011) 53 *Journal of Industrial Relations* 698.

Pollert A "The Unorganised Worker: The Decline in Collectivism and New Hurdles to Individual Employment Rights" (2005) 34 *Industrial Law Journal* 217.

Pope JG "How American Workers Lost the Right to Strike, and Other Tales" (2004) 103 *Michigan Law Review* 518.

Pope JG "Labor's Constitution of Freedom" (1997) 106 *The Yale Law Journal* 941.

Poulson BW "Criminal Conspiracy, Injunctions and Damage Suits in Labor Law" (1986) 7 *Journal of Legal History* 212.

Pound R "Equitable Relief Against Defamation and Injuries to Personality" (1915) 29 *Harvard Law Review* 640.

Previant D "Have Titles I-VI of Landrum-Griffin Served the Stated Legislative Purpose?" (1963) 14 *Labor Law Journal* 28.

Pursell DE "South African Labor Policy: "New Deal" for Nonwhites?" (1971) 10 *Industrial Relations: A Journal of Economy & Society* 36.

Quinn T "New Labour and the Trade Unions in Britain" (2010) 20 *Journal of Elections, Public Opinion & Parties* 357.

Rabin RL "Federal Regulation in Historical Perspective" (1986) 38 *Stanford Law Review* 1189.

Raskin AH "AFL-CIO: A Confederation or Federation? Which Road for the Future?" (1963) 350 *ANNALS of American Academy of Political & Social Science* 36.

Raskin AH "Elysium Lost: The Wagner Act at Fifty" (1986) 38 *Stanford Law Review* 945.

Rathbone M "Trade Unions in the USA" (2005) 53 *History Review* 1.

Ratner HA "Analyses of Smedley's Plan for Union Democracy" (1954) 5 *Labor Law Journal* 779.

Raudabaugh JN "Labored Law: Bilateralism or Pluralism, Ossification or Reformation" (2012) 87 *Indiana Law Journal* 105.

Rautenbach IM "The Liability of Organisers for Damage Caused in the Course of Violent Demonstrations as a Limitation of the Right to Freedom of Assembly – SATAWU v Garvas 2012 8 BCLR 840 (CC)" (2013) *Tydskrif vir die Suid Afrikaanse Reg* 151.

Reid J "Dismissal of the Paid Union Official" (1968) 31 *The Modern Law Review* 214.

Render ER "The Thin Line between Union Representation and Inadvertent Criminal Activity" (2014) 4 *American University Labor & Employment Law Forum* 1.

Rideout RW "Responsible Self-Government in British Trade Unions" (1967) 5 *British Journal of Industrial Relations* 74.

Rideout RW "The British Industrial Relations Act" (1972) 1 *Anglo-American Law Review* 42.

Rideout RW "The Content of Trade Union Disciplinary Rules" (1965) 3 *British Journal of Industrial Relations* 153.

Rideout RW "The Implied Requirement of the Exhaustion of Internal Remedies" (1965) 28 *The Modern Law Review* 351.

Rideout RW "The Industrial Relations Act 1971" (1971) 34 *The Modern Law Review* 655.

Roberts WL "Labor Unions, Corporations – The Coronado Case" (1923) 5 *Illinois Law Quarterly* 200.

Robinson JK "Labor Law – Federal Preemption – NLRA Does Not Preempt Court Jurisdiction of Suit against Union for Breach of Its Duty of Fair Representation" (1966) 13 *Wayne Law Review* 602.

Rosen SJ “Fair Representation, Contract Breach and Fiduciary Obligations: Unions, Union Officials and the Worker in Collective Bargaining” (1964) 15 *Hastings Law Journal* 391.

Ross C “New Unions in the UK: The Vanguard or the Rearguard of the Union Movement?” (2013) 44 *Industrial Relations Journal* 78.

Ross P “The Role of Government in Union Growth” (1963) 350 *ANNALS of American Academy of Political & Social Science* 74.

Rothman S “Judicial Interpretation of the Bill of Rights for Union Members” (1961) 45 *Minnesota Law Review* 995.

Rothman S “Legislative History of the Bill of Rights for Union Members” (1960) 45 *Minnesota Law Review* 199.

Rowley CK “Toward a Political Economy of British Labor Law” (1984) 51 *University of Chicago Law Review* 1135.

Rubinstein MH “Duty of Fair Representation Jurisprudential Reform: The Need to Adjudicate Disputes in Internal Union Review Tribunals and the Forgotten Remedy of Re-Arbitration” (2009) 42 *University of Michigan Journal of Law Reform* 517.

Rycroft A “Being Held in Contempt for Non-compliance with a Court Interdict: In2Food (Pty) Ltd v Food & Allied Workers Union & Others (2013) 34 ILJ 2589 (LC)” (2013) 34 *Industrial Law Journal* 2499.

Rycroft A “Strikes and the Amendments to the LRA” (2015) 36 *Industrial Law Journal* 1.

Rycroft A “The Legal Regulation of Strike Misconduct: The Kapesi Decisions” (2013) 34 *Industrial Law Journal* 859.

Sanchez VA “A New Look at ADR in New Deal Labor Law Enforcement: The Emergence of a Dispute Processing Continuum under the Wagner Act” (2005) 20 *Ohio State Journal on Dispute Resolution* 621.

Sachs B “Revitalizing Labor Law” (2010) 31 *Berkeley Journal of Employment & Labor Law* 333.

Sachs BI “Despite Preemption: Making Labor Law in Cities and States” (2010) 124 *Harvard Law Review* 1153.

Saley S & P Benjamin “The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa” (1992) 13 *Industrial Law Journal* 731.

Sanders A “Part One of the Employment Act 2008: ‘Better’ Dispute Resolution?” (2009) 38 *Industrial Law Journal* 30.

Santos GP “Title I and Union Democracy” (1983) 12 *Review of Law & Social Change* 449.

Saposs DJ “The American Labor Movement Since the War” (1935) 49 *The Quarterly Journal of Economics* 236.

Satgar V “The LRA and Work-place Forums: Legislative Provisions, Origins, and Transformative Possibilities” (1998) 2 *Law, Democracy & Development* 43.

Saville J “The Trade Disputes Act of 1906” (1996) *Historical Studies in Industrial Relations* 11.

Schaeffer M "The History of Industrial Legislation as Applied in South Africa with Special Reference to Black Workers" (1977) *Tydskrif vir die Suid Afrikaanse Reg* 49.

Schmall LA "Workplace Safety and the Union's Duty After Lueck and Hechler" (1990) 38 *University of Kansas Law Review* 561.

Schwartz SJ "Different Views of the Duty of Fair Representation" (1983) 34 *Labor Law Journal* 415.

Schultz TP & G Mwabu "Labor Unions and the Distribution of Wages and Employment in South Africa" (1998) 51 *Industrial & Labor Relations Review* 680.

Scrutton TE "The Work of the Commercial Courts" (1921) 1 *The Cambridge Law Journal* 6.

Seidman J "Efforts toward Merger: 1935-1955" (1955) 9 *Industrial & Labor Relations Review* 353.

Seidman J "Democracy in Labor Unions" (1953) 61 *Journal of Political Economy* 221.

Seidman J "The Yellow Dog Contract" (1932) 46 *The Quarterly Journal of Economics* 348.

Seligson H "The Paradox and Challenge of Unionism Today" (1959) 10 *Labor Law Journal* 180.

Selwyn N "Collective Agreements and the Law" (1969) 32 *The Modern Law Review* 377.

Shand J "Making the Act Work" (1972) 30 *The Cambridge Law Journal* 228.

Sheppe LE "The Duty of Fair Representation and Union Abuse of the Hiring Hall System: Breininger v. Sheet Metal Workers International Association Local Union No. 6" (1990) 32 *Boston College Law Review* 186.

Short G & H Mastrantonis "Trade Union Commitment and Participation: A Theoretical Review" (1994) 14 *Industrial Relations Journal* 4.

Silverstein E "If You Can't Beat'em, Learn to Lose, but Never Join Them" (1998) 30 *Connecticut Law Review* 1371.

Simpson B "A Not So Golden Formula: In Contemplation or Furtherance of a Trade Dispute after 1982" (1983) 46 *The Modern Law Review* 463.

Simpson B "Economic Tort Liability in Labour Disputes: The Potential Impact of the House of Lords' Decision in OBG Ltd v Allan" (2007) 36 *Industrial Law Journal* 468.

Simpson B "Individualism Versus Collectivism: An Evaluation of Section 14 of the Trade Union Reform and Employment Rights Act 1993" (1993) 22 *Industrial Law Journal* 181.

Simpson B "Judicial Control of the CAC" (2007) 36 *Industrial Law Journal* 287.

Simpson B "The Employment Act 1990 in Context" (1991) 54 *The Modern Law Review* 418.

Simpson B "The Employment Act 2008's Amendments to the National Minimum Wage Legislation" (2009) 38 *Industrial Law Journal* 57.

Simpson B "The Labour Injunction and Industrial Action Ballots" (2013) 42 *Industrial Law Journal* 54.

Simpson B "The TUC's Bridlington Principles and the Law" (1983) 46 *The Modern Law Review* 635.

Simpson B "Trade Disputes and Industrial Action Ballots in the Twenty-First Century" (2002) 31 *Industrial Law Journal* 270.

Simpson B "Trade Disputes and the Labour Injunction After the Employment Acts of 1980 and 1982" (1984) 47 *The Modern Law Review* 577.

Simpson B "Trade Union Recognition and the Law, a New Approach — Parts I and II of Schedule A1 to the Trade Union and Labour Relations (Consolidation) Act 1992" (2000) 29 *Industrial Law Journal* 193.

Simpson RC "In Place of Strife: A Policy for Industrial Relations" (1969) 32 *The Modern Law Review* 420.

Simpson RC "'Trade Dispute' and 'Industrial Dispute' in British Labour Law" (1977) 40 *The Modern Law Review* 16.

Sinwell L "'AMCU by Day, Workers' Committee by Night': Insurgent Trade Unionism at Anglo Platinum (Amplats) Mine, 2012–2014" (2016) 42 *Review of African Political Economy* 591.

Slater J "The Rise of Master-Servant and the Fall of Master Narrative: A Review of Labor Law in America" (1994) 15 *Berkeley Journal of Employment & Labor Law* 141.

Sleigh SR "What Do Unions Do? – A Unionists Perspective" (2005) 26 *Journal of Labor Research* 623.

Smedley RW "A Plan for Union Democracy" (1954) 5 *Labor Law Journal* 337.

Smith P "New Labour and the Commonsense of Neoliberalism: Trade Unionism, Collective Bargaining and Workers' Rights" (2009) 40 *Industrial Relations Journal* 337.

Smith P & G Morton "New Labour's Reform of Britain's Employment Law: The Devil is Not Only in the Detail But in the Values and Policy Too" (2001) 39 *British Journal of Industrial Relations* 119.

Smith P & G Morton "Nine Years of New Labour: Neoliberalism and Workers' Rights" (2006) 44 *British Journal of Industrial Relations* 401.

Smith RA "The Labor-Management Reporting and Disclosure Act of 1959" (1960) 46 *Virginia Law Review* 195.

Smith RA & WJ DeLancey "The State Legislatures and Unionism: A Survey of State Legislation Relating to Problems of Unionization and Collective Bargaining" (1940) 38 *Michigan Law Review* 987.

Snyman S "The Principle of Majoritarianism in the Case of Organisational Rights for Trade Unions — Is it Necessary for Stability in the Workplace or Simply a Recipe for Discord?" (2017) 37 *Industrial Law Journal* 865.

Sovern MI "Section 301 and the Primary Jurisdiction of the NLRB" (1963) 76 *Harvard Law Review* 529.

St Antoine TJ "Labor and Employment Law in Two Transitional Decades" (2004) 42 *Brandeis Law Journal* 495.

St Antoine TJ "The Regulation of Labor Unions" (1982) 30 *American Journal of Comparative Law* 299.

Stafford WW "Comments – Disputes Within Trade Unions" (1936) 45 *The Yale Law Journal* 1248.

Steadman F "Workplace Forums in South Africa: A Critical Analysis" (2004) 25 *Industrial Law Journal* 1170.

Steelman JR "The Work of the United States Conciliation Service in Wartime Labor Disputes" (1942) 9 *Law & Contemporary Problems* 462.

Steenkamp A, S Stelzner & N Badenhorst "The Right to Bargain Collectively" (2004) 25 *Industrial Law Journal* 943.

Stein E "Ethical Aspects of Union Policy and Conduct" (1966) 363 *ANNALS of American Academy of Political & Social Science* 117.

Stein E "The Dilemma of Union Democracy" (1963) 350 *ANNALS of American Academy of Political & Social Science* 46.

Stepan-Norris J "The Making of Union Democracy" (1997) 76 *Social Forces* 475.

Stephens EC "The Union's Duty of Fair Representation: Current Examination and Interpretation of Standards" (1993) 44 *Labor Law Journal* 685.

Stockham JR "The Hutcheson Case" (1940) 26 *Washington University Law Quarterly* 375.

Stuart M, L Martínez & A Robinson "'Soft Regulation' and the Modernisation of Employment Relations under the British Labour Government (1997–2010): Partnership, Workplace Facilitation and Trade Union Change" (2011) 22 *International Journal of Human Resource Management* 3794.

Stuart M, MM Lucio & A Charlwood "Britain's Trade Union Modernisation: State Policy & Union Projects" (2010) 45 *The Indian Journal of Industrial Relations* 635.

Sturmthal AF "Unions and Industrial Democracy" (1977) 431 *ANNALS of American Academy of Political & Social Science* 12.

Sugarman RA & LB Hunt "The "Arbitrary" Standard: The Duty of Fair Representation in Collective-Bargaining Negotiations" (1992) 22 *Stetson Law Review* 133.

Summers C "Disciplinary Powers of Unions" (1950) 3 *Industrial & Labor Relations Review* 483.

Summers CW "Admission Policies of Labor Unions" (1946) 61 *The Quarterly Journal of Economics* 66.

Summers CW "American Legislation for Union Democracy" (1962) 25 *The Modern Law Review* 273.

Summers CW "Exclusive Representation: A Comparative Inquiry Into a Unique American Principle" (1998) 20 *Comparative Labor Law & Policy Journal* 47.

Summers CW "From Industrial Democracy to Union Democracy" (2000) 21 *Journal of Labor Research* 3.

Summers CW "Industrial Democracy: America's Unfulfilled Promise" (1979) 28 *Cleveland State Law Review* 29.

Summers CW "Judicial Settlement of Internal Union Disputes" (1957) 7 *Buffalo Law Review* 405.

Summers CW “Legal Limitations on Union Discipline” (1951) 64 *Harvard Law Review* 1049.

Summers CW “Public Interest in Union Democracy” (1958) 53 *Northwestern University Law Review* 610.

Summers CW “The Individual Employee’s Rights Under the Collective Agreement: What Constitutes Fair Representation?” (1977) 126 *University of Pennsylvania Law Review* 251.

Summers CW “The Law of Union Discipline: What the Courts Do in Fact” (1960) 70 *The Yale Law Journal* 175.

Summers CW “The Usefulness of Law in Achieving Union Democracy” (1958) 48 *American Economic Review* 44.

Summers CW “Union Powers and Workers’ Rights” (1951) 49 *Michigan Law Review* 805.

Swartz O “Defending Labor in Commonwealth v. Pullis: Contemporary Implications for Rethinking Community” (2004) 8 *Holy Cross Journal of Law & Public Policy* 79.

Taft P “Democracy in Trade Unions” (1946) 36 *American Economic Review* 359.

Taft P “Internal Affairs of Unions and the Taft-Hartley Act” (1958) 11 *Industrial & Labor Relations Review* 352.

Taft P “Internal Characteristics of American Unionism” (1951) 274 *ANNALS of American Academy of Political & Social Science* 94.

Taft P “Judicial Procedure in Labor Unions” (1945) 59 *The Quarterly Journal of Economics* 370.

Taft P “Opposition to union officers in elections” (1944) 58 *The Quarterly Journal of Economics* 246.

Taft P “The Impact of Landrum-Griffin on Union Government” (1961) 333 *ANNALS of American Academy of Political & Social Science* 130.

Taft RA “The Taft-Hartley Act: A Favorable View” (1951) 274 *ANNALS of American Academy of Political & Social Science* 195.

Tagliacozzo DL “Trade-Union Government, Its Nature and Its Problems – A Bibliographical Review, 1945-55” (1956) 61 *American Journal of Sociology* 554.

Taitz J “The Audi Alteram Partem Rule & the Obligation to Exhaust Domestic Remedies” (1979) 96 *The South African Law Journal* 552.

Tangri R & R Southall “The Politics of Black Economic Empowerment in South Africa” (2008) 34 *Journal of Southern African Studies* 699.

Tannenbaum AS “Control Structure and Union Functions” (1956) 61 *American Journal of Sociology* 536.

Teller L “Government Seizure in Labor Disputes” (1947) 60 *Harvard Law Review* 1017.

Turnbull P “What Do Unions Do Now?” (2003) 24 *Journal of Labor Research* 491.

Tobias PH “Individual Employee Suits for Breach of the Labor Agreement and the Union’s Duty of Fair Representation” (1974) 5 *University of Toledo Law Review* 514.

Tomlins CL "Criminal Conspiracy and Early Labor Combinations: Massachusetts, 1824–1840" (1987) 28 *Labor History* 370.

Tomlins CL "The New Deal, Collective Bargaining, and the Triumph of Industrial Pluralism" (1985) 39 *Industrial & Labor Relations Review* 19.

Toner GA "New Ways of Thinking about Old Crimes: Prosecuting Corruption and Organized Criminal Groups Engaged in Labor-Management Racketeering" (2009) 16 *Journal of Financial Crime* 41.

Thomas TC "Trade Unions and Their Members" (1956) 14 *The Cambridge Law Journal* 67.

Thompson C "Labour-Management Relations" (2001) 10 *Current Labour Law* 29.

Thompson C "The Politics of the Judiciary" (1993) 14 *Industrial Law Journal* 315.

Thompson C "Twenty-Five Years after Wiehahn – A Story of the Unexpected and the Not Quite Intended" (2004) 25 *Industrial Law Journal* iv.

Twomey DP "The Employee Free Choice Act: Congress, Where Do We Go From Here?" (2009) 60 *Labor Law Journal* 71.

Tyler R "'Victims of our History'? Barbara Castle and In Place of Strife" (2006) 20 *Contemporary British History* 461.

Underwood JM "The Late, Great Diversity Jurisdiction" (2006) 57 *Case Western Reserve Law Review* 179.

Undy R "New Labour and New Unionism, 1997-2001: But is it the Same Old Story?" (2002) 24 *Employee Relations* 638.

Urwin H "Democracy and Trade Unions" (1983) 14 *Industrial Relations Journal* 21.

Van Wezel Stone K "The Post-War Paradigm in American Labor Law" (1981) 90 *The Yale Law Journal* 1511.

Varga J "Dispossession is Nine-tenths of the Law: Right-to-work and the Making of the American Precariat" (2014) 39 *Labor Studies Journal* 25.

Velton WL "Union's Breach of Duty of Fair Representation" (2005) 15 *American Jurisprudence Proof of Facts* 65.

Vettori S "Judicial Protection of Employee Interests in England, Australia and the USA" (2006) 69 *Journal of Contemporary Roman-Dutch Law* 79.

Visser W "Exporting Trade Unionism and Labour Politics: The British Influence on the Early South African Labour Movement" (2005) 49 *New Contree* 145.

VLK "Corporations: Suability of a Labor Union as a Legal Entity: Liability of a Labor Union for Unauthorized Acts of Its Members" (1922) 10 *California Law Review* 506.

Vose WJ "Wiehahn and Riekert Revisited: A Review of Prevailing Black Labour Conditions in South Africa" (1985) 124 *International Labour Review* 447.

Voss K "Democratic Dilemmas: Union Democracy and Union Renewal" (2010) 16 *Transfer: European Review of Labour and Research* 369.

Wandersee WD "'I'd Rather Pass a Law than Organize a Union': Frances Perkins and the Reformist Approach to Organized Labor" (1993) 34 *Labor History* 5.

Watkins MW "The Sherman Act: Its Design and Its Effects" (1928) 43 *The Quarterly Journal of Economics* 1.

Warner K "The Decline of Unionization in the United States: Some Lessons from Canada" (2013) 38 *Labor Studies Journal* 110.

Webb S "What Happened in 1931: A Record" (1932) 3 *Political Quarterly* 1.

Webster E "The Alliance under Stress: Governing in a Globalizing World" (2001) 8 *Democratization* 255.

Webster E & S Buhlungu "Between Marginalisation & Revitalisation? The State of Trade Unionism in South Africa" (2004) 31 *Review of African Political Economy* 229.

Wedderburn B "Recent Cases – Commentary: Underground Labour Injunctions" (2001) 30 *Industrial Law Journal* 206.

Wedderburn KW "Inducing Breach of Contract and Unlawful Interference with Trade" (1968) 31 *The Modern Law Review* 440.

Wedderburn KW "Intimidation and the Right to Strike" (1964) 27 *The Modern Law Review* 257.

Wedderburn KW "Labour Law and Labour Relations in Britain" (1972) 10 *British Journal of Industrial Relations* 270.

Wedderburn KW "Notes of Cases: Stratford and Son Ltd. v. Lindley" (1965) 28 *The Modern Law Review* 205.

Wedderburn KW "Report of the Royal Commission on Trade Unions and Employers' Associations" (1968) 31 *The Modern Law Review* 674.

Wedderburn KW "The Bonsor Affair: A Post-Script" (1957) 20 *The Modern Law Review* 105.

Wedderburn KW "The Right to Threaten Strikes" (1961) 24 *The Modern Law Review* 572.

Wedderburn KW "The Right to Threaten Strikes – II" (1962) 25 *The Modern Law Review* 513.

Wedderburn KW "Trade Disputes Act 1965 Redundancy Payments Act 1965" (1966) 29 *The Modern Law Review* 53.

Wedderburn L "Collective Bargaining or Legal Enactment: The 1999 Act and Union Recognition" (2000) 29 *Industrial Law Journal* 1.

Wedderburn L "The Social Charter in Britain: Labour Law and Labour Courts?" (1991) 54 *The Modern Law Review* 1.

Weir JA "Chaos or Cosmos? Rookes, Stratford and the Economic Torts" (1964) 22 *The Cambridge Law Journal* 225.

Wellington HH "Union Democracy and Fair Representation: Federal Responsibility in a Federal System" (1958) 67 *The Yale Law Journal* 1327.

White DJ "Democracy in Labor Unions – A Review Article" (1964) 22 *Review of Social Economy* 111.

Wickham-Jones M "From Reformism to Resignation and Remedialism? Labour's Trajectory Through British Politics" (2003) 15 *Journal of Policy History* 26.

Wiehahn NE *Die Volledige Wiehahn-Verslag: Dele 1-6 en die Witskrif op Elke Deel* (1982) Lex Patria Uitgewers, Johannesburg.

Williams FI & RC Hoell "Understanding and Quantifying the Impact of Freeman and Medoff's 'What Unions Do?' a Quarter of a Century Later" (2011) 9 *Journal of Business & Economics Research* 13.

Wilson PB "Conquering the Enemy Within: The Case for Reform of the Landrum-Griffin Act" (2005) 26 *Journal of Labor Research* 135.

Winter RK "Collective Bargaining and Competition: The Application of Antitrust Standards to Union Activities" (1963) 73 *The Yale Law Journal* 14.

Winter RK "Labor Injunctions and Judge-Made Labor Law: The Contemporary Role of Norris-LaGuardia" (1960) 70 *The Yale Law Journal* 70.

Withers LA "Labour Law – The Duty of Fair Representation" (1967) 7 *Washburn Law Journal* 78–96.

Witmer TR "Trade Union Liability: The Problem of the Unincorporated Corporation" (1941) 51 *The Yale Law Journal* 40.

Witte EE "Labor's Resort to Injunctions" (1930) 39 *The Yale Law Journal* 374.

Witte EE "Role of the Unions in Contemporary Society" (1950) 4 *Industrial & Labor Relations Review* 3.

Wollett DH "Collective Bargaining, Public Policy, and the National Labor Relations Act of 1947" (1948) 23 *Washington Law Review & State Bar Journal* 205.

Wollett DH "Addendum: Taft-Hartley and State Power to Regulate Labor Relations" (1956) 31 *Washington Law Review & State Bar Journal* 39.

Wood G "Solidarity, Representativity and Accountability: The Origins, State and Implications of Shopfloor Democracy within the Congress of South African Trade Unions" (2003) 45 *Journal of Industrial Relations* 326.

Wood G "The Politics of Trade Unions in Transition: The Case of the Congress of South African Trade Unions" (2002) 8 *Contemporary Politics* 129.

Wood G & M Harcourt "The Rise of South African Trade Unions" (1998) 23 *Labor Studies Journal* 74.

Wood G & P Mahabir "South Africa's Workplace Forum system: A Stillborn Experiment in the Democratisation of Work" (2001) 32 *Industrial Relations Journal* 230.

Wright CD "An Historical Sketch of the Knights of Labor" (1887) 1 *The Quarterly Journal of Economics* 137.

Wrigley C "Trade Unions and the 1964 General Election" (2007) 21 *Contemporary British History* 325.

Wynn M "Regulating Rogues? Employment Agency Enforcement and Sections 15–18 of the Employment Act 2008" (2009) 38 *Industrial Law Journal* 64.

Yablonski JA "Refusal to Process a Grievance, the NLRB, and the Duty of Fair Representation: A Plea for Pre-Emption" (1965) 26 *University of Pittsburgh Law Review* 593.

Zimarowski JB "The Limits upon a Labor Union's Duty to Control Wildcat Strikes" (1982) 84 *West Virginia Law Review* 933–959.

OFFICIAL PUBLICATIONS AND REPORTS:

Department of Labour *Commission for Conciliation, Mediation & Arbitration Annual Report 2018/2019* (2019).

Department of Labour [Molapo S (ed)] *Annual Labour Market Bulletin Report 2015/16* (2017).

Governing Body, International Labour Organization [Director-General ILO] *Prelude to Change: Industrial Relations Reform in South Africa – Report of the Fact-Finding and Conciliation Commission on Freedom of Association Concerning the Republic of South Africa (Report of the Director-General – First Supplementary Report)* (1992).

Governing Body, International Labour Organization [Director-General ILO] *Report of the Director-General – Fourth Supplementary Report: Complaint Submitted by the Congress of South African Trade Unions (COSATU) Against the Government of the Republic of South Africa* (1988).

National Labour & Economic Development Institute (NALEDI) [Denga S] *Building Effective Union Service Delivery* (2003).

National Labour & Economic Development Institute (NALEDI) *Findings of the COSATU Workers' Survey, 2012* (2013).

National Labour & Economic Development Institute (NALEDI) *The State of COSATU: Phase One Report* (2006).

National Labour & Economic Development Institute (NALEDI) *The Workers' Survey for COSATU* (2006).

Office for National Statistics (ONS) [Clegg R] *Labour Disputes in the UK: 2016* (2017).

RSA "Declaration of the Labour Relations Indaba" (2014) *NEDLAC* <http://nationalminimumwage.co.za/wp-content/uploads/2015/08/0012indaba_declaration.pdf> (accessed 18-06-2018).

RSA "Declaration on Wage Inequality and Labour Market Stability" (04-11-2014) <https://www.parliament.gov.za/storage/app/media/BusinessPubs/National_Minimum_Wage_Report/Declaration_on_wage_inequality_and_labour_market_stability-NMW_report.pdf> (accessed 10-07-2018).

RSA "Appointment of Mineworkers' Union Commission of Enquiry" GN 904 UG 4578 (CLXIV) (13 April 1951).

RSA Ministerial Legal Task Team "Explanatory Memorandum" (1995) 16 *Industrial Law Journal* 278.

RSA "Report of the Economic Commission" UG 37/1914.

RSA "Report of the Industrial Legislation Commission" UG 37/1935.

RSA "Report of the Industrial Legislation Commission of Enquiry" GG 62/1951.

RSA "Report of the Mine Workers' Union Commission of Enquiry" UG 36/1946.

RSA "Report of the Mine Workers' Union Commission of Enquiry" UG 52/1951.

RSA "Report of the Wiehahn Commission of Enquiry into Labour Legislation" RP 47/1979.

South African Institute of Race Relations [Phungo R & T Dimant] *2017 South African Survey – Industrial Relations* (2017).

South African Institute of Race Relations [Sethlatswe B] *2013 South African Survey – Industrial Relations* (2013).

Statistics South Africa *Census 2011 Metadata Report* (2012).

The Congress of South African Trade Unions (COSATU) *Organisational Report to the 12th National Congress 23 to 26 November 2015* (2015).

UK *Democracy in Trade Unions* Cmnd. 8778 (1983).

UK *In Place of Strife: A Policy for Industrial Relations* Cmnd. 3888 (1969).

UK *Royal Commission Appointed to Inquire into the Working of the Master and Servant Act, 1867, and the Criminal Law Amendment Act, 34 & 35 Vict. Cap. 32, and for other purposes* Cmnd. 1094 (1874).

UK *Royal Commission on Trade Disputes and Trade Combinations* Cmnd. 2825 (1906).

UK *Royal Commission on Trade Unions and Employers Organisations* Cmnd. 3628 (1968).

UK *The Eleventh & Final Report of the Royal Commissioners Appointed to Inquire into the Organisation and Rules of Trade Unions and Other Associations* Cmnd. 4123 (1869).

UK *Trade Unions and Their Members* Cmnd. 95 (1987).

UK *Trade Union Immunities* Cmnd. 8218 (1981).

USA *Commission on the Future of Worker-Management Relations "Executive Summary of the Fact Finding Report of the Commission on the Future of Worker-Management Relations* (1994) *Cornell University, School of Industrial and Labor Relations* <http://digitalcommons.ilr.cornell.edu/ key_workplace/416/> (accessed 31-10-2018).

USA *Commission on the Future of Worker-Management Relations "The Dunlop Commission on the Future of Worker-Management Relations: Final Report* (1994) *Cornell University, School of Industrial and Labor Relations* <http://digitalcommons.ilr.cornell.edu/key_workplace/2> (accessed 31-10-2018).

USA *Final Report of the United States Commission on Industrial Relations* Sen. Doc. No. 380, 57th Cong. 1st sess. (1902).

USA *Final Report of the United States Commission on Industrial Relations* Sen. Doc. No. 415, 64th Cong., 1st Sess. 62 (1916).

LEGISLATION AND DRAFT LEGISLATION:

South Africa:

Basic Conditions of Employment Act 75 of 1997.

Basic Conditions of Employment Amendment Act 11 of 2002.

Basic Conditions of Employment Amendment Act 20 of 2013.

Basic Conditions of Employment Amendment Act 7 of 2018.

Black Labour Relations Regulation Amendment Act 70 of 1973.

Black Labour Relations Regulation Amendment Act 84 of 1977.

Black Labour (Settlement of Disputes) Amendment Act 59 of 1955.

Code of Good Practice on Picketing GN R765 GG 18887 (15 May 1998).

Code of Good Practice on Picketing, Collective Bargaining and Strikes GN R1396 GG 42121 (19 December 2018).

Code of Practice on the Handling of Sexual Harassment Cases in the Workplace GN R1367 GG 19049 (17 July 1998).

Code of Practice on the Handling of Sexual Harassment Cases in the Workplace GN R1357 GG 27865 (04 August 2005).

Commencement of the Labour Relations Amendment Act, 2018 GN R1377 GG 42103 (12 December 2018).

Constitution of the Republic of South Africa, 1996.

Draft Negotiating Document in the Form of a Labour Relations Bill GN 97 GG 16259 (10 February 1995).

Employment Equity Act 55 of 1998.

Factories, Machinery and Building Works Act 22 of 1941.

Financial Institutions (Protection of Funds) Act 28 of 2001.

Guidelines issued in terms of section 95(8) of the Labour Relations Act, No. 66 of 1995 GN R 1395 GG 42121 (19 December 2018).

Industrial Conciliation Act 11 of 1924.

Industrial Conciliation Amendment Act 24 of 1930.

Industrial Conciliation Act 36 of 1937.

Industrial Conciliation Amendment Act 41 of 1959.

Industrial Conciliation Amendment Act 43 of 1966.

Industrial Conciliation Amendment Act 94 of 1979.

Industrial Disputes Prevention Act 20 of 1909.

Interim Constitution Act 200 of 1993.

Labour Laws Amendment Act 10 of 2018.

Labour Relations Act 28 of 1956.

Labour Relations Act 66 of 1995.

Labour Relations Act, 1995 Notice of Intention to Cancel the Registration of a Trade Union GN R1168 GG 42700 (12 September 2019).

Labour Relations Act, 1995 Repeal of Code of Good Practice on Picketing GN R279 GG 42260 (01 March 2019).

Labour Relations Amendment Act, 2018 Guidelines issued in terms of Section 95(9) GN R1397 GG 42121 (19 December 2018).

Labour Relations Amendment Act 57 of 1981.

Labour Relations Amendment Act 51 of 1982.

Labour Relations Amendment Act 2 of 1983.

Labour Relations Amendment Act 81 of 1984.

Labour Relations Amendment Act 83 of 1988.

Labour Relations Amendment Act 9 of 1991.

Labour Relations Amendment Act 12 of 2002.

Labour Relations Amendment Act 6 of 2014.

Labour Relations Amendment Act 8 of 2018.

Labour Relations Amendment Bill of 2014 (PMB2–2014) GN R973 GG 38180 (05 November 2014).

List of Private Agencies that have been Accredited by the CCMA (2014) GN 971 GG 38178 (5 May 2014).

Master and Servants Law 13 of 1880 (Transvaal).

Memorandum on the Objects of the Labour Relations Amendment Bill, 2017 (GN R1273 GG 41257 (17 November 2017).

National Minimum Wage Act 9 of 2018.

Native Building Workers' Act 27 of 1951.

Native Labour Regulation Act 15 of 1911.

Native Labour (Settlement of Disputes) Act 48 of 1953.

Native Service Levy Act 64 of 1952.

Native (Abolition of Passes and Co-ordination of Documents) Act 67 of 1952.

Native (Urban Areas) Consolidation Act 25 of 1945.

Riotous Assemblies and Criminal Law Amendment Act 27 of 1914.

Riotous Assemblies Amendment Act 19 of 1930.

Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration GN R223 GG 38572 (17 March 2015).

Second Black Laws Amendment Act 102 of 1978.

Shops and Offices Act 41 of 1939.

Skills Development Act 97 of 1998.

Skills Development Amendment Act 31 of 2003.

Suppression of Communism Act 44 of 1950.

Unemployment of Insurance Act 63 of 2001.

Wage Act 44 of 1937.

Workmen's Compensation Act 25 of 1914.

United Kingdom:

Combination Act of 1799 (39 Geo. III c 81).

Combination Act of 1800 (39 & 40 Geo. III c 106).

Combination Acts Repeal Act 1824 (5 Geo. IV c 95).

Combination of Workmen Act 1825 (6 Geo. IV c 129).

Combination of Workmen Act 1859 (22 Vict. c 34).

Companies (Cross-Border Mergers) Regulations 2007 (No. 2974).

Conspiracy and Protection of Property Act 1875 (38 & 39 Vict. c 86).

Criminal Law Amendment Act 1871 (34 & 35 Vict. c 32).

Disability Discrimination Act 1995 (c 50).

Employment Act 1980 (c 42).

Employment Act 1982 (c 46).

Employment Act 1988 (c 19).

Employment Act 1989 (c 38).

Employment Act 1990 (c 38).

Employment Act 2002 (c 22).

Employment Act 2002 (Dispute Resolution) Regulations 2004 (No. 752).

Employment Act 2008 (c 24).

Employment Protection Act 1975 (c 71).

Employment Protection (Consolidation) Act 1978 (c 44).

Employment Relations Act of 1999 (c 26).

Employment Relations Act 2004 (c 24).

Employment Rights Act 1996 (c 18).

Employment Rights (Dispute Resolution) Act 1998 (c 8).

Employment Tribunals Act 1996 (c 17).

Employment Tribunals Act 1996 (Tribunal Composition) Order 2012 (No. 988).

Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 (No. 1623).

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2004 (No. 1861).

Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 (No. 1237).

Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 (No. 254).

Enterprise and Regulatory Reform Act 2013 (c 24).

Equal Pay Act 1970 (c 41).

Equality Act 2006 (c 3).

Equality Act 2010 (c 15).

Friendly Societies Act of 1855 (18 & 19 Vict. c 63).

Industrial Relations Act of 1971 (c 72).

Industrial Training Act 1964 (c 16).

Information and Consultation of Employees Regulations 2004 (No. 3426).

Limitation Act 1980 (c 58).

Master and Servant Act 1823 (4 Geo. IV c 34).

National Minimum Wage Act 1998 (c 39).

Race Relations Act 1976 (c 74).

Representation of the People Act 1832 (2 & 3 Will. IV c 45).

Representation of the People Act 1867 (30 & 31 Vict. c 102).

Representation of the People Act 1884 (48 & 49 Vict. c 3).

Sex Discrimination Act 1975 (c 65).

Trade Disputes Act 1906 (6 Edw. 7 c 47).

Trade Disputes Act 1965 (c 48).

Trade Disputes and Trade Union Act 1927 (17 & 18 Geo V c 22).

Trade Disputes and Trade Union Act 1946 (9 & 10 Geo. VI c 52).

Trade Union Act 1871 (34 & 35 Vict. c 31).

Trade Union Act 1913 (2 & 3 Geo V c 30).

Trade Union Act 1984 (c 49).

Trade Union Act 2016 (c 15).

Trade Union and Labour Relations Act 1974 (c 52).

Trade Union and Labour Relations (Amendment) Act 1976 (c 7).

Trade Union and Labour Relations (Consolidation) Act 1992 (c 52).

Trade Union Ballots and Elections (Independent Scrutineer Qualifications) Order 1993 (Amendment) Order 2002 (No. 2267).

Trade Unions Funds Protection Act of 1869 (32 & 33 Vict. c 61).

Trade Union Reform and Employment Rights Act 1993 (c 19).

Transnational Information and Consultation of Employees Regulations 1999 (No. 3323).

Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014 (c 4).

Tribunals, Courts and Enforcement Act 2007 (c 15).

Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 (No. 989).

Wages Act 1986 (c 48).

United States of America:

Act of March 3 Ch. 137, 18 Stat. 470 (1875), (28 U.S.C. §§ 1330 et seq.) (2017).

Administrative Procedure Act Pub L 79-404, 60 Stat. 237 (1946), (5 U.S.C. §§ 500 et seq.) (2017).

Cesar Chavez Workplace Fairness bill H.R. 5 (S. 55), 102nd Cong. (1992).

Civil Rights Act of 1964 (Pub L 88-235, 78 Stat. 241 (1964).

Clayton Antitrust Act of 1914 Ch. 323, 38 Stat. 730 (1914), (15 U.S.C. §§ 12 et seq.) (2017).

Clean Air Act of 1963 [Pub L 88-206, 77 Stat. 392 (1963), (42 U.S.C. § 7401 et seq.) (2017).

Employee Free Choice Act of 2007, s 1041, 110th Cong. (2007).

Employee Free Choice Act of 2009, s 560 111th Cong. (2009).

Employee Retirement and Income Security Act of 1974 (Pub L 93-406, 88 Stat. 829 (1974), (29 U.S.C. §§ 1001 et seq.) (2017).

Erdman Act of 1898 [Ch. 370, § 10, 30 Stat. 434 (1898).

Fair Labor Standards Act of 1938 52 Stat. 1060 (1938), 29 U.S.C. § 203 (2017).

Federal Rules of Civil Procedure, R 17(b) (Fed. R. Civ. P. 17(b)).

Federal Service Labor-Management Relations Statute (Pub L 95-454, 92 Stat. 1111 (1978), (5 U.S.C. §§ 7101 et seq.) (2017).

Federal Trade Commission Act of 1914 38 Stat. 717 (1914), (15 U.S.C. §§ 41-58) (2017).

Interstate Commerce Act of 1887 24 Stat. 374 (1887).

Judiciary Act of 1789 Ch. 20, 1 Stat. 73 (1789).

Labour Department Act 37 Stat. 736 (1913), (29 U.S.C. §§ 551-568) (2017).

Labour Disputes Act of 1932 Ch. 90, 47 Stat. 70 (1932), (29 U.S.C. §§ 101 et seq.) (2017).

Labor Management Relations Act of 1947 Ch. 120, 61 Stat. 136 (1947), (29 U.S.C. §§ 141 et seq.) (2017).

Labor-Management Reporting and Disclosure Act Pub L 86-257, 73 Stat. 519 (1959), (29 U.S.C. §§ 401 et seq.) (2017).

Lilly Ledbetter Fair Pay Act of 2009 Pub L 111-2, 123 Stat. 5 (2009), (29 U.S.C. §§ 626 et seq. and 42 U.S.C. 2000e-5) (2017).

National Industrial Recovery Act of 1933 Ch. 90, 48 Stat. 195 (1933).

National Labor Relations Act of 1935 Ch. 372, 49 Stat. 449 (1935), (29 U.S.C. §§ 151 et seq.) (2017).

National Trade Union Act of 1886 24 Stat. 86 (1886).

Occupational Safety and Health Act of 1970 (Pub L 91-596, 84 Stat. 1590 (1970), (29 U.S.C. §§ 651 et seq.) (2017).

Racketeer Influenced and Corrupt Organizations Act Pub L 91-452, 84 Stat. 941 (1970), (18 U.S.C. §§ 1961-1968) (2017).

Railway Labor Act of 1926 (Ch. 347, 44 Stat. 577 (1926); 45 U.S.C. §§ 151-164 and 45 U.S.C. §§ 181-188) (2017).

Sherman Act of 1890 Ch. 647, 26 Stat. 209 (1890), (15 U.S.C. §§ 1 et seq.) (2017).

War Labor Disputes Act of 1943 57 Stat. 163 (1943), 50 U.S.C. § 1501 (Supp. 1946).

Other jurisdictions:

Australian Commonwealth Conciliation and Arbitration Act 8 of 1949.

INTERNATIONAL INSTRUMENTS:

Council of Europe *European Social Charter (Revised*) 3 May 1996, ETS 163.

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5.

International Labour Organization (ILO), *Freedom of Association and Protection of the Right to Organise Convention, C87*, 9 July 1948, C87.

CASE LAW:

South Africa:

ABSA Bank Ltd v South African Commercial Catering & Allied Workers Union National Provident Fund (Under Curatorship) 2012 3 SA 585 (SCA).

Adcock Ingram Critical Care v CCMA & Others 2001 9 BLLR 979 (LAC).

African National Congress & Another v Lombo 1997 3 SA 187 (A).

Ahmadiyya Anjuman Ishaati-Islam Lahore (South Africa) & Another v Muslim Judicial Council (Cape) & Others 1983 4 SA 855 (C).

Algoa Bus Company (Pty) Ltd v Transport Action Retail & General Workers Union (TARGWU) & Others (P368/13) 2015 31 (07-05-2015) SAFLII <http://www.saflii.org/za/cases/ZALCPE/2015/31.pdf> (accessed on 02-04-2017).

Algoa Bus Company v SATAWU & Others 2010 2 BLLR 149 (LC).

Amalgamated Engineering Union of SA v Minister of Labour 1965 4 SA 94 (W).

Apollis & Others v General Industries Workers Union of South Africa (J423/15) 2015 ZALCJHB 93 (15-03-2015) SAFLII <http://www.saflii.org/za/cases/ZALCJHB/2015/93.pdf> (accessed on 10-09-2018).

Association of Mineworkers & Construction Union & Others v Royal Bafokeng Platinum Ltd & Others 2018 39 ILJ 2205 (LAC).

Baloyi v M & P Manufacturing 2001 4 BLLR 389 (LAC).

Bantu Callies Football Club (also known as Pretoria Callies Football Club) v Motlhamme & Others 1978 4 SA 486 (T).

BIAWU & Another v Mutual & Federal Insurance Co Ltd 2002 7 BLLR 609 (LC).

Blyvooruitzicht Gold Mining Co Ltd v Pretorius 2000 7 BLLR 751 (LAC).

Bohlokong Black Taxi Association v Interstate Bus Lines (Edms) Bpk 1997 4 SA 635 (O).

Brock v SA Medical & Dental Council 1961 1 SA 319 (C).

Campbell Scientific Africa (Pty) Ltd v Simmers & Others 2016 37 ILJ 116 (LAC).

Cape Agri Employers' Organization v Registrar of Labour Relations 2011 32 ILJ 2952 (LC).

Cape Indian Congress & Others v Transvaal Indian Congress 1948 2 SA 595 (A).

Cape United Sick Fund Society & Others v Forrest & Others 1956 4 SA 519 (A).

Chauke v Food and Allied Workers Union and Others (J702/15) 2015 ZALCJHB 273 (26-08-2015) SAFLII <http://www.saflii.org/za/cases/ZALCJHB/2015/273.html> (accessed on 02-03-2019).

City of Johannesburg v SA Municipal Workers Union & Others 2017 38 ILJ 1342 (LC).

Coin Security Group (Pty) Ltd v Adams & Others 2000 4 BLLR 371 (LAC).

Commission for Conciliation, Mediation & Arbitration v Registrar of Labour Relations & Others 2010 31 ILJ 2886 (LC).

Constantinides v Jockey Club of South Africa 1954 3 SA 35 (C).

County Fair v CCMA & Others 1998 6 BLLR 577 (LC).

Crouse NO & Another v Workers Union of SA 2008 29 ILJ 2571 (LAC).

De Beer v Mineworkers' Union & Others 1948 4 SA 503 (T).

Du Plessis v Building Workers' Industrial Union 1948 3 SA 1059 (W).

Engen Petroleum v CCMA & Others 2007 8 BLLR 707 (LAC).

Ex Parte Gill & Others 1955 2 SA 418 (W).

Ex-TRTC United Workers Front and Others v Premier, Eastern Cape Province 2010 2 SA 114 (E).

Fakude & Others v Kwikot (Pty) Ltd 2013 34 ILJ 2024 (LC).

Fisher v S.A. Bookmakers' Association 1940 WLD 88.

Food & Allied Workers Union v Buthelezi & Others 1998 19 ILJ 829 (LC).

Food & Allied Workers Union v In2Food (Pty) Ltd 2014 35 ILJ 2767 (LAC).

Food & Allied Workers Union v Ngcobo & Another 2013 34 ILJ 1383 (SCA).

Food & Allied Workers Union v Ngcobo NO & Another 2013 34 ILJ 3061 (CC).

Fouche v Building Workers Industrial Union of SA & Others 1947 1 SA 266 (T).

Garment Workers' Union & Others v Smith 1936 CPD 249.

Garment Workers' Union v De Vries & Others 1949 1 SA 1110 (W).

General Domestic & Professional Employers' Organisation v Registrar of Labour Relations 2011 32 ILJ 316 (LC).

General Motors (Pty) Ltd v National Union of Metalworkers of South Africa obo Ruiters 2015 5 BLLR 464 (LAC).

GRI Wind Steel SA v Association of Mineworkers & Construction Union & Others 2018 39 ILJ 1045 (LC).

Gründling v Beyers & Others 1967 2 SA 131 (W).

Highveldridge Residents Concerned Party v Highveldridge Transitional Local Council & Others 2002 6 SA 66 (T).

In2food (Pty) Ltd v Food & Allied Workers Union & Others 2013 34 ILJ 2589 (LC).

Independent Municipal & Allied Trade Union obo Strydom v Witzenburg Municipality & Others 2012 7 BLLR 660 (LAC).

Jamile & Others v African Congregational Church 1971 3 SA 836 (D).

Jockey Club of South Africa & Others Appellants v Feldman Respondent 1942 AD 340.

Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal and Allied Workers Union and Others 2019 45883 JOL 1 (LC).

Kahn v Louw NO & Another 1951 2 SA 194 (C).

Kimmelman v Amalgamated Society of Woodworkers of S.A. 1941 WLD 212.

Klemp v Mentz, NO & Others 1949 2 SA 443 (W).

Klerksdorp & District Muslim Merchants Association v Mahomed & Another 1948 4 SA 731 (T).

Komane v Fedsure Life 1998 2 BLLR 215 (CCMA).

KPMM Road & Earthworks (Pty) Ltd v Association of Mineworkers & Construction Union & Others 2018 ILJ 609 (LC).

Lewis & Co (Pty) Ltd v Pietersburg Ko-Operatieve Boere Vereeniging & Others 1936 AD 344.

Lewis v Lyons 1958 2 PH M19 61 (N).

Lowveld Allied & General Employers' Organization v Minister of Labour & Others 2011 32 ILJ 340 (LC).

Mahle Behr SA (Pty) Ltd v National Union of Metalworkers of SA & Others (2019) 40 ILJ 1814 (LC).

Makate v Vodacom (Pty) Ltd 2016 4 SA 121 (CC).

Mangaung Local Municipality v SAMWU 2003 3 BLLR 268 (LC).

Manyele & Others v Maizecor (Pty) Ltd & Another 2002 23 ILJ 1578 (LC).

Maritime Safety Authority v McKenzie 2010 31 ILJ 529 (SCA).

Maxwell & Others v Amalgamated Bricklayers Union & Other 1939 TPD 300.

McCarthy & Others v Constantia Property Owners' Association & Others 1999 4 SA 847 (C).

Mhlongo & Others v FAWU & Another 2007 2 BLLR 141 (LC).

Mine Workers' Union v Brodrick 1948 4 SA 959 (A).

Minister of Labour & another v Public Servants Association of SA & Another 2017 38 ILJ 1075 (LAC).

Mkhando & Others v Mangwende NO 1977 1 SA 851 (RAD).

Mondi Ltd (Mondi Kraft Division) v Chemical Energy Paper Printing Wood & Allied Workers Union & Others 2005 26 ILJ 1458 (LC).

Moropane v Gilbeys Distillers & Vintners (Pty) Ltd & Another 1998 19 ILJ 635 (LC).

Morrison Appellant v Standard Building Society Respondent 1932 AD 229.

Motaung v Mukubela & Another NNO 1975 1 SA 618 (O).

Mphage & others v SA Municipal Workers Union 2013 34 ILJ 1764 (LC).

Municipal & Allied Trade Union of SA v Central Karoo District Municipality & Others 2019 40 ILJ 386 (LC).

Mzeku & Others v Volkswagen SA (Pty) Ltd & Others 2001 8 BLLR 857 (LAC).

Nakwanya v South African Bantu Football Association & Others 1972 4 SA 309 (D).

Natal Die Casting Co (Pty) Ltd v President, Industrial Court 1987 8 ILJ 245 (D).

National Construction Building & Allied Workers Union v Masinga & Others 2000 21 ILJ 411 (LC).

National Education Health & Allied Workers Union & Others v Vanderbijlpark Society for the Aged 2011 32 ILJ 1959 (LC).

National Employer's Forum v Minister of Labour & Others 2003 5 BLLR 460 (LC).

National Entitled Workers Union & Others v Director, Commission for Conciliation, Mediation & Arbitration & Others 2011 32 ILJ 2095 (LAC).

National Entitled Workers Union & Others v Mtshali & Another 2000 21 ILJ 1166 (LC).

National Entitled Workers Union v Ministry of Labour & Others 2010 31 ILJ 574 (LAC).

National Entitled Workers Union v Ministry of Labour & Others 2011 32 ILJ 1372 (LC).

National Entitled Workers Union v Ministry of Labour & Others 2012 33 ILJ 2585 (LAC).

National Union of Metalworkers of SA on behalf of Khanyile & Others v Dunlop Mixing & Technical Services (Pty) Ltd & Others 2018 39 ILJ 2226 (LAC).

National Union of Metalworkers of SA obo Members v Transnet SOC Ltd 2019 40 ILJ 583 (LC).

National Union of Metalworkers of South Africa obo Khanyile Nganezi & Others v Dunlop Mixing & Technical Services (Pty) Ltd & Others [2019] ZACC 25 (CC).

National Union of Metalworkers of South Africa v Intervalve (Pty) Ltd & others 2015 2 BCLR 182 (CC).

National Union of Metalworkers of South Africa v Lufil Packaging (Isithebe) (A Division of Bidvest Paperplus (Pty) Ltd) & others 2020 6 BCLR 725 (CC).

National Union of Metal Workers of South Africa & others v Congress of South African Trade Unions & others 2014 JOL 31585 (GJ).

National Union of Mineworkers & Others v Geffens Diamond Cutting Works (Pty) Ltd 2008 29 ILJ 1227 (LC).

National Union of Textile Workers v Ndlovu & Others 1987 3 SA 149 (D).

Ndlovu & Others v SA Commercial Catering & Allied Workers Union 2011 32 ILJ 697 (LC).

NEHAWU v Tsatsi 2006 6 SA 327 (SCA).

NEWU v Minister of Labour & Others 2006 10 BLLR 951 (LC).

NEWU v Sithole & Others 2004 11 BLLR 1085 (LAC).

Ngcobo & Another v Food & Allied Workers Union 2012 33 ILJ 1337 (KZD).

Ngcobo & Others v Blyvooruitzicht Gold Mining Co Ltd 1999 20 ILJ 1896 (LC).

Nugent v Morgan & Others 1932 CPD 181.

NUM & Others v Black Mountain Mining (Pty) Ltd 2010 3 BLLR 281 (LC).

NUMSA v CCMA & Others 2000 22 BLLR 1330 (LC).

One Stop Financial Services (Pty) Ltd v Neffensaan Ontwikkelings (Pty) Ltd & Another 2015 4 SA 623 (WCC).

Oranje Benefit Society v Central Merchant Bank Ltd 1976 4 SA 659 (A).

Parity Insurance Ltd v Marescia 1965 3 SA 435 (A).

Professional Transport & Allied Workers Union on Behalf of Khoza & Others v New Kleinfontein Gold Mine (Pty) Ltd 2016 37 ILJ 1728 (LC).

Public Servants Association of SA & Another v Minister of Labour & Another 2016 37 ILJ 185 (LC).

P E Bosman Transport Works Committee & Others v Piet Bosman Transport (Pty) Ltd 1980 4 SA 801 (T).

Ramolesane & Another v Andrew Mentis & Another 1991 12 ILJ 329 (LAC).

Registrar of Labour Relations v Consolidated Association of Employers of South African Region 2014 JOL 32429 1 (LAC).

Retail & Allied Workers Union v Registrar of Labour Relations 2012 33 ILJ 2149 (LC).

Rowles v Jockey Club of SA & Others 1954 1 SA 363 (A).

Rustenburg Platinum Mines Ltd v Mouthpeace Workers Union 2001 22 ILJ 2035 (LC).

Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen & Others 2018 39 ILJ 1330 (LC).

SA Airways SOC Ltd & Another v National Transport Movement & Others 2016 37 ILJ 2128 (LC).

SA Maritime Safety Authority v McKenzie 2010 5 BLLR 488 (SCA).

SA Metal Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others 2014 35 ILJ 2848 (LC).

SA Post Office Ltd v CWU & Others 2010 1 BLLR 84 (LC).

SA Security & General Workers Union v Registrar of Labour Relations 2015 36 ILJ 3149 (LC).

SA Transport & Allied Workers Union v Zondo & Others 2015 36 ILJ 2348 (LC).

Sasol Industries (Pty) Ltd & another v SA Chemical Workers Union 1990 11 ILJ 1010 (LAC).

SATAWU & Another v Garvas & Others 2013 1 SA 83 (CC).

Security Services Employers' Organisation & Others v SA Transport & Allied Workers Union & Others 2007 28 ILJ 1134 (LC).

Sidumo & Another v Rustenburg Platinum Mines Ltd & Others 2007 28 ILJ 2405 (CC).

Solidarity v Metal & Engineering Industries Bargaining Council & Others 2017 38 ILJ 2109 (LC).

Solomon v The Alfred Lodge 1917 CPD 177.

Sorenson & Others v Executive Committee, Tramway & Omnibus Workers Union (Cape) & Another 1974 2 SA 545 (C).

South African Municipal Workers' Union & Others v Mokgatla & Others 2016 2 All SA 451 (SCA).

South African Municipal Workers Union v Jada & Others (2003) 6 SA 294 (W).

South African Municipal Workers Union v Qina & Others (J965/18) 2018 ZALCJHB 185 (25-05-2018) SAFLII <http://www.saflii.org/za/cases/ZALCJHB/2018/185.pdf> (accessed on 02-03-2019).

South African National Defence Union v Minister of Defence & Others 2007 28 ILJ 1909 (CC).

Staff Association for the Motor & Related Industries v Motor Industry Staff Association & Another 1999 20 ILJ 2552 (LAC).

Steel & Engineering Industries Federation & Others v National Union of Metalworkers of SA 1992 13 ILJ 1422 (T).

Strydom v Administrator of the Orange Free State & Others 1953 2 SA 133 (O).

Sweet Workers' Union v Orkin N.O. & Minister of Labour 1946 CPD 305.

Swissport SA (Pty) Ltd v Mphalele 2018 39 ILJ 656 (LC).

Thandroyen v Sister Annuncia & Another 1959 4 SA 632 (N).

The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling 1947 4 SA 690 (T).

The Mine Workers' Union v JJ Prinsloo; The Mine Workers' Union v JP Prinsloo; The Mine Workers' Union v Greyling 1948 3 SA 831 (A).

Theron & Others v FAWU 1997 18 ILJ 1046 (LC).

Tshililo and Others v City of Johannesburg & Others 2018 12 BLLR 1180 (LAC).

Unica Plastic Moulders CC v National Union of SA Workers 2011 32 ILJ 443 (LC).

United People's Union of SA v Registrar of Labour Relations 2010 31 ILJ 198 (LC).

University of Venda v M & Others 2017 38 ILJ 1376 (LC).

Van Rooyen v Dutch Reformed Church, Utrecht 1915 36 NPD 323.

Webb & Co Ltd v Northern Rifles 1908 TS 462.

Wilken Appellant v Brebner & Others Respondents 1935 AD 175.

Williams & Others v De Wet 1946 CPD 206.

Winter v Medical Council, Southern Rhodesia 1949 1 SA 685 (SRS).

Workers Union of SA v Crouse NO & Another 2005 26 ILJ 1723 (LC).

Zondo & Others v SA Transport & Allied Workers Union 2015 36 ILJ 2916 (LC).

United Kingdom:

AB v CD [2001] IRLR 808.

Abbott v Sullivan [1952] 1 K.B. 189; [1956] AC 104; [1955] 3 WLR 788.

Allen v Flood (1898) AC 1.

American Cynamid Co. v Ethicon Ltd [1975] AC 396.

Annamunthodo v Oilfield Workers' Trade Union [1961] AC 945.

ASLEF v United Kingdom (2007) 45 EHRR 34; (2007) 36 ILJ 425.

Balfour Beatty v UNITE [2012] ICR 822.

Beetham v Trinidad Cement Ltd [1960] AC 132; [1960] 1 All ER 274.

Bonsor v Musician's Union [1956] AC 104; [1955] 3 WLR 788.

Bourne v Colodense Ltd [1985] I.C.R. 291; [1985] I.R.L.R. 339 CA (Civ Div).

Braithwaite v Electrical, Electronic & Telecommunications Union [1969] 2 All ER 859, CA.

Breen v AEU [1971] 2 QB 175.

Royal British Bank v Turquand 1856 6 E&B 327.

Brown v Amalgamated Union of Engineering Workers and Another [1976] ICR 147.

Buckley v National Union of General and Municipal Workers and Another [1967] 3 All ER 767.

Cheall v Association of Professional Executive Clerical and Computer Staff [1982] ICR 543, [1983] QB 126; [1983] IRLR 215, [1983] AC 180.

Cheall v United Kingdom (1986) 8 EHRR CD 74.

Clarke v Chadburn (No. 2) [1984] IRLR 350, [1985] 1 WLR 78.

Connex South-Eastern Ltd v RMT [1999] IRLR 249 (CA).

Conway v Wade [1909] AC 506.

Cross v British Iron, Steel & Kindred Trades Association [1967] 1 WLR 494, CA.

Cruz City 1 Mauritius Holdings v Unitech Ltd [2014] EWHC 3131 (Comm); [2015] 1 All ER (Comm) 336; [2015] 1 B.C.L.C. 377; [2014] Bus. L.R. D25, QBD.

Douglas v Graphical Paper and Media Union [1995] IRLR 426.

Drake v Morgan [1978] ICR 56.

Edwards v Society of Graphical and Allied Trades [1971] Ch 354.

Electrical, Electronic Telecommunications and Plumbing Union v Times Newspapers [1980] QB 585; [1980] 1 All ER 1097; [1980] 3 WLR 98.

Express Newspapers Ltd v McShane and Ashton [1980] IRLR 35.

Express & Star Ltd v National Graphical Association [1985] IRLR 455; [1986] ICR 589, [1986] IRLR 222.

Faramus v Film Artistes' Association [1963] 2 QB 527.

Foss v Harbottle [1843] 2 Hare 461.

Freeman v Sovereign Chicken Ltd [1991] UKEAT 514_89_2707.

Friend v Civil Aviation Authority (No.1) [1998] IRLR 253.

Friend v Institute of Professional Managers and Specialists (IPMS) [1999] IRLR 173.

General Aviation Services (UK) v Transport & General Workers Union (TGWU) [1975] I.C.R. 276; (1975) 119 S.J. 589.

Goring v British Actors Equity Association [1987] IRLR 122.

Heaton's Transport (St Helens) v TGWU [1973] AC 15; [1972] ICR 308 HL.

Hiles v Amalgamated Society of Woodworkers [1968] Ch 440, [1967] 3 All ER 70.

Hilton v Eckersley (1855) 6 El. & Bl. 47.

Hopkins v NUS [1985] IRLR 157, [1985] ICR 268.

Hornby v Close (1867) 2 LRQB 153.

In re: Caledonian Employees' Benefit Society 1928 SLT 412.

J.T. Stratford & Son Ltd v Lindley [1965] AC 269; [1964] 3 WLR 541.

Kelly v National Society of Operative Printers, Graphical & Media Personnel (NATSOPA) (1915) 84 LJKB 2236; 113 LT 1055.

Kent Free Press v National Graphical Association [1987] IRLR 267.

MacLelland v National Union of Journalists [1975] ICR 116.

Metrobus Ltd v Unite the Union [2009] IRLR 851; [2009] EWCA Civ 829.

Michael Brunsdon v Pattinson and Brewer (A Firm), The National Union of Rail, Maritime and Transport Workers (RMT) [2006] EWHC 1562 (QB).

Midland Cold Storage Ltd. v Turner and Others [1972] ICR 230.

National Union of Rail, Maritime and Transport Workers v SERCO Ltd; Associated Society of Locomotive Engineers and Firemen v London & Birmingham Railway Ltd [2011] IRLR 399; [2011] EWCA Civ 226.

Lawlor v Union of Post Office Workers [1965] Ch 712, [1965] 2 WLR 579.

Lee v Showmen's Guild of Great Britain [1952] 2 QB 329.

Loosely v National Union of Teachers [1988] IRLR 157, CA.

Longley v National Union of Journalists (NUJ) [1987] IRLR 109.

Lumley v Gye (1853) 2 E&B 216.

Oddy v Transport Salaried Staffs Association [1973] ICR 524.

Osborne v Amalgamated Society of Railway Servants (1910) AC 87.

Porter v NUJ [1980] IRLR 404.

Prole v Allen [1950] 1 All ER 476.

Radford v National Society of Operative Printers, Graphical & Media Personnel (NATSOPA) [1972] ICR 484.

Rigby v Connol (1880) 14 Ch. D 482.

Rodriguez-Noza v UNISON (11 December 2013) D/34/13.

Roebuck v National Union of Mineworkers (Yorkshire Area) (No. 2) [1978] ICR 676.

Rookes v Barnard [1964] AC 1129.

R v Bunn (1872) 12 Cox CC 316.

R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51.

Stevenson v United Road Transport Union (URTU) [1977] ICR 893.

Solihull Metropolitan Borough Council v National Union of Teachers [1985] IRLR 211.

Taff Vale Railway Company v Amalgamated Society of Railway Servants [1901] UKHL 1, [1901] AC 426, [1901] 1 KB 170 (CA).

Taylor & Foulstone v NUM (Yorkshire Area) [1984] IRLR 445.

Taylor v NUM (Derbyshire Area) (No 1) [1984] IRLR 440.

Taylor v NUM (Derbyshire Area) (No. 2) [1985] IRLR 65.

Taylor v NUM (Derbyshire Area) (No. 3) [1985] IRLR 99.

Taylor v National Union of Seaman [1967] 1 All ER 767.

Temperton v Russell [1893] 1 QB 715.

Torquay Hotel Co. Ltd. v Cousins and Others [1969] 2 WLR 289; [1969] 1 All ER 522.

Tramp Shipping Corp v Greenwich Marine Inc [1979] ICR 261 (CA).

Quinn v Leathem [1901] AC 495.

Walker v Amalgamated Union of Engineering and Foundry Workers 1969 SLT 150.

White v Kuzych [1951] AC 598.

Willerby Holiday Homes Ltd v Union of Construction, *Allied Trades and Technicians* [2003] EWHC 2608 (QB).

Wilson v United Kingdom [2002] IRLR 568; 13 BHRC 39, [2002] All ER (D) 35 (Jul), ECtHR.

United States of America:

Abood v Detroit Board of Education 431 US 209 (1977).

Adair v United States 208 US 161 (1908).

Allis-Chalmers Corp. v Lueck 471 US 202 (1985).

American Federation of Labor & Congress of Industrial Organizations v Chao 409 F.3d 377 (D.C. Cir. 2005).

American Federation of Teachers, AFL-CIO v Bullock 539 F.Supp.2d 161 (2008).

American Guild of Variety Artists v Detroy 366 US 929 (1961).

Association of Westinghouse Salaried Employees v Westinghouse Electric Corp. 348 US 437 (1955).

Banks v Bethlehem Steel Corp. 870 F.2d 1438 (1989).

Baskin v Hawley 807 F.2d 1120 (1986).

Bloom v International Brotherhood of Teamsters Local 468 752 F.2d 1312 (1984).

Bowen v United States Postal Service 459 US 212 (1983).

Boys Markets, Inc v Retail Clerks Union, Local 770 398 US 235 (1970).

Breininger v Sheet Metal Workers International Association Local Union No. 6 493 US 67 (1989).

Budzanoski v Sabolsky 409 US 853 (1972).

Carbon Fuel Co. v United Mine Workers of America 444 US 212 (1979).

Chamber of Commerce v Brown 554 US 60 (2008).

Charles Dowd Box Co. v Courtney 368 US 502 (1962).

Caterpillar, Inc. v. Williams 482 US 396 (1987).

Chavez v United Food & Commercial Workers International Union, AFL-CIO-CLC 779 F.2d 1353 (1985).

Chevron, USA, Inc. v Natural Resources Defense Council, Inc. 467 US 837 (1984).

Clayton v International Union, United Automobile, Aerospace & Agricultural Implement Workers of America 451 US 679 (1981).

Commonwealth v Hunt 4 Met. 111 (1842).

Consolidated Freightways, Inc. v Walker 502 US 1004 (1992).

Coronado Coal Co. v United Mine Workers of America 268 US 295 (1925).

Crocker v Weil 227 Or. 260 (1961).

DelCostello v International Brotherhood of Teamsters 462 US 151 (1983).

Detroy v American Guild of Variety Artists 286 F.2d 75 (1961).

Duplex Printing Co. v Deering 254 US 445 (1921).

Eichelberger v NLRB 765 F.2d 851 (1985).

Erie Railroad Co. v Tompkins 304 US 64 (1938).

Feather v Mine Workers 711 F.2d 530 (1983).

Ford Motor Co. v Huffman 345 US 330 (1953).

Glover v St. Louis-San Francisco Railway Co. 393 US 324 (1969).

Gompers v Buck Stove & Range Company 221 US 418 (1911).

Gregg v Chauffers, Teamsters & Helpers Union Local 150 699 F.2d 1015 (1983).

Hawaii Regional Council of Carpenters v Yoshimura 237 F.Supp.3d 1029 (2017).

Hitchman Coal & Coke Co. v Mitchell 245 US 229, 38 Sup. Ct. 65 (1917).

Hines v Anchor Motor Freight Inc. 424 US 554 (1976).

Holmes v Grooms 391 F.Supp.3d 536 (2019).

Hunt v Weatherbee 626 F.Supp 1097 (1986).

International Association of Machinists v Gonzales 356 US 617 (1958).

International Brotherhood of Electrical Workers v Foust 442 US 42 (1979).

International Brotherhood of Electrical Workers (IBEW) v Hechler 481 US 851 (1987).

International Union, United Automobile Workers (UAW-CIO) v Russell 356 US 634 (1958).

Iron Workers Local Union 377 54 NLRB 326 (1998).

In re Debs 158 US 564 (1895).

Janus v American Federation of State, County, and Municipal Employees Council 585 US __ (2018).

J.I Case Co. v NLRB 321 US 332 (1944).

Korzen v Local Union 705, International Brotherhood of Teamsters 75 F.3d 286 (1996).

Kovach v Turner Dairy Farms 929 F.Supp.2d 477 (2013).

Lawlor v Loewe 235 US 522 (1915).

Lewis v Tuscan Dairy Farms, Inc. 25 F.3d 1138 (1994).

Lingle v Norge Division of Magic Chef, Inc. 486 US 399 (1988).

Local 174, Teamsters Union v Lucas Flour Co. 369 US 95 (1962).

Lochner v New York 198 US 45 (1905).

Loewe v Lawlor 208 US 274 (1908).

Machinists, Lodge 76 v Wisconsin Employment Relations Commission 427 US 132 (1976).

Marquez v Screen Actors Guild, Inc. 525 US 33 (1998).

Millwright Local 1079 v Carpenters 878 F.2d 960 (1989).

Motion Picture & Videotape Editors Guild Local 776 v Theatrical Stage Employees Local 695 800 F.2d 973 (1986).

National Labor Relations Board v Cabot Carbon Company 360 US 203 (1959).

National Labor Relations Board v Jones & Laughlin Steel Corp. 301 US 1 (1937).

National Labor Relations Board v Miranda Fuel Corp. 140 NLRB 181 (1962).

NLRB v Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO 391 US 418 (1968).

NLRB v Mackay Radio & Tel. Co. 304 US 333 (1938).

Noble v Sombrotto 84 F.Supp.3d 11 (2015).

Sabolsky v Budzanoski 457 F.2d 1245 (1972).

San Diego Building Trades Council v Garmon 353 US 26 (1957); 359 US 236 (1959).

Sedima, S.P.R.L. v Imrex Co. Inc. 473 US 479 (1985).

Services Employees International Union v National Union of Healthcare Workers 718 F.3d 1036 (2013).

Sim v New York Mailers Union No. 6 166 F.3d 465 (1999).

Smith v Hussmann Refrigerator Corp. 619 F.2d 1229 (1980).

Steele v Louisville & Nashville Railroad Co. 323 US 192 (1944).

Syres v Oil Workers International Union 350 US 892 (1956).

Teamsters Local 705 (Gasoline Retailers Ass'n) 210 NLRB 210, 86 LRRM 1011 (1974).

Textile Workers Union of America v Lincoln Mills 353 US 448 (1957).

Trans World Airlines, Inc. v Independent Federation of Flight Attendants 489 US 426 (1989).

United Steelworkers v American Manufacturing Co. 363 US 561 (1960).

United Steelworkers v Enterprise Wheel & Car Corp. 363 US 593 (1960).

United Steelworkers v Warrior & Gulf Navigation Co. 363 US 574 (1960).

U.S. v Debs 64 Fed. 725 (1894).

U.S. v McCarthy 422 F.2d 160 (2d Cir. 1970).

United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, AFL-CIO v Local 334, United Association of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada 452 US 615 (1981).

United Mine Workers of America v The Coronado Coal Company 42 Sup. Ct. Rep. 570 (1922); 259 US 344 (1922).

United States v White 322 US 694 (1944).

United Steelworkers of America, AFL-CIO v Rawson 495 US 362 (1990).

Universal Camera Corp. v NLRB 340 US 474 (1951).

Walker v Consolidated Freightways, Inc. 930 F.2d 376 (1991).

Wiggins v United Food & Commercial Workers Union, Local 56 420 F.Supp.2d 357 (2006).

Wooddell v International Brotherhood of Electrical Workers, Local 71 502 US 93 (1991).

Vaca v Sipes 386 US 171 (1967).

LOOSE-LEAF PUBLICATIONS

De Stadler E "Section 5" in Naudé T & S Eiselen (eds) *Commentary on the Consumer Protection Act* (OS 1 2014) Juta & Company (Pty) Ltd, Claremont.

Pons A & P Deale "Trade Unions and Organisational Rights" in Pons A & P Deale (eds) *Labour Relations Handbook* (RS 15 2006) Juta & Co Ltd, Cape Town.

Van Loggerenberg DE "Interdicts" in Van Loggerenberg DE & E Bertelsmann (eds) *Erasmus: Superior Court Practice Volume 2 – Uniform Rules and Appendices* (RS 5 2018) Juta & Company (Pty) Ltd, Claremont.

ARTICLES IN PRINTED MEDIA:

Marrian N "Adapt or Die" *Financial Mail* (3-9 October 2019) 24.

DISSERTATIONS:

Forrest KA *Power, Independence and Worker Democracy in the Development of the National Union of Metalworkers of South Africa (NUMSA) and its Predecessors: 1980 – 1995* D Phil thesis University of the Witwatersrand (2005).

Frimpong FS '*Unions are for Older People': A Case Study of Young People in the South African Commercial, Catering and Allied Workers Union (SACCAWU)* M A thesis University of the Witwatersrand (2009).

Lever JT *South African Trade Unionism in an Era of Racial Exclusion* D Lit et Phil thesis University of South Africa (1992).

UNPUBLISHED SOURCES:

Armstrong P & J Steenkamp (2008) "South African Trade Unions: An Overview for 1995 to 2005" (Working Paper No. 10/08), retrieved from the Bureau for Economic Research (BER), University of Stellenbosch website: <https://www.ekon.sun.ac.za/wpapers/2008/wp102008/wp-10-2008.pdf>.

Benjamin P "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)" (2013) Working Paper 47 *International Labour Office – Industrial & Employment Relations Department* 1.

Bhorat H, C Van der Westhuizen & S Goga (2009) "Analysing Wage Formation in the South African Labour Markets: The Role of Bargaining Councils" (Working Paper No. 09/135), retrieved from the Development Policy Research Unit (DPRU), University of Cape Town website: <http://open.uct.ac.za/bitstream/handle/11427/7281/DPRU_WP09-135.pdf?sequence=1>.

Buhlungu S "Democratising the Workplace: Worker Perspectives on Industrial Democracy" (1994) unpublished paper presented at a seminar on Democracy, Popular Precedents, Practice, Culture hosted by the School of Social Sciences, History Workshop at University of Witwatersrand, 13-07-1994 1.

Buhlungu S "Workplace Democratisation: Shopfloor Voices and Visions for Emancipation" (1997) unpublished paper presented at a seminar hosted by the Institute for Advanced Social Research at University of Witwatersrand, 21-04-1997 1.

Eidelberg PG "The Tripartite Alliance on the Eve of a New Millennium: The Congress of South African Trade Unions, The African National Congress And The South African Communist Party" (1997) unpublished paper presented at a seminar hosted by the Institute for Advanced Social Research at University of Witwatersrand, 3-03-1997 1.

Epstein RA (2010) "One Bridge Too Far: Why the Employee Free Choice Act Has, and Should, Fail" (Working Paper No. 249), retrieved from the New York University Law and Economics Working Papers website: <https://perma.cc/357D-7ZA5>.

Fairbrother P "Union Democracy: Processes, Difficulties and Prospects" (2006) unpublished paper presented at a conference on Union Democracy Reexamined hosted by the Harry Bridges Center for Labor Studies at University of Washington, 26-02-2006 (copy on file with author) 1.

Godfrey S, J Maree & J Theron (2006) "Conditions of Employment and Small Business: Coverage, Compliance and Exemptions" (Working Paper No. 06/106), retrieved from the Development Policy Research Unit (DPRU), University of Cape Town website:

<http://www.dpru.uct.ac.za/sites/default/files/image_tool/images/36/DPRU%20WP06-106.pdf>.

Maree J "The COSATU Participatory Democracy Tradition and Worker Expectations from the New Parliament: Are they Reconcilable?" (1994) unpublished paper presented at a seminar on Democracy, Popular Precedents, Practice, Culture History Workshop hosted by the School of Social Sciences, History Workshop at University of Witwatersrand, 1.

Nattrass N & J Seekings "The Economy and Poverty in the Twentieth Century in South Africa" (2010) unpublished paper presented at a seminar hosted by the Centre for Social Science Research: Social Surveys Unit at University of Cape Town, 01-07-2010 1.

INTERNET SOURCES:

ACAS Code of Practice 4 "Settlement Agreements (under section 111A of the Employment Rights Act 1996)" (2013) <https://archive.acas.org.uk/media/3725/Code-of-Practice-on-settlement-agreements/pdf/11287_CoP4_Settlement_Agreements_v1_0_Accessible.pdf> (accessed 29-05-2017).

AFL-CIO "Constitution of the AFL-CIO" (2017) *American Federation of Labor & Congress of Industrial Organizations (AFL-CIO)* <https://aflcio.org/sites/default/files/2017-11/17157_AFL-CIO_Constitution_10-17.pdf> (accessed 12-10-2018).

American Civil Liberties Union (ACLU) "A Labor Union 'Bill of Rights' – Democracy in Labor Unions – The Kennedy-Ives Bill: Statements by the America Civil Liberties Union" (1958) <http://debs.indstate.edu/a505l33_1958.pdf> (accessed 18-11-2018).

Anonymous "Mayhem: 37 unionists in court" (17-05-2006) *News24* <https://www.news24.com/SouthAfrica/News/Mayhem-37-unionists-in-court-20060517-3> (accessed 18-10-2018).

Anonymous "New laws an attack on Amcu: Mathunjwa" (20-09-2019) *eNCA* <https://www.enca.com/news/new-laws-attack-amcu-mathunjwa> (accessed 20-09-2019).

Anonymous "History of OLMS" (2011) *Office of Labor-Management Standards (OLMS)* <https://www.dol.gov/olms/history/index.htm> (accessed 20-06-2018).

Anonymous "Union Reports, and Constitutions and Bylaws (OLPDR)" *Office of Labor-Management Standards (OLMS)* <https://olms.dol-esa.gov/olpdr/#Union%20Reports/Union%20Search/> (accessed 02-12- 2018).

Anonymous "Union refuses to touch Zim arms" (17-04-2008) *News24* <https://www.news24.com/SouthAfrica/News/Union-refuses-to-touch-Zim-arms-20080417> (accessed 2-08-2017).

Anonymous "OLMS Summary" (2017) *Office of Labor-Management Standards (OLMS)* <https://www.dol.gov/olms/about/mission_and_purpose.htm> (accessed 20-06-2018).

Barron C "Something rotten in state of unions" (15-07-2018) *Business Live* <https://www.businesslive.co.za/bt/business-and-economy/2018-07-14-something-rotten-in-state-of-unions/> (accessed 03-03-2019).

Beyzade B "Employment tribunal fees – the next steps" (01-08-2017) *The Law Society Gazette* <https://www.lawgazette.co.uk/practice-points/employment-tribunal-fees-the-next-steps/5062300.article> (accessed 12-09-2017).

Bradley DH "Major Functions of the U.S. Department of Labor (CRS In Focus IFI0975)" (2018) *Congressional Research Service* <https://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=3103&context=key_workplace> (accessed 20-02-2019).

Botes J "When logic fails: Labour unions reject their members' right to a secret vote" (19-09-2019) *Business Maverick* <https://www.dailymaverick.co.za/article/2019-09-19-when-logic-fails-labour-unions-reject-their-members-right-to-a-secret-vote/> (accessed 21-09-2019).

Bureau of Labor Statistics "Economic News Release: Union Membership (Annual) News Release" (2019) *United States Department of Labor* <https://www.bls.gov/news.release/union2.htm> (accessed 31-01-2019).

Bureau of Labor Statistics "News Release: Major Work Stoppages in 2018" (2019) *United States Department of Labor* <https://www.bls.gov/news.release/pdf/wkstp.pdf> (accessed 24-02-2019).

Certification Officer "Annual Report of the Certification Officer 2015-2016" (2016) *GOV.UK* <https://www.gov.uk/government/publications/annual-report-of-the-certification-officer-2015-2016> (accessed 20-06-2017).

Certification Officer "Official list and schedule of trade unions and their annual returns" (08-07-2019) *GOV.UK* <https://www.gov.uk/government/publications/public-list-of-active-trade-unions-official-list-and-schedule/trade-unions-the-current-list-and-schedule> (accessed 20-07-2019).

Cohen T "New legislation requiring secret strike ballots is the latest in South Africa's intra-union battles" (15-09-2019) *Business Maverick* <https://www.dailymaverick.co.za/article/2019-09-15-new-legislation-requiring-secret-strike-ballots-is-the-latest-in-south-africas-intra-union-battles/> (accessed 20-09-2019).

Cottle E "The Labour Relations Amendment Bill – A Victory for Business" (04-06-2018) *Daily Maverick* <https://www.dailymaverick.co.za/opinionista/2018-06-04-the-labour-relations-amendment-bill-a-victory-for-business/> (accessed 07-07-2019).

Cox J "Supreme Court rules employment tribunal fees are unlawful" (26-07-2017) *The Independent* <http://www.independent.co.uk/news/business/news/supreme-court-employment-tribunal-fees-unlawful-plaintiffs-women-gender-uk-companies-lawyers-a7860521.html> (accessed 12-09-2017).

Department of Employment and Labour "Employment and Labour on Labour Relations Act amendments on strike action" (09-09-2019) *South African Government – Gov.za* <https://www.gov.za/speeches/employment-and-labour-labour-relations-act-amendments-strike-action-9-sep-2019-0000> (accessed 11-09-2019).

Department for Business, Energy & Industrial Strategy (BEIS) "Code of Practice Industrial Action Ballots and Notice to Employers" (March 2017) *BEIS*

<https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/594781/Code_of_Practice_on_Industrial_Action_Ballots_and_Information_to_Employers.pdf> (accessed 04-02-2018).

Department for Business Innovation & Skills (BIS) "Employment Law 2013 – Progress on reform" (March 2013) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/184892/13-P136-employment-law-2013-progress-on-reform2.pdf> (accessed 20-06-2017).

Department for Business Innovation & Skills (BIS) "Trade Union Membership 2012 Report" (2013) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/299291/bis-13-p77-trade-union-membership-2012-corrrection.pdf> (accessed 13-05-2014).

Department for Business Innovation & Skills (BIS) "Trade Union Membership 2017 Report" (2018) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/712543/TU_membership_bulletin.pdf> (accessed 14-05-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Part 403 Rescission of Form T–1, Trust Annual Report; Requiring Subsidiary Organization Reporting on the Form LM–2, Labor Organization Annual Report; Modifying Subsidiary Organization Reporting on the Form LM–3, Labor Organization Annual Report; LMRDA Coverage of Intermediate Labor Organizations; Final Rule" (01-12-2010) *75 FR 74936* <https://www.govinfo.gov/content/pkg/FR-2010-12-01/pdf/2010-29226.pdf> (accessed 23-04-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Part 404 Labor Organization Officer and Employee Report, Form LM-30; Final Rule" (02-07-2007) *72 FR 36106* <https://www.govinfo.gov/content/pkg/FR-2007-07-02/pdf/07-3155.pdf> (accessed 23-03-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Part 404 Labor Organization Officer and Employee Reports" (10-08-2010) *75 FR 48416* <https://www.govinfo.gov/content/pkg/FR-2010-08-10/pdf/2010-19250.pdf> (accessed 24-04-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Part 404 Labor Organization Officer and Employee Reports" (26-10-2011) *76 FR 66442* <https://www.govinfo.gov/content/pkg/FR-2011-10-26/pdf/2011-26816.pdf> (accessed 24-04-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Parts 403 and 408 Labor Organization Annual Financial Reports" (09-10-2003) *68 FR 58374* <https://www.govinfo.gov/content/pkg/FR-2003-10-09/pdf/03-25487.pdf> (accessed 20-04-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Parts 403 and 408 Labor Organization Annual Financial Reports Labor Organization Annual Financial Reports" (13-10-2009) *74 FR 52401* <https://www.govinfo.gov/content/pkg/FR-2009-10-13/pdf/E9-24571.pdf> (accessed 20-05-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Parts 403 and 408: Labor Organization Annual Financial Reports" (27-12-2002) *67 FR 79280* <https://www.govinfo.gov/content/pkg/FR-2002-12-27/pdf/02-32445.pdf> (accessed 21-02-2018).

Department of Labor: Office of Labor-Management Standards "29 CFR Parts 405 and 406 Rescission of Rule Interpreting ''Advice'' Exemption in Section 203(c) of the Labor-Management Reporting and Disclosure Act" (18-07-2018) *83 FR 33826* <https://www.govinfo.gov/content/pkg/FR-2018-07-18/pdf/2018-14948.pdf> (accessed 22-10-2018).

Department of Labor: Office of Labor-Management Standards "Form LM-2 Labor Organization Annual Report" (2021) *DOL: OLMS* <https://www.dol.gov/olms/regs/compliance/GPEA_Forms/forms/Form_LM2_2021.pdf> (accessed 22-04-2018).

Department of Labor: Office of Labor-Management Standards "Form LM-30 Labor Organization Officer and Employee Report" (2021) *DOL: OLMS* <https://www.dol.gov/olms/regs/compliance/GPEA_Forms/forms/Form_LM30_2021.pdf> (accessed 22-04-2018).

Department of Labor: Office of Labor-Management Standards "Online Public Disclosure Room" (22-07-2019) *DOL: OLMS* <https://www.dol.gov/olms/regs/compliance/rrlo/lmrda.htm> (accessed 20-08-2019).

Department of Labour "Registered Bargaining Councils – August 2019" (2019) <http://www.labour.gov.za/DocumentCenter/Publications/Labour%20Relations/Registered%20Bargaining%20Councils%20–%20August%202019.pdf> (accessed 24-09-2019).

Faku D "NUM, Amcu rivalry goes beyond Marikana graves" (27-08-2017) *IOL/Business Report* <https://www.iol.co.za/business- report/num-amcu-rivalry-goes-beyond-marikana-graves-10955731> (accessed 2-10-2017).

FMCS "2018 FMCS Annual Report" (2019) *Federal Mediation & Conciliation Service* <https://www.fmcs.gov/wp-content/uploads/2019/08/2018-FMCS-Annual-Report.pdf> (accessed 22-10-2018).

Gazette Reporter "No announcement on tribunal fee refunds until September" (17-08-2017) *The Law Society Gazette* <https://www.lawgazette.co.uk/practice/no-announcement-on-tribunal-fee-refunds-until-september/5062480.article> (accessed 12-09-2017).

Harper P "Key union faces deregistration" (17-10-2019) *Mail & Guardian* <https://mg.co.za/article/2019-10-16-key-union-faces-deregistration> (accessed 20-10-2019).

Hlongwane S "Has Cosatu Drifted Away From Its Orginal Mission?" (29-08-2012) *Daily Maverick* <https://www.dailymaverick.co.za/article/2012-08-29-has-cosatu-drifted-away-from-its-original-mission/> (accessed 2-10-2017).

Horowitz CF "Cooking the Crooks: Unions Must Disclose Financial Deals Beginning Next Month" (August 2005) <https://www.heartland.org/_template-assets/documents/publications/19930.pdf> (accessed 20-03-2018).

Hughes L "Government's employment tribunal fees are 'illegal', Supreme Court rules" (26-07-2017) *The Telegraph*

<http://www.telegraph.co.uk/news/2017/07/26/governments-employment-tribunal-fees-illegal-supreme-court-rules/> (accessed 21-09-2017).

Jim I "Code of Practice treats African workers as violent savages – NUMSA" (09-01-2018) *Politicsweb* <https://www.politicsweb.co.za/politics/working-class-must-stand-up-and-fight--irvin-jim> (accessed 20-07-2019).

Khuzwayo W "Nedlac passes labour bills for drafting" (10-02-2012) *IOL/Business Report* <https://www.iol.co.za/business-report/economy/nedlac-passes-labour-bills-for-drafting-1231224> (accessed 20-10-2018).

Mabena S "Hawks probing Suid-Afrikaanse Onderwyser Unie" (2018) <https://citizen.co.za/news/south-africa/2035044/hawks-probing-suid-afrikaanse-onderwyser-unie/> (accessed 02-03-2019).

Mahlakoana T "Amend constitutions on balloting or be deregistered, unions warned" (02-04-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/04/02/amend-constitutions-on-balloting-or-be-deregistered-unions-warned> (accessed 20-07-2019).

Mahlakoana T "Court places SAMATU under administration following independence concerns" (18-10-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/10/18/samatu-to-have-independent-administrator-within-21-days-says-labour-registrar> (accessed 18-10-2019).

Mahlakoana T "Labour Registrar waiting on court to place 2 unions under administration" (02-04-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/04/02/labour-registrar-waiting-on-court-to-place-2-unions-under-administration> (accessed 20-07-2019).

Mahlakoana T "SAMATU to have independent administrator within 21 days, says labour registrar" (18-10-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/10/18/samatu-to-have-independent-administrator-within-21-days-says-labour-registrar> (accessed 18-10-2019).

Mahlakoana T "SAMWU leaders sacked after years of corruption claims" (04-04-2019) *EWN Eyewitness News* <https://ewn.co.za/2019/04/04/samwu-national-leadership-voted-out-of-office> (accessed 10-04-2019).

Mckaiser E "Marikana: A Story About Unresponsive Leadership" (20-09-2012) *News24* <https://www.news24.com/Columnists/EusebiusMcKaiser/Marikana-a-story-about-unresponsive- leadership-20120920> (accessed 2-10-2017).

Ministry of Justice Statistics Bulletin "Tribunal and Gender Recognition Certificate Statistics Quarterly April to June 2016" (2017) <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/550952/tribunal-and-gpc-stats.pdf> (accessed 2-10-2019).

Mkentane L "Amcu thrown a lifeline as labour registrar decides against deregistering it" (02-09-2019) *Business Day* <https://www.businesslive.co.za/bd/national/2019-09-02-amcu-thrown-a-lifeline-as-labour-registrar-decides-against-deregistering-it/> (accessed 10-09-2019).

Mkhwanazi S "'New' law has unions up in arms" (15-09-2019) *Weekend Argus* <http://capeargus.newspaperdirect.com/epaper/showarticle.aspx?article=42edd311-9141-46de-8663-

d9f139580ece&key=r6p6NeflxQLvEzQI8%2bXjFg%3d%3d&issue=70672019091500000000001001> (accessed 20-09-2019).

Molatudi O "It's now law — no secret balloting, no strike" (31-05-2019) *BusinessLive* <https://www.businesslive.co.za/bd/opinion/2019-05-31-its-now-law--no-secret-balloting-no-strike/> (accessed 06-06-2019).

National Labor Relations Board "Jurisdictional Standards" (2019) *National Labor Relations Board* <https://www.nlrb.gov/rights-we-protect/law/jurisdictional-standards> (accessed 26-06-2019).

National Labor Relations Board "Strategic Plan FY 2014 – FY 2018" (2014) *National Labor Relations Board* <https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1709/NLRB%20Strategic%20Plan%20FY2014-18.pdf> (accessed 26-06-2019).

National Labor Relations Board "Strategic Plan FY 2019 – FY 2022" (2018) *National Labor Relations Board* <https://www.nlrb.gov/sites/default/files/attachments/basic-page/node-1709/strategicplanfy19-22final-2018-12-12.pdf> (accessed 26-06-2019).

National Labor Relations Board "Who We Are" (undated) *National Labor Relations Board* Who We Are" <https://www.nlrb.gov/about-nlrb/who-we-are/regional-offices> (accessed 26-06-2019).

Office for National Statistics "Labour Market Statistical Bulletin (LMSB) – March 2017" (2017) *ONS* <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/earningsandworkinghours#datasets> (accessed 30-05-2017).

Office for National Statistics "Labour Disputes in the UK: 2016" (2017) *ONS* <https://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/workplacedisputesandworkingconditions/articles/labourdisputes/latest#review-of-1997-to-2016> (accessed 12-08-2017).

Omarjee L "Explainer: Why unions have mixed feelings on secret ballot votes for strikes" (15-09-2019) *Fin24* <https://www.fin24.com/Economy/explainer-why-unions-have-mixed-feelings-on-secret-ballot-votes-for-strikes-20190913> (accessed 16-0-2019).

ONS Digital "Five facts about… strikes" (12-08-2016) *Office for National Statistics (ONS)* <https://visual.ons.gov.uk/five-facts-about-strikes/> (accessed 12-09-2017).

Parliament UK "Consolidated Fund" (2017) <http://www.parliament.uk/site-information/glossary/consolidated-fund/> (accessed 10-05-2017).

Patel K "Analysis: NUM - Rich History, Unforgiving Present" (05-09-2012) *Daily Maverick* <https://www.dailymaverick.co.za/article/2012-09- 05-analysis-num-rich-history-unforgiving-present/> (accessed 2-10-2017).

Saunderson-Meyer W "A tentative move to curb union destructiveness" (21-09-2019) *IOL* <https://www.iol.co.za/news/opinion/a-tentative-move-to-curb-union-destructiveness-33390496> (accessed 22-09-2019).

Sibanyoni M "Secret vote before strike pits unions against each other" (13-09-2019) *Sowetan Live* <https://www.sowetanlive.co.za/news/south-africa/2019-09-13-secret-vote-before-strike-pits-unions-against-each-other/> (accessed 14-09-2019).

Singh S & K Sidzumo "Employment Alert: Secret ballot required prior to engaging in a strike" (08-04-2019) <https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Employment/employment-alert-8-april-secret-ballot-required-prior-to-engaging-in-a-strike-.html> (accessed 21-05-2019).

Smit S "'Jo'burg uses our fees for slush fund'" (24-10-2019) *Mail & Guardian* <https://mg.co.za/article/2019-10-24-00-joburg-uses-our-fees-for-slush-fund> (accessed 26-10-2019).

Smit S "Media workers' union gets the boot" (13-08-2019) *Mail & Guardian* <https://mg.co.za/article/2019-08-13-media-workers-union-gets-the-boot> (accessed 16-08-2019).

Smit S "Registrar gets tough on unions" (31-05-2019) *Mail & Guardian* <https://mg.co.za/article/2019-05-31-00-registrar-gets-tough-on-unions> (accessed 02-06-2019).

Spies D "Numsa to march against new labour laws on Human Rights Day" (17-03-2018) *News24* <https://www.news24.com/SouthAfrica/News/numsa-to-march-against-new-labour-laws-on-human-rights-day-20180317?isapp=true> (accessed 24-05-2018).

Stoddard E "Department of Labour threatens to cancel Amcu's registration" (25-04-2019) *Business Maverick* <https://www.dailymaverick.co.za/article/2019-04-25-department-of-labour-threatens-to-cancel-amcus-registration/> (accessed 18-06-2019).

Swart H "Labour Action: A Breakdown in Collective Bargaining" (28-09-2012) *Mail & Guardian* <https://mg.co.za/article/2012-09-28-00-labour-action-a-breakdown-in-collective-bargaining> (accessed 2-10-2017).

Trades Union Congress "TUC Disputes Principles and Procedures: 2016 Edition" (2016) *Trades Union Congress* <https://www.tuc.org.uk/sites/default/files/DPP_2016.pdf> (accessed 13-05-2017).

UAW "Constitution of the International Union" (2018) *United Automobile, Aerospace and Agricultural Implement Workers of America, (UAW)* <https://uaw.org/wp-content/uploads/2019/01/2018-UAW-Constitution.pdf> (accessed 12-10-2018).

United States "General Statement Concerning the Bonding Requirements of the [LMRDA]" (undated) *United States Code of Federal Regulations* <https://www.ecfr.gov/cgi-bin/text-idx?SID=0f9756081ee5d201496c74b7a1a726a5&mc=true&node=pt29.2.453&rgn=div5> (accessed 23-01-2019).

United States "Procedure for Removal of Local Labor Organization Officers" (undated) *United States Code of Federal Regulations* <https://www.ecfr.gov/cgi-bin/ECFR?page=browse> (accessed 23-01-2019).

Walters M "Supreme Court humiliates government over tribunal fees" (26-07-2017) *The Law Society Gazette* <https://www.lawgazette.co.uk/law/supreme-court-humiliates-government-over-tribunal-fees/5062220.article> (accessed 12-09-2017).

Yeselson R "Not With a Bang, But a Whimper: The Long, Slow Death Spiral of America's Labor Movement" (06-06-2012) *The New Republic*

<https://newrepublic.com/article/103928/rich-yeselson-not-bang-whimper-long-slow-death-spiral-americas-labor-movement> (accessed 20-01-2019).

OTHER:

Anonymous “Legislation: DA bill would make unions liable for strike” *Legalbrief* (19-06-2006) 1.